IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARC FIEDLER, Plaintiff, v. AMERICAN MULTI-CINEMA, INC., Defendant.	Civil Action 92-0486 TPJ

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

BACKGROUND

The plaintiff, Marc Fiedler, is an individual with a mobility impairment who uses a wheelchair. He filed this action alleging, inter alia, that the Union Station 9 Theaters, located in Washington D.C.'s Union Station and operated by the defendant, American Multi-Cinema, Inc. ("AMC"), are in violation of title III of the Americans with Disabilities Act ("ADA" or "the Act"), 42 U.S.C. §§ 12181-12189, and the title III regulation ("the regulation"), 28 C.F.R. Pt. 36. Specifically, the plaintiff has alleged that in none of the nine theaters are wheelchair seating locations dispersed throughout the seating area. Instead, all wheelchair seating locations in every theater within the Union Station 9 Theaters are located in the back row of seats.

Eight of the nine theaters at the Union Station 9 have fewer than 300 seats. The plaintiff appears to have abandoned his argument that dispersal of wheelchair seating locations is

required in these theaters. The remaining theater, known as the Grand Avenue Theater, has 374 seats, with two rear locations designated for persons who use wheelchairs. In this situation, the defendant is required to achieve the level of accessibility specified in the ADA Standards for Accessible Design ("the Standards"), 28 C.F.R. Pt. 36, App. A, if doing so would be readily achievable. See 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.304(a); 28 C.F.R. § 36.308(a). The plaintiff maintains that it is readily achievable for AMC to provide four additional wheelchair seating locations in the fourth and fifth rows of the Grand Avenue Theater, in order to equal the six such locations that would be required in a newly constructed assembly hall of a comparable size, while also achieving at least greater seating dispersal than currently exists. See Standards, § 4.1.3(19)(a).

This case is now before the Court on defendant's motion for summary judgment. AMC makes three arguments in support of its motion. First, it contends that the ADA does not apply to the Grand Avenue Theater because the facility is located in space leased by AMC from the Executive Branch of the Federal government. AMC argues that only the Architectural Barriers Act ("ABA"), 42 U.S.C. § 4151 et seq., and the Uniform Federal Accessibility Standards ("UFAS")[1] apply to the facility, and that

[1] The Architectural Barriers Act of 1968 applies to buildings and facilities that are designed, constructed, altered, or leased using certain Federal funds. The law applies to buildings for which a lease was entered into on or after January 1, 1977, including any renewal of a lease entered into before

the ABA requires the plaintiff to file a complaint with the Architectural and Transportation Barriers Compliance Board ("ATBCB" or "Access Board") prior to instituting an action in Federal court.

The defendant next argues that even if the ADA applies to the Grand Avenue Theater, the Act does not require dispersed wheelchair seating. AMC interprets the ADA as allowing the virtually every newly constructed and altered motion picture theater, regardless of its size, to place all wheelchair seating locations in the back row of seats. Since an existing facility, like the Grand Avenue Theater, is not required to exceed the standards for new construction and alterations when undertaking measures solely for the purpose of removing barriers to access, AMC concludes that its present practice with respect to wheelchair seating locations at that theater complies with the ADA.

Finally, the defendant argues that allowing the plaintiff to sit in the fourth of fifth row of seats at the Grand Avenue Theater would constitute a "direct threat" to the health and safety of other theater patrons in an emergency. The defendant says that the width of plaintiff's wheelchair and the difficulty he would encounter when attempting to negotiate the aisle leading

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such date which renewal is on or after such date. The ABA does not apply to buildings leased by the Government for subsidized housing programs. UFAS is the accessibility standard applicable to facilities subject to the ABA.

to the back of the theater would impede the movement of other patrons out of the theater to such an extent that they would face a significant risk of injury.

The United States has sought to participate in this action as amicus curiae, because this case raises novel issues concerning both the scope of the ADA's coverage and the meaning of provisions in the Act and in the title III implementing regulation, which the Department of Justice promulgated and has responsibility for enforcing. It is the government's position that the ADA applies to public accommodations, like the Grand Avenue Theater, located in space leased by private entities from the Federal government. It is also our position that the ADA requires existing motion picture theaters having more than 300 seats to provide wheelchair seating in more than one location if this is readily achievable.[2] Furthermore, existing motion picture theaters must provide assistance to persons who wish to sit in wheelchair seating locations that are not served by "accessible routes," to the extent it is readily achievable to do so. Persons in wheelchairs seated in such locations do not per se constitute a "direct threat" to the health and safety of other theater patrons in the event of an emergency. The positions advanced by the defendant in support of its motion for summary judgment are contrary to law, and the motion should be denied.

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[2] The ADA requires dispersal even if it is not readily achievable to put all locations on fully accessible aisles in the theater. In short, those steps that can be taken to remove barriers must be taken even if other steps are not readily achievable.

