

2006

Is the ADA Short-Sighted? An Analysis of Sightline Regulations in Movie Theaters

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Michael D. Driver, *Is the ADA Short-Sighted - An Analysis of Sightline Regulations in Movie Theaters*, 8 VAND. J. ENT. & TECH. L. 399 (2006).

ALWD 7th ed.

Michael D. Driver, *Is the ADA Short-Sighted - An Analysis of Sightline Regulations in Movie Theaters*, 8 Vand. J. Ent. & Tech. L. 399 (2006).

APA 7th ed.

Driver, M. D. (2006). *Is the ada short-sighted an analysis of sightline regulations in movie theaters*. *Vanderbilt Journal of Entertainment and Technology Law*, 8(2), 399-420.

Chicago 17th ed.

Michael D. Driver, "Is the ADA Short-Sighted - An Analysis of Sightline Regulations in Movie Theaters," *Vanderbilt Journal of Entertainment and Technology Law* 8, no. 2 (Spring 2006): 399-420

McGill Guide 9th ed.

Michael D. Driver, "Is the ADA Short-Sighted - An Analysis of Sightline Regulations in Movie Theaters" (2006) 8:2 Vand J Ent & Tech L 399.

AGLC 4th ed.

Michael D. Driver, 'Is the ADA Short-Sighted - An Analysis of Sightline Regulations in Movie Theaters' (2006) 8(2) *Vanderbilt Journal of Entertainment and Technology Law* 399

MLA 9th ed.

Driver, Michael D. "Is the ADA Short-Sighted - An Analysis of Sightline Regulations in Movie Theaters." *Vanderbilt Journal of Entertainment and Technology Law*, vol. 8, no. 2, Spring 2006, pp. 399-420. HeinOnline.

OSCOLA 4th ed.

Michael D. Driver, 'Is the ADA Short-Sighted - An Analysis of Sightline Regulations in Movie Theaters' (2006) 8 Vand J Ent & Tech L 399
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Is the ADA Short-Sighted? An Analysis of Sightline Regulations in Movie Theaters

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Over the last decade, disabled moviegoers have been met with adversity due to the prevalence of stadium seating. These patrons were often left with seats at the front of theaters in one large group, rather than at the various positions and viewing angles provided to other patrons. When the Access Board regulated viewing angles under the Americans with Disabilities Act Accessibility Guidelines (“ADAAG”) section 4.33.3,¹ an ambiguity was left as to what it means to require that disabled patrons be given “lines of sight comparable” to other patrons. The federal circuit courts have split over whether that language requires comparable viewing angles in stadium seating theaters, or simply an unobstructed view of the screen. The Access Board has since released a new regulation that clarifies the problem to

1. Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities, 36 C.F.R. pt. 1191, app. A (2002), *repealed by* 69 Fed. Reg. 44,084 (July 23, 2004).

the extent that the Act definitely considers viewing angles.² However, the old regulation was controlling law when many buildings were constructed or altered, and the difference in circuit opinions may leave many movie theaters suddenly out of compliance with the Americans with Disabilities Act (“ADA”).

In 1990, Congress stated in its fact-finding for the ADA that “society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”³ Only a handful of acts passed by Congress protected disabled persons before the passage of the ADA in 1990.⁴ As late as 1961, there were not even guidelines for builders to obtain a minimum amount of accessibility for commonly used buildings.⁵ Moreover, the pre-ADA guidelines were not adopted by all state governments.⁶

Congress, in passing the ADA, found that disabled persons not only faced overt discrimination, but also faced discrimination when buildings were not built or modified to allow accessibility.⁷ The ADA therefore affected both new constructions and building alterations after January 26, 1992.⁸ It was passed “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”⁹

The Access Board is an independent Federal agency that suggests criteria under the ADA which other federal agencies, such as the Department of Justice or Department of Transportation, later promulgate.¹⁰ It recently suggested amendments to the portion of the ADA dealing with viewing angles in movie theaters to require that viewing angles of a movie screen provided for disabled customers be “substantially equivalent” to those provided to all other customers.¹¹

2. Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 36 C.F.R. pt. 1191.1, apps. A-E (2005).

3. Americans with Disabilities Act of 1990, 42 USC § 12101(a)(2) (2000).

4. LAURA F. ROTHSTEIN, *DISABILITIES AND THE LAW* 3 (2d ed. 1997).

5. *Id.*

6. *Id.*

7. 42 U.S.C. § 12101(a)(5).

8. *Id.* § 12183(a).

9. *Id.* § 12101(b).

10. See United States Access Board, About the United States Access Board, <http://www.access-board.gov/about.htm> (last visited Mar. 7, 2006).

11. Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 36 C.F.R. pt. 1191.1, app. B, § 221.2.3 (2005).

Prior to this amendment, however, the circuits were split over language requiring that disabled moviegoers receive “lines of sight comparable” to those provided to all other patrons. The Fifth Circuit believed that this language only required theater owners to give disabled patrons an unobstructed view of the screen.¹² The other circuits read the language as requiring some sort of similarity in angle between the lines of sight given to disabled persons and those given to other patrons.¹³

The Access Board, in reaction to the circuit split, repealed the original regulation and promulgated the new one,¹⁴ but not before the circuits interpreted the original law, which was effective when many theaters were built or altered. This leaves “thousands of movie theaters [to] discover that they are out of compliance with the law, and that they must destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time.”¹⁵

Section 221.2.3 codified the position that there must be some comparability between the viewing angles of disabled patrons and other moviegoers,¹⁶ but it is still not clear exactly what the difference between allowable angles is. In order to rectify this problem before the circuits again split, this time as to what viewing angles are acceptable, the Access Board should promulgate an amendment to section 221.2.3 that states exactly what standard those building new facilities or altering old ones are required to provide to disabled patrons. Two possibilities are: (1) requiring the viewing angles provided to disabled patrons be within a set amount of degrees from the average viewing angle of all other seats in a theater; or (2) simply providing a range of viewing angles that are acceptable.

