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Comments

STANDING IN FRONT OF THE DISABLED: JUDICIAL UNCERTAINTY OVER ENHANCED SIGHTLINES IN SPORTS ARENAS

I. Introduction

For many years modern stadiums have been built for fans to enjoy sporting events. Unfortunately, patrons who attend these events are often bothered when people seated in front of them stand up during an exciting moment of a game. For most fans, however, this is nothing more than a mere inconvenience, as they can simply stand up to see the excitement as well. Although it is a nuisance, most fans accept this as part of the experience of watching a live event.

For disabled fans, however, this is more than a nuisance because they often cannot stand to see the excitement when a fan in front of them stands up. Historically, disabled patrons have not been able to enjoy the same benefits of attending sporting events that others enjoy. Recently, awareness regarding the disabled heightened as Congress enacted Title III of the Americans With Disabilities Act ("ADA"), which prohibits discrimination against disabled individuals in places of public accommodation. Although


3. See id. (stating that people will stand up so not to miss plays that may become highlights).

4. See id. (commenting on general acceptance of inconvenience).

5. See id. (stating that "[i]nstead of seeing the home run or the touchdown, [wheelchair patrons] are forced to look at the backside of the person in front of them.")

6. See Conrad, supra note 1, at 264 (stating that disabled patrons were not able to take advantage of facilities in 1920s and 1930s). During this period, the disabled were also unable to take advantage of benefits others enjoyed in areas such as employment and transportation. See id.

many agree that the new attitude towards disabled individuals is long overdue, questions arise over the enforcement of new regulations and how much of a burden stadium owners should bear when accommodating the disabled. The ambiguity of these regulations has given rise to many conflicting court decisions. As a result, uncertainty exists for architects and owners constructing new stadiums.

This Comment discusses an aspect of that uncertainty by examining the split among circuits as to whether Title III of the ADA requires enhanced lines of sight for those individuals in wheelchairs. Section II discusses the passage of Title III of the ADA and the debate over whether the Department of Justice ("DOJ") adopted the enhanced lines of sight standard. Section III examines the circuit split regarding the interpretation of the Department of Justice's Standards for Accessible Design, Standard 4.33.3. Section IV discusses the future of Title III of the ADA and the resulting impact that the enhanced lines of sight standard would have on stadium operators if adopted by all courts. Section V discusses suggested solutions to resolve the dispute regarding the enhanced lines of sight standard.

II. BACKGROUND

Title III of the ADA prohibits discrimination against individuals with disabilities by owners and operators of sports stadiums or arenas. The broad language of Title III protects individuals

8. See Conrad, supra note 1, at 265 (questioning uncertainty of Title III).
9. For an analysis of these conflicting court decisions, see infra notes 57-130 and accompanying text.
10. See Conrad, supra note 1, at 286 (believing that United States Supreme Court must resolve confusion regarding “proper standard for sightline views” of disabled).
11. For a discussion of the history of Title III of the ADA, see infra notes 15-56 and accompanying text.
12. For a discussion of the circuit split concerning the interpretation of Standard 4.33.3, see infra notes 57-130 and accompanying text.
13. For a discussion of the future of Title III of the ADA and the resulting impact that the enhanced lines of sight standard would have on stadium operators if adopted by all courts, see infra notes 131-97 and accompanying text.
14. For a discussion of the suggested solutions to resolve disputes concerning the enhanced sightlines standard, see infra notes 138-58 and accompanying text.
against discrimination “on the basis of disability in the full and equal enjoyment of the . . . advantages or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation.”16 Title III was passed based on reports that “an overwhelming majority of individuals with disabilities lead isolated lives and do not frequent places of public accommodation.”17 The overall goal of this statute was “to provide a clear and comprehensive national mandate for the elimination of discrimination against persons with disabilities.”18

Under Title III, sports arenas are classified as either newly constructed facilities or existing facilities.19 For newly constructed facilities, Title III requires that the stadium design be “readily accessible to and usable by individuals with disabilities.”20 The only exception


16. 42 U.S.C. § 12182(a). Public accommodation is defined, in part, as “a motion picture house, theater, concert hall, stadium or other place of exhibition entertainment.” Id. § 12181(7)(c).