ARGUMENT

I. THE ADA APPLIES TO THE GRAND AVENUE THEATER

A. AMC is a Private Entity Operating a Place of Public Accommodation

As a "motion picture house," the Grand Avenue Theater is a place of public accommodation within the meaning of title III. 42 U.S.C. § 12181(7)(C); 28 C.F.R. § 36.104. Defendant AMC operates the Grand Avenue Theater and, accordingly, is subject to Section 302(a) of the ADA which prohibits discrimination by "any person" who owns or operates a place of public accommodation.[3]

Despite this unequivocal language of the statute and the regulation, AMC claims that because it leases the space used for the Union Station 9 Theaters from the Federal government, the Architectural Barriers Act and UFAS, rather than the ADA and the ADA Standards for Accessible Design, govern this matter. Therefore, AMC urges, plaintiff has no recourse under the ADA but rather should have filed a complaint with the Access Board, which is responsible for enforcing the ABA. Nothing in the ADA, the

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[3] Section 302(a) provides:

> . . . No individual with a disability shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Section 36.201(a) of the title III regulation says virtually the same thing, except that the term "private entity" is substituted for "person." See 28 C.F.R. § 36.201(a); 28 C.F.R. Pt. 36, App. B, at 590.

Department of Justice's implementing regulation, or the legislative history of the ADA supports defendant's theory.

The purpose of section 302(a) and the corresponding section of the regulation is clear. They establish the two conditions that trigger liability under the public accommodations provisions of the ADA. Covered entities must be "private entities," as defined elsewhere in the Act and the regulation, see 42 U.S.C. § 12181(6); 28 C.F.R. § 36.104 (definition of "private entity"), and must be an owner, tenant, landlord, or operator of a statutorily defined place of public accommodation. Neither 42 U.S.C. § 12182(a) nor 28 C.F.R. § 36.201(a) suggests that a tenant which otherwise meets the definition of a public accommodation would be excused from compliance with title III because its landlord is not a private entity. The language of the statute and the regulation says that either a tenant or a landlord may be liable under title III.

AMC is indisputably a "private entity," since it is "an[] entity other than a public entity (as defined in section 201(1))." 42 U.S.C. § 12181(6); 28 C.F.R. § 36.104 (definition of "private entity"). It is also both the lessee and the operator of the Grand Avenue Theater, which falls squarely within the definition of a place of public accommodation. See 42 U.S.C. § 12181(7)(C); 28 C.F.R. § 36.104 (definition of "place of public accommodation") (same). The defendant, therefore, satisfies the statutory jurisdictional requirements and is subject to title III of the ADA.

To support its argument against coverage, AMC makes two points. First, it asserts that "subject[ing] AMC as the tenant to the guidelines and requirements of the ADA would subject [the landlord,] an executive agency of the federal government[,] to the ADA -- a result . . . contrary to Congressional intent." Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment (hereafter "Def. Mem.") at 15. Second, the defendant claims applying the ADA to the Grand Avenue Theater would create an "administrative nightmare" and would unfairly subject AMC to "two distinctly different -- and oftentimes conflicting -- regimes regulating building accessibility for the disabled." Id. at 10. As we demonstrate below, neither of these points has merit.

B. A Private Entity Operating a Public Accommodation in Space Leased from the Federal Government is Subject to Title III of the ADA

While it provides that landlords and tenants may both be liable for violations in places of public accommodation, title III applies only to private entities that are landlords or tenants. The fact that a landlord may not be a private entity and thus may not be covered by title III, however, does not affect the title III liability of a tenant that is a private entity.

In fact, in its Title III Technical Assistance Manual issued pursuant to statutory directive (42 U.S.C. § 12206(c)(3)), the Department of Justice answers precisely the question in

controversy in this case. The Technical Assistance Manual contains the following illustration:

> A Federal Executive agency owns a building in which several spaces are rented to retail stores. Although Federal executive agencies are not covered by the ADA, the private entities that rent and operate the retail stores, which are places of public accommodation, are covered by title III.

U.S. Department of Justice, Americans with Disabilities Act -- Title III Technical Assistance Manual § III-1.2000. (1993 & Supp. 1994). As a Federal agency's interpretation of its own regulations, the Technical Assistance Manual is entitled to controlling weight. See Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2386 (1994); United States v. Larionoff, 431 U.S. 864, 872-73 (1977); Udall v. Tallman, 380 U.S. 1, 16-17 (1965); cf. Pinnock v. International House of Pancakes, 844 F. Supp. 574, 581, 584 (S.D. Cal. 1993) (relying on TA manual's interpretation of Title III), cert denied, 114 S. Ct. 2726 (1994); appeal dismissed as moot, No. 94-55030 (9th Cir. July 21, 1993); Noland v. Wheatley, 835 F. Supp. 476, 483 (N.D. Ill. 1993); Petersen v. University of Wisc. Bd. of Regents, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993) (same). Clearly, title III of the ADA covers AMC's operation of the Grand Avenue Theater.

C. The ADA Contemplates that Covered Entities Might Be Subject to Other Accessibility Laws

AMC argues that the ADA should not apply to the Grand Avenue Theater because subjecting the theater to two separate sets of standards for building accessibility would be

administratively burdensome to the Federal government and simply unfair to AMC. AMC discusses at some length the history of the Federal government's association with Union Station and two prior Access Board investigations of the Union Station 9 Theaters under the Architectural Barriers Act. This discussion, however, is irrelevant because the ADA explicitly contemplates that facilities may be subject to other accessibility laws and expressly declines to disturb the applicability of any other statute, except to the extent it provides lesser protection to persons with disabilities. Section 501(b) of the ADA states in relevant part:

> . . . Nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.

42 U.S.C. § 12201(b) (emphasis added).

Consistent with the language of section 501(b), the Department of Justice promulgated section 36.103(b) stating that the regulation "does not affect the obligations of a recipient of Federal financial assistance to comply with the requirements of section 504 of the Rehabilitation Act of 1973 . . . and regulations issued by Federal agencies implementing section 504." 28 C.F.R. § 36.103(b). This language clearly contemplates situations in which public accommodations which also receive Federal financial assistance will have both ADA and section 504 obligations.