In Part I, the history of disability law in the United States will be discussed, following the decision of *Brown v. Board of Education*¹⁷ until the passage of the ADA. The purpose and contents of the ADA will, in pertinent part, then be discussed, as will the language of the Act that caused the circuits to split and the language of the Act as it now stands. The contents of the circuit court cases from the First, Fifth, Sixth, and Ninth Circuits will be analyzed, separating the

12. *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 789 (5th Cir. 2000).

13. *See, e.g., Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1131 (9th Cir. 2003).

14. Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 69 Fed. Reg. 44,084 (Jul. 23, 2004) (codified as amended at 36 C.F.R. pt. 1191.1, apps. A-E (2005)).

15. *Id.* at 1134.

16. 36 C.F.R. pt. 1191.1, app. B, § 221.2.3 (2005).

17. 347 U.S. 483 (1954).

circuits into majority (First, Sixth, and Ninth Circuits) and minority (Fifth Circuit) positions. In Part II the majority and minority positions, as well as the current language of ADAAG § 221.2.3, will be examined for problems, and the strengths of each view will be discussed. Finally, in Part III, a course of action will be suggested to the Access Board to remedy the problems that remain among the circuits despite the new language in the regulation.

I. DISABILITY LAW AND THE CURRENT CIRCUIT SPLIT

A. Disability Law Before the Americans with Disabilities Act of 1990

Before the advent of the ADA, those who were discriminated against because of a disability often did not have a legal method to deal with their grievance.¹⁸ Although a few acts prior to the middle of the twentieth century dealt with protecting those with disabilities, they were largely limited to getting medical attention to children with crippling disabilities, and to dealing with the employability of those with disabilities.¹⁹

In 1954, the United States Supreme Court decided *Brown*, rejecting the "separate but equal" doctrine of the old Courts and finding that racially segregated public schools violated the equal protection clause of the Fourteenth Amendment.²⁰ This case is not only a landmark case in racial equal rights cases, but in all civil rights cases; it paved the way for the legal movement towards equal protection of disabled persons.

It was not until 1961 that the American National Standards Institute (ANSI) released suggested minimum accessibility guidelines for common buildings that some state and federal statutes adopted.²¹ In the early 1970s, some lower courts began to expand the holding of *Brown* within the field of education to apply to students with mental disabilities.²² These cases led to the Education for All Handicapped

18. Cf. 24 U.S.C. § 12101(a)(4) (2000) (illustrating absence of statutory right to remedy for disability discrimination).

19. ROTHSTEIN, *supra* note 4, at 3.

20. *Brown*, 347 U.S. at 494-95.

21. ROTHSTEIN, *supra* note 4, at 3 (the ANSI standards were incorporated, to some extent, by the federal government in both the Architectural Barriers Act of 1968, 42 U.S.C. § 4151, and the Urban Mass Transportation Act of 1970, 49 U.S.C. § 1612).

22. *Id.* See generally *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972); *Penn. Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1275 (E.D. Pa. 1971).

Children Act, which was later renamed the Individuals with Disabilities Education Act.²³

In 1973, the Rehabilitation Act represented another significant step towards the equality of disabled persons.²⁴ It applied to the federal government and covered three major sections: (1) “nondiscrimination and affirmative action by federal employers”; (2) “nondiscrimination and affirmative action in employer requirements for federal contracts”; and (3) “nondiscrimination and reasonable accommodation” in programs receiving federal funding.²⁵ The Rehabilitation Act was the most far-reaching disability act until the ADA was promulgated in 1990, because it included “education programs, public facilities, transportation, and health and welfare services.”²⁶ The Rehabilitation Act gave the task of giving further federal recognition of “the importance of access to the physical environment” to the Architectural and Transportation Barriers Compliance Board.²⁷

Despite Congress passing three more major pieces of legislation in 1975,²⁸ advocates for disabled persons were disappointed by a lack of enforcement.²⁹ Eventually, pressure caused the President to issue an Executive Order in 1976 to force the Department of Health, Education, and Welfare (HEW) to issue regulations under the Rehabilitation Act.³⁰

HEW subsequently “issued model minimum regulations to be followed by each federal agency providing federal financial assistance in issuing their own . . . regulations.”³¹ However, lax enforcement due to reasons including federal agencies’ reluctance to enforce against individual complaints led individuals to bring their complaints to the judicial system.³² Most cases brought in the 1970s dealt with

23. 20 U.S.C. § 1400; *see* ROTHSTEIN, *supra* note 4, at 4.

24. ROTHSTEIN, *supra* note 4, at 4; *see also* 29 U.S.C. §§ 791-796.

25. ROTHSTEIN, *supra* note 4, at 4.

26. *Id.*

27. *Id.*

28. *Id.* at 51; *see* Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6000; National Housing Act Amendments, and the Department of Transportation Appropriations Act, Pub. L. No. 93-391, 88 Stat. 768 (1974); Pub. L. No. 94-173, 89 Stat. 1027 (1975). Each sought to remove barriers to disabled persons in a particular field.

29. ROTHSTEIN, *supra* note 4, at 4.

30. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (April 28, 1976).

31. ROTHSTEIN, *supra* note 4, at 5; *see also* Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities, 36 C.F.R. pt. 1190 (2002), *repealed by* 69 Fed. Reg. 44,084 (July 23, 2004).