18. 42 U.S.C. § 12101(b)(1). Congress hoped to eliminate discrimination against an estimated forty-three million Americans with disabilities by promulgating clear, consistent and enforceable standards. See id. § 12101(b)(2). It has been referred to as the “emancipation proclamation” for the disabled and “the most sweeping piece of civil rights legislation possible in the history of our country, but certainly since the Civil War era . . . .” 135 CONG. REC. 8506 (1989) (statement by Sen. Harkin); see also 135 CONG. REC. 19,833, 19,847 (1989) (statement by Sen. Hatch).


20. 42 U.S.C. § 12183(a)(1). “When alterations to an existing facility are made, the altered portion must, to the maximum extent feasible, comply with the Department of Justice’s architectural regulations.” Thomas P. Murphy, Disabilities Discrimination Under the Americans With Disabilities Act, 36 CATH. L. W. 15, 36 (1995) (citing 42 U.S.C. § 12183(a)(2)). Moreover, an alteration affecting access to a main area of a facility must be made “in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, tele-
under this classification applies when it is "structurally impracticable" for an arena to meet these requirements. For existing facilities, Title III requires reasonable modification to ensure access for disabled patrons.

In order to formulate applicable standards for compliance with Title III, Congress directed the Attorney General to issue regulations setting forth guidelines for facilities covered under Title III. Congress required these guidelines to be consistent with the minimum guidelines set forth by the Architectural and Transportation Barriers Compliance Board ("Board"). The guidelines issued by

phones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a)(2).

According to the ADA's legislative history, "the term 'readily accessible and usable by' is intended to provide 'a high degree of convenient accessibility' and enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter and use a facility." Accessibility Guidelines, supra note 15, at 2296 (citing H.R. Rep. No. 101-485, pt. 2, at 17-18) (1990).

21. Id.; see also Standards, supra note 19, § 36.401(c) (discussing "structurally impracticable" exception). Structurally impractical means "those rare circumstances when the unique characteristic of the terrain prevents the incorporation of accessibility features." Accessibility Guidelines, supra note 15, at 2296.

22. See 42 U.S.C. § 12182(b)(2). The DOJ ordered that:
A public accommodation shall make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the public accommodation can demonstrate that making the modification would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.

Standards, supra note 19, § 36.302(a). The DOJ also provided that "[a] public accommodation shall remove all architectural barriers . . . that are structural in nature, where such removal is readily achievable . . . and able to be carried out without much difficulty or expense." Id. § 36.304.

To determine whether removal of a barrier is readily achievable, three factors are considered. See Standards, supra note 19, § 36.301. First, the DOJ examines the cost of removing the barrier. See id. Second, the financial resources of the public accommodation owner are considered. See id. Third, the DOJ looks at the safety requirements of the public accommodation. See id.

Since most entities owning a place of public accommodation have limited resources, the DOJ prioritizes steps for removing barriers. See Standards, supra note 19, § 36.304(c). The first priority of the entity owning a place of public accommodation is to provide access to the building. See id. Second, the entity must provide access to goods and services available to the general public. See id. § 36.304(c)(2). Third, the entity must ensure the disabled access to restrooms. See id. § 36.304(c)(3).

23. See 42 U.S.C. § 12186(b) (directing Attorney General to issue regulations for carrying out Title III). Additionally, the ADA provides individuals affected by discrimination with a private cause of action to enforce provisions of the ADA. See id. § 12188(a) (allowing individuals to sue for equitable relief).

A. Department of Justice Regulations

In the construction of sports stadiums two specific guidelines adopted by the DOJ are applicable. The first regulation determines the number of wheelchair locations that an arena must contain in an "assembly arena." Under this regulation, if all designated wheelchair spaces are not sold out, folding chairs may be put in those spaces for spectators who wish to purchase a ticket. This regulation has not been a source of controversy.