Although no other courts have yet addressed the question of whether title III of the ADA applies to a facility to which the ABA may also apply, courts have rejected basically the same argument that AMC is making where the ABA and section 504 were involved. For example, in Eastern Paralyzed Veterans Ass'n v. Sykes, 697 F. Supp. 845 (E.D. Pa. 1990), an organization of persons with disabilities sued the City of Philadelphia and the Southeastern Pennsylvania Transportation Authority ("SEPTA"), alleging that renovations done to Philadelphia subway stations violated, inter alia, section 504 and the ABA. The City and SEPTA argued that only the ABA and section 502 of the Rehabilitation Act[4] applied to them, and that the plaintiffs were required to exhaust their administrative remedies by filing a complaint with the ATBCB. Id. The court roundly rejected this argument stating that

> in light of the recognition that section 504 provides a private cause of action and the fact that Congress has not empowered the [ATBCB] to make final determination with regard to compliance with section 504 . . . regarding architectural . . . barriers confronting handicapped individuals, plaintiffs should not be limited to proceeding only under the Architectural Barriers Act, section 502 of the Rehabilitation Act and the regulations promulgated thereunder.

Id. at 847 (internal quotation marks and footnote omitted). See also Disabled in Action of Pennsylvania v. Pierce, 606 F.Supp. 310, 315 (E.D.Pa. 1985) (holding that both the ABA and

[4] Section 502 of the Rehabilitation Act, 29 U.S.C. § 792, established the ATBCB and sets out its functions.

Rehabilitation Act applied to accessibility of a facility at which Federal agency conducted activities). The same result should obtain here.

II. DEFENDANT'S OBLIGATION TO REMOVE ARCHITECTURAL BARRIERS AT THE GRAND AVENUE THEATER INCLUDES, IF READILY ACHIEVABLE, ADDING WHEELCHAIR SEATING AS PROPOSED BY THE PLAINTIFF

A. An Existing Motion Picture Theater is Required to Disperse Wheelchair Seating Locations to the Extent it is Readily Achievable to do so, Even if not all Locations can be Located on an "Accessible Route"

The ADA's most stringent requirements look to the future. Accordingly, the Act requires a greater level of accessibility for newly constructed facilities and facilities undergoing alterations than for those already in existence. Public accommodations located in existing facilities are required to remove physical barriers to access, but only to the extent this is "readily achievable." See 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.304(a). The Act, therefore, does permit something less than complete accessibility in existing facilities in some circumstances, and existing facilities are never required to exceed the level of accessibility required of facilities that have done alterations. See 28 C.F.R. § 36.304(g) (related to the general obligation of all public accommodations to do barrier removal); 28 C.F.R. § 36.308(b)(3) (related to the obligation of assembly halls specifically).

As we argue below, an existing motion picture theater having more than 300 seats, like the Grand Avenue Theater, must disperse wheelchair seating locations to the extent this is readily

achievable, even if putting all such locations on an "accessible route" is not. This result is compelled by the language of the relevant portion of the title III regulation governing barrier removal in existing assembly areas, and is consistent with both the requirements for barrier removal generally and the ADA's overall objective of achieving integration of persons with disabilities into society at large.

1. Section 36.308(a) Governing Removal of Barriers in Existing Assembly Areas and the General Obligation to do Barrier Removal Support the Government's Position

For the Grand Avenue Theater -- an existing facility -- title III requires the removal of architectural barriers to the extent such removal is readily achievable. The statute and the regulation define "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.304(a).[5]

[5] The statute and the regulation set forth various factors to consider in determining whether a particular action is readily achievable. Some of the most important factors include the nature and cost of the action needed; the overall financial resources of the facility; the relationship of any parent corporation to the facility in question and the parent corporation's resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; and the impact otherwise of the action taken to remove barriers upon the operation of the facility in question. See 42 U.S.C. § 12181(9); 28 C.F.R. § 36.104.

A specific provision in the title III regulation, 28 C.F.R. § 36.308, governs an existing theater's obligation to provide dispersed wheelchair seating locations as one form of barrier removal. The relevant part of section 36.308 states:

> 36.308 Seating in assembly areas.
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> (a) Existing facilities. (1) To the extent that it is readily achievable, a public accommodation in assembly areas shall--
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> (i) Provide a reasonable number of wheelchair seating spaces and seats with removable aisle-side arm rests; and
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> (ii) Locate the wheelchair seating spaces so that they--
>
> (A) Are dispersed throughout the seating area;
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> (B) Provide lines of sight and choice of admission prices comparable to those for members of the general public;
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> (C) Adjoin an accessible route that also serves as a means of egress in case of emergency; and
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> (D) Permit individuals who use wheelchairs to sit with family members or other companions.

28 C.F.R. § 36.308(a). While desirable, it may not always be readily achievable in existing facilities to remove all barriers so that wheelchair seating meets all four criteria specified in 28 C.F.R. § 36.308(a)(1)(ii)(A) through (D). In this case, for example, plaintiff asserts that it would be neither expensive nor difficult for AMC to remove some fixed seats in the Grand Avenue Theater's fourth and fifth rows where the floor is level and could accommodate wheelchair seating locations. Plaintiff does

not suggest, however, that it would be readily achievable to provide an "accessible route" to all such locations. See Memorandum of Points and Authorities in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment (hereafter "Pl. Mem.") at 18. What the defendant must do is what it can achieve readily.