32. ROTHSTEIN, *supra* note 4, at 5.

procedural issues under the Rehabilitation Act, and it was not until the 1980s that substantive issues began to be addressed.³³

In 1978, the Rehabilitation Act was amended to include the remedies and rights provided by Title VI of the Civil Rights Act, including the awarding of attorneys' fees to the prevailing party.³⁴ The Supreme Court first interpreted the Rehabilitation Act in 1979, when it decided that for a successful claim, a person, despite having a disability, must still meet the requirements to participate in a federal program, but a failure to alter programs to allow disabled persons could be discrimination.³⁵

Throughout the 1980s, controversy continued over the validity of regulations promulgated by federal agencies in fields like transportation and education. For instance, in 1981, the Department of Transportation issued regulations requiring mass transit systems to take special steps to make the transit systems accessible to disabled persons.³⁶ The Supreme Court later held that "federal financial assistance by one program within an institution does not subject the entire institution to coverage by one of several civil rights statutes."³⁷ However, this decision was changed by the Civil Rights Restoration Act of 1987,³⁸ which "provides that if any part of a program or activity receives assistance which subjects it to [the Rehabilitation Act], all operations of the program are subject to [the Act]."³⁹

B. The Americans with Disabilities Act of 1990

Those with disabilities often faced not only overt discrimination, but they also faced discrimination because of a failure to modify existing facilities.⁴⁰ Congress's purpose in enacting the ADA was to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."⁴¹ For purposes of the ADA,⁴² "a motion picture house, theater, concert hall,

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33. *Id.*
 34. *Id.* at 6; *see* Civil Rights Act, 42 U.S.C. 2000a-3(b) (2000).
 35. *See* Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979).
 36. Nondiscrimination on the Basis of Handicap, 49 C.F.R. pt. 27 (1981).
 37. ROTHSTEIN, *supra* note 4, at 9; *see also* Grove City Coll. v. Bell, 465 U.S. 555, 574 (1984), *superseded by statute, as stated in* O'Connor v. Davis, 126 F.3d 112, 117 (1997).
 38. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended in scattered statutes of 20 U.S.C.).
 39. ROTHSTEIN, *supra* note 4, at 9.
 40. *See* Americans With Disabilities Act of 1990, 42 U.S.C. § 12101(a)(5) (2000).
 41. *Id.* § 12101(b)(2).
 42. *Id.* § 12101.

stadium, or other place of exhibition or entertainment” is considered a public accommodation, and thus falls within the purview of the act.⁴³

The ADA is “the most significant disability rights statute” because “it broadens the coverage of protection for individuals with disabilities by extension to a much broader group of employers, public accommodations, public services, transportation programs, telecommunications, and public opportunity providers.”⁴⁴ Practically every field is now controlled by ADA regulations, with the exception of insurance.⁴⁵

The ADA not only applies to new construction, but whenever “major changes, such as remodeling, renovation, rehabilitation, rearrangement of structural parts or walls or full-height partitions are made, accessibility requirements [in the ADA] will apply.”⁴⁶ However, because of the nature of the Act and the large financial costs involved, the ADA did not apply immediately. Instead, it stipulated that alterations that began after January 26, 1992 in places of public accommodation had to provide to the greatest feasible extent accessibility to the areas that were altered.⁴⁷

Moreover, the ADA does not apply only to new and altered facilities. “The greatest mandate to make existing facilities accessible is under Title III of the ADA relating to public accommodations.”⁴⁸ This section of the ADA may be enforced by both private individuals through judicial suits, and by the Attorney General.⁴⁹ Remedies may include “injunctive relief, requirements to provide aid or services, modifications of policies and practices, monetary damages (but not punitive damages), and civil penalties.”⁵⁰

An action exists under the ADA if any “individual [is] 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.”⁵¹ Further, the ADA makes it discrimination to “afford an individual or class of individuals, on the basis of a disability . . . the opportunity to participate in or benefit from a good, service, facility, privilege,

43. *Id.* § 12181(7)(c).

44. ROTHSTEIN, *supra* note 4, at 14.

45. *Id.*

46. *Id.* at -396-397.

47. *Id.*; see 42 U.S.C. § 12183(a).

48. ROTHSTEIN, *supra* note 4, at 397.

49. See 42 U.S.C. § 12188.

50. ROTHSTEIN, *supra* note 4, at 399 (discussing the listed remedies in 42 U.S.C. § 12188).

51. 42 USC § 12182(a).

advantage, or accommodation that is not equal to that afforded to other individuals.”⁵² The term “individual or class of individuals” in the ADA includes “customers of the covered public accommodation.”⁵³

C. The Sightline Regulation

Under the ADAAG, the Department of Justice (DOJ) promulgates regulations for the interpretation of the ADA. In the original regulation of the ADA, the DOJ required that “[w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.”⁵⁴

In late 2004, the Access Board, which releases regulations to be considered for promulgation by the DOJ, released a suggested amendment that requires that “wheelchair spaces shall be dispersed and shall provide wheelchair users a choice ‘of seating locations and viewing angles that are substantially equivalent to, or better than,’ those ‘available to all other spectators.’”⁵⁵ The DOJ revised Title III of the ADA, effective January 2005, to include the Access Board’s suggested amendment.⁵⁶ However, this amendment only applies to new constructions and altered facilities.⁵⁷

D. The Circuit Split

The circuit courts presently have two interpretations on the DOJ’s current regulation dealing with a disabled person’s view in a movie theater. The majority circuit view, shared by the First, Sixth, and Ninth Circuits, requires that a movie theater with stadium seating provide viewing angles of the screen for disabled persons that are not inferior to those shared by other patrons.⁵⁸ The Fifth Circuit,

52. *Id.* § 12182(b)(1)(A)(ii).

53. *Id.* § 12182(b)(1)(A)(iv).

54. Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities, 36 C.F.R. pt. 1191, app. A, ch. 4, § 4.33.3 (2002), *repealed by* 69 Fed. Reg. 44,084 (July 23, 2004).

55. *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 565 (1st Cir. 2004) (citing Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 36 C.F.R. pt. 1191, app. B, § 221 (2005)).