The second regulation, Standard 4.33.3, however, deals with the placement of wheelchair locations and is a source of disagreement. First, this section requires that wheelchair locations have

or agencies. See id. The Board’s overall mission is the elimination of architectural, transportation, communication, and attitudinal barriers confronting people with disabilities. See id. § 792(b). The ADA directed the Board to promulgate “minimum guidelines” to supplement previous Minimum Guidelines and Requirements for Accessible Design “to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible . . . to individuals with disabilities.” 42 U.S.C. § 12204(a)-(b). The deadline for these regulations was April 26, 1991. See id. (stating date for regulation). Based on the ADA’s legislative history, the DOJ’s standards may incorporate these guidelines. See H.R. REP. NO. 101-485, pt. 2, at 119 (1990).

25. See Standards, supra note 19, at App. A. (stating that “[t]hese guidelines are to be applied during the design, construction, and alteration of . . . buildings and facilities”). The design standards promulgated by the Attorney General are known as “Standards.” See Indep. Living Res. v. Or. Arena Corp., 982 F. Supp. 698, 708 (D. Or. 1997) (noting that “design standards enacted by the Attorney General are identical to the ADAAGs, but are denominated as ‘Standards’.”). Despite the name difference in the board regulations and the DOJ’s regulations, these standards are used “interchangeably.” See id.

26. Standards, supra note 19, at App. A. This rule is known as the “one percent plus one” rule and requires that when the seating capacity of an arena exceeds 500 persons, six wheelchair locations plus one additional space for every 100 seats above 500 is required. Id. This means the total number of wheelchair locations must equal one-percent of the total seating capacity plus one more location, as long as seating capacity exceeds 500. See id. Additionally, no less than one percent of all fixed seats shall be aisle seats with no armrests on the aisle side, or removable or folding armrests on the aisle side.” Id.

27. See Standards, supra note 19, at App. A (stating, “Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.”); see also U.S. DEP’T. OF JUSTICE, ACCESSIBLE STADIUMS 1 (1996) (stating that “[r]emovable or folding seats can be provided in wheelchair seating locations for use by persons who do not use wheelchairs so the facility does not lose revenue when not all wheelchair seating locations are ticketed to persons who use wheelchairs.”). Fritts, supra note 2, at 2656 (stating that folding seats may be provided in stadiums).

28. See Standards, supra note 19, at App. A. Standard 4.33.3 states:
"lines of sight comparable to those for members of the general public." Second, wheelchair locations must "be an integral part of any fixed seating plan." Third, the dispersal requirement mandates that "when the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location."

B. The Board's Recommendations

In formulating minimum guidelines for Title III, the Board solicited comments on whether an "enhanced" line of sight, one that gave a "full line of sight over standing spectators in sports arenas," should be required, or if a "general" line of sight, one based on a seated position, was enough. When the Board published its final guidelines, however, it deferred its issuance of an opinion on "enhanced" lines of sight until a later date. Because the Board issued its final guidelines on the day the Justice Department's final regulations were due, the DOJ adopted virtually all the Board's recommendations.

Wheelchair locations 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 exceeds 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.

Id.

29. Id. The phrase "lines of sight comparable" is the main source of controversy regarding Title III because of the disagreement whether the DOJ actually adopted the Board's enhanced line of sight standard. Id.; see also Fritts, supra note 2, at 2657 (noting first requirement of Standard 4.33.3).

30. Id. This requirement is designed to prohibit a seating plan that creates "vast wasteland within which one or two isolated wheelchair patrons will be seated." Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, 950 F. Supp. 393, 402 (D.D.C. 1996); see also Fritts, supra note 2, at 2657 (noting second requirement of Section 4.33.3).