Interpreting section 36.308(a)(1) to require partial barrier removal even though complete removal is not readily achievable, is perfectly consistent with the general barrier removal obligation in section 36.304 of the regulation.[6] Section 36.304(c), for example, establishes priorities for barrier removal, 28 C.F.R. § 36.304(c), recognizing that "the resources available for barrier removal may not be adequate to remove all existing barriers at any given time." 28 C.F.R. Pt. 36, App. B at 610 (emphasis added). Subsection (d)(2) recognizes exactly the same thing, stating that "if the measures required to remove a barrier [completely] would not be readily achievable, a public accommodation may take other readily achievable measures to remove a barrier that do not fully comply with the specified requirements." 28 C.F.R. § 36.304(d)(2). For example, one acceptable method of removing a barrier that might fall short of

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[6] Moreover, section 36.308 itself contemplates that in some situations persons who use wheelchairs will, in existing facilities, likely be seated in areas not served by an accessible route. Subsection (a)(1) requires an existing assembly hall to provide "a reasonable number of . . . seats with removable aisle-side arm rests." 28 C.F.R. § 36.308(a)(1). The regulation does not say that such seats must be on an "accessible route," even though the Preamble clearly indicates that they may be used by persons in wheelchairs. See 28 C.F.R. Pt. 36, App. B at 613.

complete removal is "providing a ramp with a steeper slope" than would be under the ADA Standards for Accessible Design. Id.

The ADA's barrier removal obligation is flexible and reasonable, promoting the greatest possible access for individuals with disabilities while recognizing the economic and physical limitations faced in existing facilities. The obligation to provide a ramp for access to an existing facility, if readily achievable, is not changed simply because the ramp's slope may be slightly greater than would be permitted in new construction. The same is true of the obligation to disperse wheelchair seating locations in existing assembly halls, which is not eliminated altogether simply because all locations cannot be put on "accessible routes."

AMC is correct in asserting that some wheelchair users might have some difficulty, without the assistance of others, negotiating the upward slope of the aisle in the Grand Avenue Theater in order to exit the facility. But this is not a basis upon which a theater can justify keeping all wheelchairs users in the back of the room. Section 302(b)(2)(A)(v) of the ADA and section 36.305(a) of the regulation also require public accommodations to provide readily achievable alternatives to barrier removal when removal of a barrier itself is not readily achievable. See 42 U.S.C. § 12182(b)(2)(A)(v); 28 C.F.R. § 36.305(a). Thus, for individuals who cannot negotiate the aisle leading to and from wheelchair seating locations that are not on an "accessible route," the theater must provide the

assistance of ushers or other theater staff if this is readily achievable.[7] The defendant has failed to demonstrate why providing the minimal level of assistance required to push a wheelchair from the Grand Avenue Theater's fourth or fifth row to the back of the facility would exceed its ADA obligation. Indeed, in the instant case staff at the Grand Avenue Theater would apparently not even be required to offer this minimal level of assistance that the law requires, since the plaintiff has stated that he would not sit in the Grand Avenue Theater's fourth and fifth rows unaccompanied by an individual who would be capable of pushing his wheelchair up the theater's aisle in order to exit. See Pl. Mem. at 30; Part III.B, infra.

2. The Government's Interpretation of Section 36.308(a) is Consistent with the ADA's Purpose of Promoting Integration of Persons with Disabilities

The text of the ADA and of the title III regulation and its Preamble are replete with references to the historical segregation of persons with disabilities and to the central role that the ADA is to play in ensuring integration. Congress found

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[7] The regulation and Preamble provide similar examples of readily achievable alternatives to barrier removal, which include, providing a store clerk or other personnel to retrieving items from shelves that are too high for a person with a disability to reach, assuming lowering the shelves is not readily achievable. See 28 C.F.R. § 36.305(b)(2); 28 C.F.R. Pt. 36, App. B at 611. The Preamble discussion of section 36.308 regarding situations where a person who uses a wheelchair chooses to slide from the wheelchair to an existing seat, states that "the public accommodation shall provide assistance in handling the wheelchair of the patron with the disability." 28 C.F.R. Pt. 36, App. B at 613 (emphasis added).

that passage of the ADA was necessary in part because "historically, society has tended to isolate and segregate individuals with disabilities, and such forms of discrimination . . . continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Among the forms of discrimination encountered by persons with disabilities, Congress found, are "segregation[] and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5). Elsewhere, Congress refers to persons with disabilities as a "discrete and insular minority," 42 U.S.C. § 12101(a)(7), invoking language which has for many years been used to describe the exclusion of racial and ethnic minorities from full participation in the political process.

Title III of the ADA and the title III regulation contain a number of specific provisions aimed at promoting integration. Public accommodations are required to offer goods and services to individuals with disabilities "in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. § 12182(b)(1)(B); 28 C.F.R. § 36.203(a). It is generally unlawful to provide such persons goods and services that are "different or separate from th[ose] provided to other individuals." 42 U.S.C. § 12182(b)(1)(A)(iii); 28 C.F.R. § 36.202(c).