56. Unified Agenda, 69 Fed. Reg. 37,749 (June 28, 2004) (codified at 36 C.F.R. pt. 1191.1 (2005)).

57. *See id.*

58. *See, e.g., United States v. Cinemark USA, Inc.*, 348 F.3d 569, 575 (6th Cir. 2003).

on the other hand, decided that “lines of sight comparable” means nothing more than an unobstructed view of the screen.⁵⁹ The Ninth Circuit’s decision in this line of cases was considered for review by the United States Supreme Court, but was later opposed for certiorari by the Solicitor General. It was subsequently turned down for review by the Court, with the Solicitor General noting that the new Access Board amendment would provide more direction for the courts soon.⁶⁰

1. The Majority Position – The First, Sixth, and Ninth Circuits

Although the Fifth Circuit decided *Lara v. Cinemark* three years prior to the Ninth Circuit’s decision in *Oregon Paralyzed Veterans of America v. Regal Cinemas*,⁶¹ the Ninth Circuit announced the majority rule. Three wheelchair-using disabled persons brought suit in Oregon against movie theater operators, including Regal Cinemas (Regal), which operated theaters with stadium seating where the majority of seating for disabled persons was located in the first few rows.⁶² “[E]xperts, who visited the theaters and conducted research there, found that the vertical lines of sight for the wheelchair seating locations ranged from 24 to 60 degrees, with an average of approximately 42 degrees, as compared with the average median line of sight of 20 degrees in the non-wheelchair seating.”⁶³

The DOJ issued an amicus brief in *Lara* in which it interpreted the ADA “to require that, in stadium-style theaters, ‘wheelchair locations must be provided lines of sight in the stadium seating seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt.’ ”⁶⁴ While the *Lara* court and the district court in *Oregon Paralyzed Veterans* rejected this statement for reasons that will be discussed later, the Ninth Circuit in *Oregon Paralyzed Veterans* itself found that the interpretation still warranted “substantial deference.”⁶⁵ The court went on to state that the seats available to wheelchair-bound patrons in the theaters at issue were “objectively uncomfortable, requiring [the patrons] to crane their necks and twist their bodies in order to see the

59. *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 789 (5th Cir. 2000)

60. *Stewmon v. Regal Cinemas, Inc.*, 542 U.S. 937 (2004), *denying cert. to Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126 (2003); Brief for the U.S. as Amicus Curiae, *Stewmon v. Regal Cinemas, Inc.*, 542 U.S. 937 (2004) (No. 03-641).

61. *Or. Paralyzed Veterans*, 339 F.3d at 1127-28.

62. *Id.* at 1128.

63. *Id.* at 1128.

64. *Id.* at 1130.

65. *Id.* at 1131 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 612 (1994)).

screen, while non-disabled patrons have a wide range of comfortable viewing locations from which to choose.”⁶⁶

A similar decision was sent down by the Sixth Circuit in *U.S. v. Cinemark USA, Inc.* Cinemark, like the companies in *Oregon Paralyzed Veterans*, operated a number of movie theaters with stadium seating.⁶⁷ In Cinemark’s theaters, the “wheelchair placements [were] generally located on a flat portion of the auditorium approximately one-third of the way back from the screen.”⁶⁸ The government alleged that wheelchair-using patrons would sometimes have to “look up at the screen at sharp angles, resulting in severe discomfort and pain.”⁶⁹

The Sixth Circuit held that reading the portion of the ADAAG dealing with lines of sight furthered the purposes of the ADA if it included a requirement of checking viewing angles.⁷⁰ Further, the court went on to state that “the language cited by the Fifth Circuit [in *Lara*] does not definitively support the conclusion that the Access Board acknowledged that additional language will be necessary to codify the DOJ’s litigating position.”⁷¹ The court also found that the Fifth Circuit’s reading did not consider the use of the word “comparable” in the statute when used to describe what kind of line of sight is required.⁷² “In order to be comparable,” stated the court, “viewing angles must also be taken into account to some degree.”⁷³ The court left the district court to “determine the extent to which lines of sight must be similar for wheelchair patrons in stadium-style theaters, but [held] that the plain meaning of ‘lines of sight comparable to those for members of the general public’ clearly requires more points of similarity than merely an unobstructed view.”⁷⁴

Finally, the First Circuit weighed in on the matter in *United States v. Hoyt’s Cinemas Corp.*, further entrenching the majority position.⁷⁵ However, the court in *Hoyts* did not announce a position

66. *Id.* at 1133.

67. *See United States v. Cinemark USA, Inc.*, 348 F.3d 569, 572 (6th Cir. 2003).

68. *Id.*

69. *Id.*

70. *Id.* at 576.

71. *Id.* at 577.

72. *Id.* at 578.

73. *Id.* at 579.

74. *Id.* (quoting Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities, 36 C.F.R. pt. 1191, app. A, § 4.33.3 (2002), *repealed by* 69 Fed. Reg. 44,084 (July 23, 2004)).

75. *See United States v. Hoyt’s Cinemas Corp.*, 380 F.3d 558, 575 (1st Cir. 2004).

that was nearly as forceful as the majority in *Cinemark*.⁷⁶ The First Circuit noted that it:

[W]ould have been child's play for the drafters to make clear that the 'lines of sight' requirement encompassed not only unobstructed views – a classic problem for wheelchair occupants in many types of auditoriums and arenas . . . but also angles of sight. Yet the [DOJ] and the Access Board apparently took no such position until 1998.⁷⁷

However, the court further opined that “the better reading of the regulation is that it takes angles of sight into account,” even though the framers of the ADA may have never considered viewing angles at all.⁷⁸

The First Circuit held that the best meaning of the statute was not found in the text of the statute itself but in the “underlying policy of the statute.”⁷⁹ The court wrote: “If most or all of the wheelchair sites in the theater have badly degraded views and most or all of the non-wheelchair seats have good viewing angles, the basic objective of the statute would surely be undermined.”⁸⁰ While the court suggested that viewing angles exceeding thirty-five degrees to the top of the screen are uncomfortable, it did not go so far as to find an explicit angle that would be required.⁸¹ The court did admit that determining what viewing angles are comparable is a “fact-intensive” process.⁸²

The court finally went on to briefly discuss the Access Board's amended section 4.33.3:

[I]f adopted by the [DOJ, the amendment] goes a long way to determining for the future the extremely difficult question of how much “comparability” is required for new construction. But it is an amendment, not a gloss on the existing regulation, and therefore does not itself govern existing theaters (future alterations aside).⁸³

2. The Minority Position – The Fifth Circuit

It was the Fifth Circuit in 2000 that took the first bite at the proverbial stadium-seating apple.⁸⁴ The court initially took a plain meaning approach to the statute and found that the terms “comparable choice of admission prices” and “comparable lines of

76. See at 566.

77. *Id.*

78. *Id.*

79. *Id.* at 566-67.