31. Standards, supra note 19, at App. A. The dispersal requirement allows wheelchair patrons to choose among seat locations and ticket prices. See Ellerbe Becket Architects & Eng'rs, 950 F. Supp. at 404 (explaining that "[d]ispersal requires a choice of various seating areas, good and bad, expensive and inexpensive, which generally match those of ambulatory spectators."); see also Fritts, supra note 2, at 2657 (discussing third requirement of Section 4.33.3).

32. Accessibility Guidelines, supra note 15, at 2314.

33. Id. at 35,440 (stating that "many commentators . . . recommended that lines of sight should be provided over standing spectators . . . . The issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities."). These comments were published on July 26, 1991, three months after the statutory deadline. See id.
guidelines in its final regulations.\textsuperscript{34} When the DOJ wrote its commentary on the regulations, it made no reference to the issue of an enhanced line of sight standard.\textsuperscript{35} The Board then later published an "enhanced" line of sight guideline, which resulted in an inconsistency between the Board's recommendations and the final DOJ regulations.\textsuperscript{36}

C. TAM Supplement

In order to assist with compliance under Title III of the ADA, Congress required that the DOJ issue technical manuals.\textsuperscript{37} Prior to the 1994 Technical Assistance Manual ("TAM Supplement"), the Technical Assistance Manual for Title III did not address the issue of lines of sight over standing spectators.\textsuperscript{38} As a result, a definite view on the "lines of sight comparable" requirement did not exist.\textsuperscript{39} This subsequently caused confusion for stadium owners.\textsuperscript{40}

The TAM Supplement was the first official interpretation of Standard 4.33.3.\textsuperscript{41} The TAM Supplement explicitly stated that

\begin{itemize}
  \item \textsuperscript{34} See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544 (July 26, 1991) (to be codified at 28 C.F.R. pt. 36) (discussing reason why DOJ's and Board's regulation are identical); see also Indep. Living Res. v. Or. Arena Corp., 982 F. Supp. 698, 739-40 (D. Or. 1997) (same); see also Fritts, supra note 2, at 2656 (same).
  \item \textsuperscript{35} See Paralyzed Veterans of Am. v. D.C. Arena, 117 F.3d 579, 581 (D.C. Cir. 1997) (explaining that DOJ made no reference to enhanced sightlines); see also Indep. Living Res., 982 F. Supp. at 740 (same). The DOJ did not expressly adopt the Board's commentary, but it simply recommended "lines of sight comparable to those available to the rest of the public," failing to mention the issue of standing spectators. \textit{D.C. Arena}, 117 F.3d at 581 (quoting 56 Fed. Reg. 35, 408, 35,440 (1991)).
  \item \textsuperscript{36} See Accessibility Guidelines, supra note 15, at 34,440 (explaining that Board's "enhanced" line of sight guideline came out three months after DOJ regulations were published).
  \item \textsuperscript{37} See 42 U.S.C. § 12206(c)(3).
  \item \textsuperscript{38} See \textit{D.C. Arena}, 117 F.3d at 587; see also U.S. DEP'T. OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL 13 (Supp. 1994) [hereinafter "TAM Supplement"] (noting that prior manual did not discuss lines of sight issue). Between July 1991, when the DOJ regulations were issued, and December 1994, when the TAM Supplement was issued, the DOJ never officially interpreted Standard 4.33.3. \textit{See D.C. Arena}, 117 F.3d at 587 (concluding that Department "never authoritatively adopted a position contrary" to 1994 TAM Supplement).
  \item \textsuperscript{39} \textit{D.C. Arena}, 117 F.3d at 581-82 (recognizing unresolved issue of comparable lines of sight).
  \item \textsuperscript{40} See Fritts, supra note 2, at 2657 (noting confusion for stadium owners and operators when deciphering which line of sight was required).
  \item \textsuperscript{41} See id. The prior Title III Technical Assistance Manual did not address the enhanced line of sight issue. \textit{See also D.C. Arena}, 117 F.3d at 581-82. The 1994 TAM Supplement was issued after two and a half years of informal interpretation. \textit{See Indep. Living Res. v. Or. Arena Corp.}, 982 F. Supp. 698, 737 (D. Or. 1997) (discussing speech by Irene Bowen, deputy chief of Public Access Section of De-
wheelchair locations must have lines of sight over standing spectators.42 The technical manuals required under Title III of the ADA are intended to assist architects in designing and building new arenas.43 The source of controversy surrounding the TAM Supplement concerns whether it is a valid interpretation of a pre-existing regulation or whether the Supplement was an attempt by the DOJ to issue a new regulation.44