Section 36.308 of the regulation is yet another specific application of the ADA's general principle of integration of persons with disabilities. The Department of Justice has said

that this particular section of the regulation grew out of a recognition that

> [i]ndividuals who use wheelchairs historically have been relegated to inferior seating in the back of assembly areas separate from accompanying family members and friends. The provisions of 36.308 are intended to promote integration and equality in seating.

28 C.F.R. Pt. 36, App. B at 613.

Yet AMC would have this court interpret section 36.308 to reach the opposite result -- the relegation of persons who use wheelchairs to the back of an assembly area. For the many individuals who use wheelchairs and who can negotiate the aisle of the Grand Avenue Theater and for those who can do so with that minimal level of assistance the ADA requires as a readily achievable alternative to barrier removal, the greatest access possible means not merely the availability of some wheelchair seating location, but the ability to choose from locations in different parts of the theater. Providing wheelchair seating locations in the manner proposed by the plaintiff would advance this objective.

B. Requiring the Defendant to Provide Additional Wheelchair Seating Locations at the Grand Avenue Theater Would not Exceed the Standards for Accessible Design Applicable to Alterations and New Construction

Contrary to the defendant's assertion, requiring the Grand Avenue theater and other existing motion picture theaters having more than 300 seats to disperse wheelchair seating, if it is readily achievable, does not exceed the ADA's standards for

"alterations," which apply to situations where the facility is not newly constructed but rather is subjected, as an existing facility, to renovations or other physical changes that affect or could affect the usability of its spaces. See 42 U.S.C. § 183(a)(2); 28 C.F.R. 36.402(a) and (b). Motion picture theaters of the same size as the Grand Avenue Theater which are "altered" in this sense must generally provide both dispersed wheelchair seating locations and "accessible routes" to and from each such location. The plaintiff's proposal allows some dispersal, but does not require that every wheelchair seating location be on an "accessible route." Thus, the defendant is incorrect in arguing that the plaintiff's proposal exceeds what the theater would be required to do if it were undergoing alterations.

The United States does not believe that the exception in section 4.33.3 of the Standards, allowing "clustering" of wheelchair seating locations in very limited circumstances, applies to single-level theaters with more than 300 seats. The defendant's assumption that the exception is intended to ensure that persons who use wheelchairs will not be required to traverse aisle slopes of greater than 1:20 when exiting assembly areas contradicts both the exception's plain language and other portions of the Standards which contemplate that persons in wheelchairs can and will traverse aisle slopes of as much as

1:12.[8] Even if, however, the section 4.33.3 exception does apply to the Grand Avenue Theater, we believe that it would not preclude granting the requested relief. Indeed, the plaintiff's plan for adding wheelchair seating locations is probably the only one that AMC could possibly adopt consistent with the section 4.33.3 exception.

1. The ADA Standards for Alterations Generally Require that Wheelchair Seating Locations be Both Dispersed and on "Accessible Routes"

AMC is incorrect in arguing that dispersing seats as a barrier removal action would exceed the requirements for alterations or new construction applicable to a similar type of space. Alterations to existing facilities must generally comply with the ADA's new construction standards. See 28 C.F.R. § 36.402(b)(2); Standards, § 4.1.6(1)(b).[9] The new construction

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[8] The Standards express floor slope in terms of the number of inches of run per inch of vertical rise. A slope of 1:20, for example, which equals five percent, rises one inch for every twenty inches of run. A slope of 1:12, the maximum allowable for an accessible route, has a vertical rise of one inch for every twelve inches of run.

[9] "If existing elements, spaces, or common areas are altered, then each such element, space, or area shall comply with the applicable provisions of Appendix A to this part." 28 C.F.R. § 36.402(b)(2). Section 4.1.6(1)(b) of the Standards says basically the same thing, requiring that altered element, spaces, or areas must comply with the applicable provisions of § 4.1.1 through § 4.1.3 of the Standards, which are the minimum standards for new construction.

The title III regulation, which was issued in accordance with statutory directive and was required by law to be consistent with the minimum accessibility guidelines and requirements issued by the Access Board, see 42 U.S.C. § 12186(b) and (c),

provision in the Standards that generally mandates dispersal of wheelchair seating locations is section 4.33.3.[10] Section 4.33.3's general rule of dispersal reads as follows:

> **Placement of Wheelchair Locations.** Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceed 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.

Standards, § 4.33.3.

Defendant relies on the exception in section 4.33.3 of the Standards that says:

> 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.

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incorporates the Standards by reference. See 28 C.F.R. § 36.406(a). The Standards thus have the force of law.

[10] This conclusion is derived from reading that part of the standards for new construction that applies to assembly areas, section 4.1.3(19). It says in part that "[i]n places of assembly with fixed seating accessible wheelchair locations shall comply with 4.33.2, 4.33.3, and 4.33.4 . . . ." Standards, § 4.1.3(19)(a).

Standards, § 4.33.3. Defendant urges that this exception would permit new construction of a typical, single-level movie theater with all wheelchair seating located at the back, just as in the existing Grand Avenue Theater. Defendant asserts that the language "sight lines that require slopes of greater than 5 percent" refers to the slope of the floor and thus claims that the exception applies whenever sight lines require that the floor have a greater than 1:20 slope. See Def. Mem. at 18-19. The exception, according to AMC, is intended to ensure that individuals who use wheelchairs will not have to traverse slopes of greater than 1:20 to exit. See id. at 19; Defendant's Reply Memorandum in Support of Motion for Summary Judgment (hereafter "Def. Repl. Mem.") at 11, 12.