80. *Id.* at 567.

81. *Id.*

82. *Id.*

83. *Id.* at 575.

84. *Lara v. Cinemark U.S.A., Inc.*, 207 F.3d 783, 789 (5th Cir. 2000).

sight” are two separate phrases, meaning that the term “choice of” does not apply to lines of sight.⁸⁵

Cinemark, in contentions similar to those brought forward in the other cases in this line, stated that its wheelchair-accessible areas were in the middle of the seating area and unobstructed, thus comparable to the seats provided to non-disabled patrons.⁸⁶ The court found this reasoning persuasive and held that “[u]nlike questions of ‘viewer obstruction,’ which the DOJ and Access Board explicitly considered before issuing section 4.33.3, . . . questions regarding ‘viewing angle’ did not arise until well after the DOJ promulgated section 4.33.3.”⁸⁷ The court pointed out that other statutes that used the term “line of sight” referred only to an unobstructed view.⁸⁸ The court, therefore, read the term “line of sight” only to include an unobstructed view of the screen for disabled moviegoers since a holding otherwise would “require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers.”⁸⁹

II. HOW CLEAR IS THE CURRENT STATE OF THE SIGHTLINE REGULATIONS?

Some commentators believe that most of the holes that existed in the old ADAAG regulations have been addressed, leaving only a few ambiguities.⁹⁰ While it is true that the new regulations are significantly more instructive than the old in providing specific requirements for both horizontal and vertical dispersion, the ambiguity left by the current regulation in the area of lines of sight does not necessarily resolve the current circuit split. The regulation requires that wheelchair-based lines of sight provide spectators with “viewing angles that are substantially equivalent to, or better than, the choices of . . . viewing angles available to all other spectators.”⁹¹

The advisory portion of section 221.2.3 goes on to provide that:

85. *Id.* at 787 (citing 56 Fed. Reg. 2296, 2314 (Jan. 22, 1992); 56 Fed. Reg. 35408, 35440 (July 26, 1991)).

86. *Id.* at 788.

87. *Id.*

88. *Id.* at 788-89 (citing 47 C.F.R. § 73.685 (2000); 46 C.F.R. § 13.103 (2000); 36 C.F.R. § 2.18 (2000)).

89. *Lara*, 207 F.3d at 789.

90. Laura K. McKibbin, *The ADA Takes on the Movie Industry: Do the Disabled Have a Right to the Best Seats in the House?*, 38 U.S.F. L. Rev. 831, 849-54 (2004).

91. Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 36 C.F.R. pt. 1191.1, app. B, § 221.2.3 (2005).

[I]ndividuals who use wheelchairs must be provided equal access so that their experience is substantially equivalent to that of other members of the audience. Thus, while individuals who use wheelchairs need not be provided with the best seats in the house, neither may they be relegated to the worst.⁹²

This section has its own share of problems, one of which is that it does not solve the dilemma created by the circuit split. This is because the newly amended version of the ADAAG is to be applied “during the design, construction, *additions* to, and *alterations* of *sites, facilities, buildings, and elements* to the extent required by regulations issued by Federal agencies under the [ADA].”⁹³ Since the amendments only affect new construction and alterations, that means that movie theater owners are left to deal with the interpretations set out by the different circuits in the split decision. In his dissent in *Oregon Paralyzed Veterans*, Judge Kleinfeld stated that since the circuit decisions are “retroactive as judicial decisions generally are, thousands of movie theaters will discover that they are out of compliance with the law, and must destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time.”⁹⁴

While the goal of such a regulation is one that needs to be accomplished, the DOJ has left the complaints of the court in *Lara* largely unanswered by replacing old ambiguous language with new ambiguous language.⁹⁵ Courts are still left to decide what “substantially equivalent” viewing angles are, or, for that matter, which angles are better than any others.⁹⁶ The argument still remains that requiring something more than an unobstructed view of the screen would “require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers.”⁹⁷

However, the *Lara* court’s approach does not seem to advance the goal of the ADA “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁹⁸ This is because it does not confront the problem

92. *Id.*

93. *Id.* § 101.1 (emphasis added).

94. *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1134 (9th Cir. 2003).

95. *See Lara v. Cinemark U.S.A., Inc.*, 207 F.3d 783, 787 (5th Cir. 2000) (finding that, under the old ADA guidelines the term “lines of sight comparable” meant nothing more than giving disabled moviegoers an unobstructed view).

96. *See* 36 C.F.R. pt. 1191.1, app. B (2006) (containing no definitions for the words “substantially”, “equivalent”, or “experience”).

97. *Lara*, 207 F.3d at 789.

98. 42 U.S.C. § 12101(b) (2000).

created at all, but instead lets the theater owners who simply provide unobstructed views of screens at terrible angles to continue at the status quo. It is equally questionable that the current regulation of lines of sight, section 221.2.3, “provide[s] clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,” another goal of the ADA.⁹⁹

A. The Necessity of Regulation

Without any regulation of viewing angles, and even with dispersion requirements, disabled persons could easily be forced to sit in the areas of the theater that are less popular. When the ADA was passed in 1990, Congress stated that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.”¹⁰⁰ Congress went on to find that:

[H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

....