Stadium operators contend that the TAM Supplement created a “line of sight” requirement that previously did not exist.45 As evidence of their position, stadium operators cite numerous conflicting DOJ interpretations of the line of sight requirement.46

42. See TAM Supplement, supra note 38, at 13. Two years after issuing the TAM Supplement, the DOJ issued a memorandum, which explained in detail the line of sight requirement stating:

In stadiums where spectators can be expected to stand during the show or event (for example, football, baseball, basketball games, or rock concerts), all or substantially all of the wheelchair seating locations must provide a line of sight over standing spectators. A comparable line of sight . . . allows a person using a wheelchair to see the playing surface between the heads and over the shoulders of the persons standing in the row immediately in front and over the heads of the persons standing two rows in front.

Fritts, supra note 2, at 2658 (citing U.S. DEP'T OF JUSTICE, ACCESSIBLE STADIUMS 1 (1996)). Because this DOJ memorandum qualifies the interpretation of the enhanced line of sight standard by requiring "all or substantially all" wheelchair locations to have a line of sight over standing spectators, it has been a source of litigation in courts. See id. at 2656.

43. See 42 U.S.C. § 12206(c)(3). These manuals are not supposed to be used as a substitute for notice under the Federal Register. See id.

44. See Fritts, supra note 2, at 2661 (noting cases discussing whether TAM Supplement should be classified as interpretive rule).

45. Indep. Living Res., 982 F. Supp. at 736. The court noted that it does not matter that this is the DOJ's first public interpretation of Standard 4.33.3. See id. at 735 (noting that enhanced line of sight standard either previously existed or did not exist at all). If the "line of sight" requirement did not previously exist, the DOJ could only create such a requirement "through a legislative regulation promulgated in accordance with the procedures established in the Administrative Procedure Act (hereinafter "APA")." Id. at 735; cf. NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974) (discussing circumstances under which agency may announce new rule by adjudication).

46. Compare Indep. Living Res., 982 F. Supp. at 737 (discussing speech by Irene Bowen, deputy chief of Public Access Section of Department of Justice, to Major
Therefore, it is argued that because the DOJ has issued inconsistent statements regarding Standard 4.33.3 that the TAM Supplement is an attempt by the DOJ to issue a new substantive regulation without notice and comment.47

D. The Administrative Procedure Act

The Administrative Procedure Act ("APA") exempts "interpretive rules" but not "substantive rules" from notice and comment requirements.48 Interpretive rules are statements "issued by an agency to advise the public of the agency's construction of the ... rules which it administers."49 Substantive rules, however, "grant rights, impose obligations, or produce other significant effects on the private interests."50 Because the TAM Supplement "was not issued pursuant to notice and comment procedures, its interpretation of Standard 4.33.3 must be classified as an interpretive rule" to survive an APA challenge.51

League Baseball Stadium operators which stated that the Department did not interpret Standard 4.33 to require lines of sight over standing spectators), with Indep. Living Res., 982 F. Supp. at 750-51 (discussing Justice Department's notification to representatives of Atlanta Committee on Olympic Games that lines of sight over standing spectators are required at newly constructed Olympic stadiums); see also Indep. Living Res., 982 F. Supp. at 753 n.71 (discussing letters sent out by DOJ during 1993 and 1994 advising stadium operators that lines of sight over standing spectators were required).

47. See id. at 735-36. Whether the TAM Supplement is a substantive regulation depends on whether the DOJ formally and publicly adopted a contrary interpretation of Standard 4.33. See id. at 737.