This argument is based on a misunderstanding of the exception and renders meaningless the general requirement in section 4.33.3 to provide "accessible routes" in assembly areas. Contrary to the defendant's theory, the exception has very limited application to discrete parts of assembly areas -- balconies, bleachers, and seating areas having characteristics similar to them. It does not apply to an assembly area, such as a typical single-level movie theater, where steep lines of sight are not required. The rationale for the exception is based on the typical characteristics of bleachers and balconies. They generally have steps, not ramped aisles, and sight lines with slopes that will likely always exceed five percent. Because the sight lines required for bleachers and balconies usually preclude

ramping as an option, the only means of egress in these seating areas for persons who use wheelchairs will be on a single level -- usually the top or the bottom of the area.

The same rationale has no meaning in a newly constructed motion picture theater having an aisle with a slope of between 1:20 and 1:12. In such a theater, seats other than those located in the back row would, by definition, have an accessible means of egress, since an "accessible route" may have a slope of as much as 1:12.[11] Applying section 4.33.3's exception in the manner proposed by the defendant -- in effect, treating all newly constructed, single-level theaters as if they were balconies -- would give motion picture theaters the option of putting all accessible seats in the last row of an auditorium, even though this practice is unnecessary and would undermine the ADA's objectives of promoting integration of wheelchair seating locations and of offering to persons seated in these locations a choice of viewing positions.

Defendant's assertion is also mistaken because other portions of the Standards contemplate that individuals who use wheelchairs will be traversing aisles having slopes exceeding 1:20. Such aisles, according to section 4.8.1 are considered

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[11] See Standards, §§ 4.3.5 and 4.8.2. This is not explicitly stated, but is derived from reading § 4.3.7 of the Standards together which § 4.8.2. Section 4.3.7 says that "[a]n accessible route with a running slope greater than 1:20 is a ramp and shall comply with 4.8." Section 4.8.2 says that "[t]he maximum slope of a ramp in new construction shall be 1:12." Neither party appears to dispute the fact that an "accessible route" cannot have a slope that exceeds 1:12.

ramps, and must comply with the provisions of section 4.8. Section 4.8.5 specifically addresses the use of ramps in assembly areas, providing an exception to the general requirement to provide handrails on longer ramps where the ramps are "adjacent to seating in assembly areas." This portion of the Standards undermines the defendant's interpretation of the exception in section 4.33.3, which begins with the assumption that wheelchair users will not generally be using aisles with slopes of greater than 1:20.[12] Because the section 4.33.3 exception allowing

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[12] A second exception to the general requirement of dispersal that applies only in the case of alterations to existing assembly halls further supports the government's position. Section 4.1.6(3)(f)(i) says that

> Where it is technically infeasible to disperse accessible seating throughout an altered assembly area, accessible seating areas may be clustered. Each accessible seating area shall have provisions for companion seating and shall be located on an accessible route that also serves as a means of emergency egress.

Standards, § 4.1.6(3)(f)(i). The concept of "technical infeasibility" is used in the Standards to denote a physical change that has "little likelihood of being accomplished" due to a facility's structure. See Standards, § 4.1.6(1)(j). The concept does not, however, take into account the cost of making the physical change.

In other words, when doing an alteration, an assembly hall may cluster wheelchair seating locations only when there is little likelihood that all such locations can be put on an accessible route. Since, as earlier demonstrated, an "accessible route" may have a slope of as much as 1:12, section 4.1.6(3)(f)(i) requires dispersal if all wheelchair seating locations can be put on routes that have slopes of 1:12 or less. The defendant's interpretation of the section 4.33.3 exception is that in new construction dispersal can be required only be

clustering does not apply to a newly constructed or altered one-level movie theater, requiring AMC to disperse wheelchair seating as part of barrier removal does not exceed the standards for new construction or alterations.

2. Applying the Section 4.33.3 Exception Allowing "Clustering" of Wheelchair Seating Locations to the Grand Avenue Theater Would not Preclude Granting the Relief Requested

Placing wheelchair seating in rows four and five as plaintiff suggests would not exceed the standards for alterations and new construction even assuming the section 4.33.3 exception does apply to the Grand Avenue Theater. The exception allows either clustering within a seating area where sight lines exceed five percent, or alternatively, provision of "[e]quivalent accessible viewing positions . . . located on levels having accessible egress." Standards, § 4.33.3. Of course, in motion picture theaters like the Grand Avenue Theater the alternative to clustering has no meaning at all, since all seats are on a single level.[13] Therefore, if the exception applies, the only course of action it can be read to permit at the Grand Avenue Theater is clustering of wheelchair seating within the first fourteen rows,

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required when the wheelchair seating locations can be put on routes having slopes of less than 1:20. This cannot be correct, because the standards for alterations, which are less rigorous than the standards for new construction, require dispersal whenever the egress routes are less than 1:12.

[13] In fact, AMC has neither characterized the last row of seats in the Grand Avenue Theater as a separate level, nor defended its practice as an alternative to clustering permitted by the last sentence of section 4.33.3.

where, the parties have said, sight lines exceed five percent. The exception certainly does not support AMC's current practice of clustering wheelchair seating locations in areas where sight lines are clearly less than five percent. The only part of the area in which AMC can "cluster" wheelchair seating locations that also has the level surface needed for such locations is in the fourth and fifth rows, precisely the area proposed by the plaintiff.