[T]he Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals¹⁰¹

Historically, since there was no proper regulation in this area, disabled persons – as a discreet and insular minority – “have often had no legal recourse to redress such discrimination.”¹⁰²

Stadium seating has become the benchmark in the movie theater industry.¹⁰³ In 2002, American Multi-Cinema, Inc. (AMC) owned 84 theater complexes around the United States, all of which had been altered or built after 1995 using stadium seating.¹⁰⁴ In one of AMC’s stadium seating theaters, there were twenty-four screens, twenty of which had no wheelchair seating in the stadium area of the auditorium.¹⁰⁵ All of the wheelchair seating was located on a sloped

99. *Id.*

100. *Id.* § 12101(a)(1).

101. *Id.* § 12101(a)(2), (8).

102. *Id.* § 12101(a)(4).

103. *United States v. AMC Entm’t, Inc.*, 232 F. Supp. 2d 1092, 1096 (C.D. Cal. 2002).

104. *Id.*

105. *Id.*

floor in the front of the theater.¹⁰⁶ This kind of seat grouping is expressly forbidden by the ADAAG.¹⁰⁷

This case goes a long way towards illustrating why some sort of regulation in the area of lines of sight and the viewing angles is necessary. The facts in *AMC* showed that, very soon after AMC opened its first stadium-seating theater, several patrons began to complain of discomfort after watching movies when subjected to seating that was located at the front of the auditorium.¹⁰⁸ Further:

[T]he Government . . . also presented evidence that wheelchair-bound customers experience other conditions that detract from their moviegoing experience. These customers report that they suffer from a sense of embarrassment and isolation from being relegated to a section of the theater where no one else is sitting. Other customers have described feelings of anger and humiliation, or report a feeling of being watched because everyone else in the audience is behind them.¹⁰⁹

B. Analyzing the Majority Position and Section 221.2.3

While the majority circuits agree that viewing angles are to be considered, they differ as to exactly what is required to be in compliance with the ADA. The *Oregon Paralyzed Veterans* court found that the DOJ amicus brief interpreting the “lines of sight comparable” portion of the regulation to require that “wheelchair locations must be provided with lines of sight in stadium seating seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt” deserved considerable deference.¹¹⁰ The court in *Oregon Paralyzed Veterans* stated that it was only to decide “whether it is unreasonable for DOJ to interpret ‘comparable line of sight’ to encompass factors in addition to physical obstructions, such as viewing angle. The answer, in light of the plain meaning of the regulation both in general and as understood in the movie theater industry, is ‘no.’”¹¹¹

But Judge Kleinfeld stated that the Ninth Circuit decision “sets up a conflict with the Fifth Circuit, adopts an unreasonable construction of the applicable regulation, and puts theater owners in a position of impossible uncertainty as to what they must do to comply

106. *Id.*

107. See Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 36 C.F.R. pt. 1191.1, app. B, § 221.2.3 (2005).

108. *AMC*, 232 F. Supp. 2d at 1097.

109. *Id.*

110. *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1130 (9th Cir. 2003).

111. *Id.* at 1132.

with the law.”¹¹² At the time of the *Oregon Paralyzed Veterans* decision, the Access Board was considering releasing a suggested regulation to provide wheelchair patrons lines of sight that were better than those enjoyed by half of the patrons in the movie theater, but met resistance from design professionals who complained that it would be difficult to tell if they complied with the law.¹¹³

The Access Board stated that it intended to include technical provisions in a new regulation.¹¹⁴ However, section 221.2.3 does not contain any technical information.¹¹⁵ Judge Kleinfeld noted that, after the *Oregon Paralyzed Veterans* decision, “[t]heater owners in the Ninth Circuit have no guidance from the majority on how to build their theaters, other than to stop doing what they are doing now.”¹¹⁶ Even if the standard proffered were less ambiguous, there is no standard to determine how many degrees off the general public’s lines of sight the wheelchair viewers’ lines cannot be, nor is it clear how much of the seating dispersed about the theater must be within such requirements.

Perhaps even worse than the ambiguity left by the Ninth Circuit in *Oregon Paralyzed Veterans*, is the Sixth Circuit in *Cinemark* leaving the decision to the district court as to what kind of viewing angle was appropriate.¹¹⁷ Without at least a standard that encompasses the entire circuit, movie theater owners are left with little direction within an individual district, much less between different ones. *Cinemark* and *Regal Cinemas* are both large, nationwide corporations and it seems extraordinary to expect them to attempt to contend with a different set of regulations set up by the judiciary in each circuit, or district.

In *Hoyt’s*, the First Circuit remanded after encouraging the district court to walk a very fine equitable line between the two parties.¹¹⁸ The court remanded because the district court’s “blanket determination—that all slope-only wheelchair placements are inferior, whatever the size or configuration of the theater—is multiply flawed.”¹¹⁹ The court went on to state that it was not sure “[w]hether a

112. *Id.* at 1133 (Kleinfeld, J., dissenting).

113. *Id.* at 1134.

114. *Id.*

115. Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 36 C.F.R. pt. 1191.1, app. C, § F221.2.3 (2005).

116. *Or. Paralyzed Veterans*, 339 F.3d at 1136 (Kleinfeld, J., dissenting.).

117. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 579 (6th Cir. 2003).

118. *United States v. Hoyt’s Cinemas Corp.*, 380 F.3d 558, 574-75 (1st Cir. 2004).

119. *Id.* at 570.

remand will entail trench warfare litigation on a theater-by-theater basis or whether there are shortcuts” to determine compliance.”¹²⁰

These courts seem to be going in the right direction. Despite their attempts to create *ad hoc* standards out of vague administrative regulations, the First, Sixth, and Ninth Circuits have at least put some regulatory meat on the bare bones of the law.¹²¹ As the First Circuit stated, the best meaning of the statute – as it currently stands – is not found within the text of the law but in the “underlying policy of the statute.”¹²² Even if the statute’s provided regulations are vague, that does not mean that they should be considered ineffective. Still, without some sort of overarching regulation, the movie theater owners may be left to face liability in one section of the country while the exact same viewing angle is found to be passable in another section. This leaves the owners in the untenable position of trying to guess which standard they will face in each circuit for their stadium seating theaters.