III. THE DEFENDANT HAS NOT DEMONSTRATED THAT THE PLAINTIFF WOULD CONSTITUTE A "DIRECT THREAT" TO THE HEALTH AND SAFETY OF OTHER PATRONS IN THE GRAND AVENUE THEATER IN AN EMERGENCY IF HE PERMITTED TO SIT IN THE FACILITY'S FOURTH OR FIFTH ROW

A. The "Direct Threat" Exception to a Public Accommodation's Obligation to Provide Goods and Services in a Nondiscriminatory Manner is an Extremely Narrow One

The ADA contains a narrow exception to a public accommodation's obligation to provide goods and services to individuals with disabilities in a nondiscriminatory way. The ADA does "not require a public accommodation to permit an individual to participate in or benefit from its goods [and] services . . . when that individual poses a direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3); 28 C.F.R. § 36.208(a). Section 36.208 says that a "direct threat" is a "significant risk to the health or safety of others." 28 C.F.R. § 36.208(b), which must be determined by

> an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the

> nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

28 C.F.R. § 36.208(c).

The portion of the Preamble explaining section 36.208 underscores the exceedingly narrow scope of this exception. The Preamble stresses that section 36.208 was not intended to suggest that persons with disabilities pose risks to others, but instead "establishes a strict standard that must be met before denying service to an individual with a disability or excluding that individual from participation." 28 C.F.R. Pt. 36, App. B at 597. The Preamble further cautions that a determination that a person with a disability constitutes a "direct threat" to the health and safety of others "may not be based on generalizations or stereotypes about the effects of a particular disability." Id. at 597-598.

Two recent district court decisions considering application of the "direct threat" defense to an allegation of employment discrimination are particularly instructive in the instant case. In Bombrys v. City of Toledo, 849 F. Supp. 1210 (N.D. Ohio 1993), the court held that a city's policy of excluding all insulin-dependent diabetics from its police force violates the ADA. Id. at 1218.[14] Bombrys rejected any blanket exclusion of persons with

[14] The court's analysis makes reference primarily to the provisions in title III and in the title III regulation, even though title I and its implementing regulation are clearly the more appropriate bases for analysis. The title I definition of "direct threat," however, does not differ in any significant way. See 42 U.S.C. § 12111(3).

a particular disability from a category of work on the basis that such individuals pose a "direct threat" to the health and safety of others. Id. at 1221.[15] The court said that instead the City of Toledo must "evaluate each police officer candidate on a case-by-case basis and determine what risks that individual presents to himself/herself and the public." Id.[16] Relevant to this evaluation are the measures which individuals with disabilities themselves take to minimize the risk of harm to others (i.e., in Bombrys, whether an insulin-dependent diabetic police officer monitors his or her blood sugar level and takes insulin injections at appropriate times).

Bombrys made two other observations that bear upon the instant case. First, it found significant the fact that the Toledo police department had successfully employed insulin-dependent officers prior to instituting its blanket policy of excluding all such applicants in 1985. Id. at 1215. Second, the court noted that some of the risks arguably posed by officers

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[15] See also Anderson v. Little League Baseball, Inc. 794 F. Supp. 342, 345 (D. Ariz. 1992) (rejecting blanket exclusion of any coach with a disability from being on the field of play during the course of a game).

[16] See also Sarsyki v. United Parcel Service, 1994 WL 477169 at *5 (W.D. Okl. Aug. 31, 1994) In Sarsyki, a case alleging employment discrimination under the ADA, the court found that the defendant had not shown that the specific plaintiff, an insulin-dependent diabetic, would pose a "direct threat" to the health and safety of others if permitted to drive a package car weighing 10,000 pounds or less.

having this disability -- most notably the possibility that an officer might become incapacitated while on duty -- could, for any number of reasons, also be posed by officers who were not insulin-dependent diabetics. Id. at 1219.

In Doe v. District of Columbia, 796 F. Supp. 559 (D.D.C. 1992), the court refused to allow the District of Columbia to exclude a person who was HIV-positive from a position as a firefighter. With respect to the relative importance of the first and second prongs of the "direct threat" analysis -- the nature, duration and severity of the risk and the probability that harm will occur -- Doe noted that the probability of harm can be so remote as to render the severity of the harm insignificant as well. Concluding that the possibility of transmitting the HIV virus in the course of one's duty as a firefighter is remote or theoretical at best, the court rejected the "direct threat" defense under both section 504 of the Rehabilitation Act and the ADA. See id. at 569. The court also considered relevant the fact that other fire departments throughout the country have employed firefighters who are HIV-positive without incident. Id. at 558.

As is demonstrated below, the plaintiff in this case has presented evidence that the risk of fire in a motion picture theater is exceedingly small; indeed, he contends, and AMC concedes, that a fire has not occurred in a motion picture theater in more than fifty years. He has also shown that he takes steps necessary to avoid the risk of harm to others by not

sitting in locations on inaccessible routes unless he is accompanied by someone who can assist him in exiting if necessary. The defendant has neither conducted the individualized assessment of Mr. Fiedler's abilities necessary to support its claim that he would constitute a "direct threat" to the health and safety of others, nor shown that no reasonable modification to the Grand Avenue Theater's policies, practices, and procedures could eliminate any "direct threat" that the plaintiff might arguably pose. Summary judgment is clearly inappropriate under these circumstances.

B. The Existence of Material Facts in Dispute as to Whether the Plaintiff Would Constitute a Significant Risk of Harm to the Health and Safety of Others Precludes Summary Judgment

Despite its attempts to characterize it as such, the defendant's "direct threat" analysis is not the individualized assessment of the plaintiff's ability to exit the Grand Avenue Theater in an emergency situation that the ADA requires. It is, instead, merely a series of generalizations about the capabilities individuals who use wheelchairs.[17] In opposition,

[17] Defendant's flawed analysis is exemplified by its discussion of problems created by the very presence of a wheelchair in the aisle of an assembly hall during an emergency evacuation. "Plaintiff would block a far greater portion of the aisle than he would on foot," the defendant says, "even assuming equal ability to get up the aisle." Def. Mem. at 22 (emphasis added). This would be true, of course, on any aisle, regardless of its slope. The consequence of accepting the defendant's direct threat argument is that individuals in wheelchairs will always be relegated to the back row of an every existing and newly constructed assembly hall, immediately adjacent to a means of egress. The "direct threat" exception in section 302(b)(3) of the ADA and section 36.208 of the regulation was defined narrowly

the plaintiff has presented evidence with particularized facts sufficient to demonstrate a material issue of fact that precludes summary judgment.

The plaintiff has presented expert testimony to the effect that a fire has not occurred in a motion picture theater in more than fifty years, see Id. at 32, and that the tendency of individuals in emergency situation to assist one another would minimize the risk of harm in those rare situations that would necessitate evacuation of a theater. Id. at 33. He also has submitted a sworn declaration that he is able to negotiate an aisle having the slope of the one at the Grand Avenue Theater, and that in any event he never goes to theaters where wheelchair seating locations are not on an "accessible route" without another individual accompanying him who would be capable of pushing his wheelchair up a steeply-inclined aisle in an emergency. See id. at 30.

The defendant has neither presented expert testimony to counter the opinions of plaintiff's expert,[18] nor made any factual

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so as to avoid precisely this type of result -- a result which is clearly at odds with the ADA's requirement of dispersal of wheelchair seating locations in newly constructed facilities.

[18] At one point in its reply memorandum AMC states that it "agrees with the plaintiff's assessment that the various considerations that have gone into theater design, materials and safety and fire-prevention devices, may well mean that there will never be an emergency evacuation of the Grand Avenue theater." Def. Repl. Mem. at 18.

submission to dispute Mr. Fiedler's personal declaration. Rather, defendant urges the court to give more weight to the first prong of the "direct threat" analysis -- the nature, duration, and severity of the injury that could result -- than to the second prong -- the likelihood of injury. See Def. Repl. Mem. at 18. Defendant further suggests that it cannot rely on an altruistic response from the audience as a whole. Id. at 20. Defendant's assertions are not sufficient to warrant summary judgment. While the defendant is correct that the probability that an injury will occur is but one factor considered in the "direct threat" analysis, it is equally clear that at some point the probability that harm will occur becomes so small that the seriousness of the harm which could potentially result becomes insignificant. See Doe, 796 F. Supp. at 568. The defendant apparently gives no weight at all to the plaintiff's assertions regarding the measures he takes to minimize the risk of harm to others; yet as discussed in Bombrys, supra, 849 F. Supp. at 1218, this evidence is significant in an analysis of whether a particular individual with a disability poses a "direct threat" to others.

The plaintiff also points to other AMC theaters which he asserts have similar configurations to the Grand Avenue Theater, but provide dispersed wheelchair seating. See Pl. Mem. at 36, 37. The current and past practices of both a defendant and other entities engaged in the same or similar activity are relevant to determining whether a person with a disability presents a "direct

threat" in the particular activity at issue. See Bombrys, 849 F. Supp. at 1216; Doe, 796 F. Supp. at 558.[19]

Another important challenge that the plaintiff makes to the defendant's "direct threat" argument is his assertion that AMC does not have a policy of restricting the seating of other individuals who may impede patrons from exiting a theater in the event of an emergency but who do not use wheelchairs, such as individuals who, due to advanced age or disability, can walk only slowly and with great difficulty, see Pl. Mem. at 36, or persons who use crutches or walkers. This evidence -- that a public accommodation treats classes of individuals differently even though they could potentially present the same risk to others -- further undermines the defendant's position that safety concerns require its policy of providing only two wheelchair seating locations in the back of the Grand Avenue Theater. See Bombrys, 849 F. Supp at 1218.

Even if AMC had alleged facts sufficient to demonstrate that the plaintiff would pose a "direct threat" to the health and safety of others, which the government believes it has not done, AMC had the further obligation to demonstrate that the "direct threat" could not be eliminated by a reasonable modification to its policies, practices, and procedures. For his part, the plaintiff has proposed such a reasonable modification -- the use of ushers or other theater staff to assist individuals in

[19] Indeed, if AMC disperses wheelchair seating in theaters which have physical characteristics similar to the Grand Avenue theater, its "direct threat" argument here is frivolous.

wheelchairs to exit the theater. For the reasons stated in connection with its discussion of a public accommodation's obligation to provide readily achievable alternatives to barrier removal, the government believes that affording this level of assistance to theater patrons who use wheelchairs is also a reasonable modifications of policies, practices, and procedures that could eliminate whatever direct threat AMC believes such patrons would pose to others in an emergency situation.

CONCLUSION

For all of the foregoing reasons, the United States respectfully requests this Court to deny the defendant's motion for summary judgment.

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