The advisory portion of section 221.2.3 does not provide much more guidance than the section itself. The advisory portion of the statute makes reference to the “experience” of the moviegoer as compared to non-disabled viewers, and states that “while individuals who use wheelchairs need not be provided with the best seats in the house, neither may they be relegated to the worst.”¹²³ The latter statement seems to provide no direction, since it simply states that the seats provided to wheelchair using patrons should fall somewhere between the best and worst provided to the general public.

The sections dealing with horizontal and vertical dispersion explicitly exclude theaters with less than 300 seats so long as the viewing angles provided by the available wheelchair seating have a viewing angle as good as the average viewing angle provided in the facility.¹²⁴ From this, it seems likely that the Access Board intended for wheelchair seats dispersed in the stadium section of a theater to

120. *Id.* at 572.

121. *See Hoyt’s Cinemas Corp.*, 380 F.3d at 566 (finding that section 4.33.3 of the ADAAG might be read to include angles of lines of sight to further the ADA even if that is not the result the drafters intended); *Or. Paralyzed Veterans*, 339 F.3d at 1133 (finding that section 4.33.3 of the ADAAG “require[d] a viewing angle for wheelchair seating within the range of angles offered to the general public in the stadium-style seats”); *Cinemark USA*, 348 F.3d at 572 (remanding to the district court to determine what lines of sight are comparable).

122. *Hoyt’s Cinemas Corp.*, 380 F.3d at 567.

123. Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 36 C.F.R. pt. 1191.1, app. C, § F221.2.3 (2005).

124. *See id.* at app. B, § 221.2.3.1-2.

have at least the same viewing angle as that of the average of all viewing angles available in the theater. This standard could be dangerous, however, because if the viewing angle is changed a few degrees up or down from the average then courts are left with the discretion to decide which angles are “substantially similar.”

Section 802.2 of the ADA Accessibility Guidelines provides further guidance into how wheelchair user seating should be located.¹²⁵ However, there is no information contained in the section as to what the viewing angles from those seats should be to the screen.¹²⁶ Instead, the section simply illustrates how the seats should be arranged so that wheelchair-using viewers can see over people seated in the first row at the same angle as those sitting in a similar area.¹²⁷ This sort of detail is a step in the right direction since it clearly provides exactly how wheelchair users in stadium seating are to view the screen, but it does not alleviate the issue of what viewing angles movie theater owners should provide to disabled viewers.

C. Analyzing the Minority Position

While the majority position and the current set of regulations found in the ADA have their own problems, the position espoused in *Lara* may be even more problematic. The Fifth Circuit’s approach in that case does not apply to the newly reworded section 221.2.3 since it was decided under the wording of the now repealed section 4.33.3. However, judicial decisions generally apply retroactively and consequently the law as interpreted under section 4.33.3 is still relevant to any theaters built while the old regulation was in force.

Prior to *Lara*, the Access Board stated that the DOJ was litigating so

[T]hat wheelchair seating locations [in stadium-style theaters] must: (1) be placed within the stadium-style section of the theater . . . ; (2) provide viewing angles that are equivalent or better than the viewing angles . . . provided by 50 percent of the seats in the auditorium, counting all seats of any type sold in that auditorium; and (3) provide a view of the screen, in terms of lack of obstruction . . . that is in the top 50 percent of all seats of any type sold in the auditorium. The Board is considering whether to include specific requirements in the final rule that are consistent with the DOJ’s interpretation of 4.33.3 pertaining to stadium-style movie theaters.¹²⁸

125. See *id.* at app. D, § 802.2 (illustrating proper placement and sight lines over individuals).

126. *Id.*

127. *Id.*

128. *Lara*, 207 F.3d at 788 (citing 64 Fed. Reg., 622,248, 62278 (Nov. 16, 1999)).

However, the Access Board also recognized that more language would need to be added to section 4.33.3 in order to include viewing angles in the definition of “lines of sight.”¹²⁹

Without further guidance, the Fifth Circuit found that “[t]o impose a viewing angle requirement at this juncture would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers.”¹³⁰ The *Lara* court, therefore, found that the term “lines of sight comparable” in section 4.33.3 included nothing more than an unobstructed view of the screen.¹³¹

The Fifth Circuit’s position in *Lara* seems more equitable to movie theater owners than the opinions written by the majority circuits. Theater owners who found themselves suddenly out of compliance with the law after a decision like the one in *Oregon Paralyzed Veterans* would have to “destroy facilities built in compliance with the law according to the best knowledge of design professionals at the time.”¹³² Under the *Lara* decision, all theaters but the most egregious offenders (those that do not even supply disabled patrons with an unobstructed view of the screen) would be safe from suit until they decided to alter the existing theater or build a new one.

However, this position is adverse for disabled moviegoers. If the law were to reflect *Lara* – which of course it does for theaters built in the Fifth Circuit before section 221.2.3 took effect in 2005 – theaters that are already in existence are not required to do any more than provide unobstructed lines of sight, something that even seats in the front row allow.¹³³ A disabled movie patron attending theaters built before section 221.2.3 may still be forced to “crane his or her neck at a very uncomfortable angle in order to view the feature on the motion picture screen.”¹³⁴ The Ninth Circuit found that this effectively denied a “wheelchair-bound patron . . . the full and equal enjoyment of the movie going experience.”¹³⁵ Denying disabled patrons full enjoyment of a movie is not within the purview of the ADA since the Act recognizes that “society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue

129. *Id.*

130. *Id.* at 789.

131. *See id.*

132. *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1134 (9th Cir. 2003).

133. *Lara*, 207 F.3d at 789.

134. *Or. Paralyzed Veterans*, 339 F.3d at 1129.

135. *Id.*

to be a serious and pervasive social problem.”¹³⁶ Congress, therefore, created the ADA to address “major areas of discrimination faced day-to-day by people with disabilities.”¹³⁷

III. CLARIFYING THE REGULATIONS AND RESOLVING THE CIRCUIT SPLIT

The change from section 4.33.3 to section 221.2.3 is a step in the right direction. However, this new regulation leaves several important questions completely unanswered. Even if it assumed that “viewing angles that are substantially equivalent to, or better than, the choices of . . . viewing angles available to all other spectators”¹³⁸ means that the viewing angle of the wheelchair seats must be “substantially equivalent” to the average viewing angles of all other seats in that auditorium, it is not clear how far theater owners may deviate from the mean before they will be held in violation of section 221.2.3.

Also, section 4.33.3 left a legacy of confusion. Since it was the law when many of the existing stadium seating theaters were built, it is the law that controls whether or not they are in compliance with the ADA. Given the conflicting decisions handed down by the different circuits,¹³⁹ theater owners now have very little, if any, guidance as to what they should do in order for their old theaters to comply with the old regulations; all they know is that it is not what they are presently doing.¹⁴⁰

While decisions are generally applied retroactively, labeling an act illegal that was legal at the time that the act was taken tends to raise much higher judicial scrutiny and weighs in favor of making any decisions to that effect prospective.¹⁴¹

Equitable considerations do not operate only one way. The plight of the disabled, whom Congress sought to protect starting over a decade ago, is the central concern of the statute and a proper consideration – even in a due process assessment. Even in a due process context, the public interest bears upon the retroactivity to be allowed.¹⁴²

However, at this point, a decision that lacks retroactivity based on the old statute would have no effect since movie theater owners who alter

136. 42 U.S.C. § 12101(a)(2) (2000).

137. *Id.* § 12101(b)(4).

138. Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 36 C.F.R. 1191.1, app C, § F221.2.3 (2005).

139. *Compare Or. Paralyzed Veterans*, 339 F.3d at 1137 *with Lara*, 207 F.3d at 788.

140. *Or. Paralyzed Veterans*, 339 F.3d 1126 at 1136.

141. *United States v. Cinemark USA, Inc.*, 348 F.3d 569, 581 (6th Cir. 2003).

142. *United States v. Hoyt’s Cinemas Corp.*, 380 F.3d 558, 574 (1st Cir. 2004).

their theaters in hopes of meeting the guidelines under which their theaters were originally built will find themselves subjected to the new language of section 221.2.3.¹⁴³

As previously discussed, while the language in section 221.2.3 is easier to follow than the language in 4.33.3, it is still in need of refinement.¹⁴⁴ Many of the regulations in the ADA specify down to the millimeter exactly what is required to be in compliance with the Act.¹⁴⁵ It is unclear why the Access Board could not provide a similar level of specificity in dealing with the angles of sight lines. Such a nationally promulgated and recognized regulation would be the best way for the federal government to resolve this conflict and get the results it wants.

However, as the situation presently exists, movie theater owners may find compliance hard to achieve. In the First, Sixth, and Ninth Circuits, at least, movie theaters with stadium seating that do not fall within the position espoused by the relevant court will find themselves out of compliance. However, until section 221.2.3 has been clarified at a national level, it should not be left to judges to guess exactly what the Access Board desired.¹⁴⁶

The Access Board should find a range of viewing angles that it finds satisfactory and hold new constructions and alterations to that standard, one with a definite value that movie theater owners may use to construct reliably compliant structures. Until that has occurred, the courts should refrain from going after all but the most egregious cases of theater construction problems in order to allow time for some sort of national clarification to be made. At this point in time, it is impossible to guess whether the First, Sixth, and Ninth Circuits will read the new law any differently from the old law and if the Fifth Circuit will change its stance in relation to the clarity of the statute. "In a court of equity it is legally possible, and almost surely wise in this case, to decouple what is required prospectively from what is required as to theaters already built."¹⁴⁷

143. 36 C.F.R. pt. 1191.1, app. C, § F221.2.3 (stating that the Act applies to alterations).

144. *See id.* at app. B, § 221.2.3 (providing that viewing angles must be "substantially equivalent to, or better than those provided to other spectators", but failing to define "substantially equivalent" or state which viewing angles are any "better than" any others).

145. *See, e.g., id.* at app. D.

146. *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1137 (9th Cir. 2003).

147. *United States v. Hoyt's Cinemas Corp.*, 380 F.3d 558, 574 (1st Cir. 2004).

IV. CONCLUSION

The United States has made great strides towards civil rights for many groups over the last fifty years.¹⁴⁸ However, it was only in 1990 when disabled persons, a previously largely ignored minority, were recognized as a great enough concern by Congress to enact the ADA.¹⁴⁹ Although earlier measures had been taken to prevent discrimination on the basis of disability, they were largely limited, or riddled with a lack of enforcement.¹⁵⁰ The ADA required all newly built or altered facilities that fell within its purview to meet certain minimum specifications.

However, the original regulation dealing with lines of sight for movie theater patrons in stadium seating did not necessarily include viewing angles in its purview.¹⁵¹ This ambiguous language caused the circuits to split, leaving theaters in the First, Sixth, and Ninth Circuits possibly out of compliance with the law under which they were built. The Access Board has since altered the regulations to include viewing angles, but it has not clarified the ambiguity as to what viewing angles are acceptable or what method should be used to discern such angles. This leaves movie theater owners in the untenable position of finding their old theaters suddenly out of compliance and in need of alteration, but with no guidance as to exactly what those alterations should be.

It is possible that the Access Board simply meant to codify the DOJ's litigating position that the viewing angles provided to disabled patrons should be substantially similar to the average viewing angle of all other patrons in a theater. However, what – if any – action the Access Board will take is unclear at this time. The Access Board should alter the regulations as soon as possible to specify what angles are required for disabled moviegoers.

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148. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

149. See 42 U.S.C. § 12101 (2000).

150. ROTHSTEIN, *supra* note 4, at 3-5.

151. See Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities, 36 C.F.R. pt. 1191, app. A, § 4.33.3 (2002), *repealed by* 69 Fed. Reg. 44,084 (July 23, 2004) (stating that lines of sight provided to disabled patrons must be “comparable”).

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