48. See 5 U.S.C. § 553(b)(A) (1994). Notice and comment procedures require an agency to: (1) publish in the Federal Register a notice of proposed rule making; (2) afford interested parties an opportunity to submit written comments on the proposed rule; and (3) respond to the comments to some degree in a statement of basis and purpose issued with the final rule. See id. § 553(b)-(c).


50. Am. Hosp. Ass'n, 834 F.2d at 1045 (quoting Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir 1980)). A rule is not a substantive right because it may have a substantive impact. See id. at 1046 (citing Am. Postal Workers Union v. U.S. Postal Serv., 707 F.2d 548, 560 (D.C. Cir. 1983)).

51. Fritts, supra note 2, at 2660; see also Paralyzed Veterans of Am. v. D.C. Arena, 117 F.3d 579, 587-88 (D.C. Cir 1997) (rejecting APA challenge because manual's interpretation of Standard 4.33.3 was found to be an interpretive rule). This was because of the proposition that when an agency substantially departs from its previous interpretation of a regulation, the action is paramount to an amend-
Many argue that the TAM Supplement is an interpretive rule and that Standard 4.33.3 may be enforced without notice or comment.\(^5^2\) In Paralyzed Veterans of America \textit{v. D.C. Arena},\(^5^3\) the United States Court of Appeals for the District of Columbia Circuit explained that in determining whether a rule is substantive or interpretive it is necessary to examine "how tightly the agency's interpretation is drawn linguistically from the actual language of Standard 4.33.3."\(^5^4\) The court concluded that this should be classified as an interpretive rule because the DOJ based its interpretation upon the "lines of sight comparable" language in Standard 4.33.3.\(^5^5\) Further, the court stated that "the government arguably could have relied on the regulation itself, even without the manual interpretation, to seek lines of sight over standing spectators."\(^5^6\)

**III. COURT CASES INTERPRETING THE DOJ’S REGULATION**

**A. Courts Requiring Lines of Sight Over Standing Spectators**

1. \textit{Paralyzed Veterans of America v. D.C. Arena}

In 1996 an organization of disabled veterans and individual wheelchair users filed a suit against the builders of the MCI Arena in Washington, D.C. alleging that the seating in the arena failed to provide the number of accessible wheelchair locations required by the ADA.\(^5^7\) Although the court gave deference to the DOJ’s 1994 TAM interpretation of enhanced sightlines for wheelchair patrons, the court criticized the government for not giving a more explicit

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52. \textit{See} Fritts, \textit{supra} note 2, at 2660 (stating that "TAM supplement should be classified as an interpretive rule because it offers a cogent explanation of the term 'lines of sight' comparable which Standard 4.33.3 fails to define.").

53. 117 F.3d 579 (D.C. Cir. 1997).

54. \textit{Id.} at 588.

55. \textit{Id.}

56. \textit{Id.} Earlier courts concluded that the narrower a rule is interpreted, the less notice the court affords parties of an agency's position. \textit{See} Am. Mining Cong. \textit{v. Mine Safety & Health Admin.}, 995 F.2d 1106, 1111-12 (C.A.D.C. 1993). Further, these courts held that if every official interpretation were required to go through notice and comment procedures, agencies would simply let the regulatory interpretation evolve during the enforcement process. \textit{See} \textit{id.}

interrogation. Further, the district court held that the arena, as designed, failed to provide a sufficient number of wheelchair spaces with lines of sight over standing spectators. Moreover, the court determined the arena failed to disperse adequately wheelchair spaces throughout the seating bowl. The court stated that full compliance with these elements was not necessary based upon the DOJ's ambiguous interpretation of the Standard. Therefore, the court concluded that the defendants did violate Standard 4.33.3, but it did not require every seat to provide enhanced sightlines.

On appeal, the District of Columbia Circuit held that the DOJ's interpretation of guidelines requiring enhanced lines of sight for wheelchair patrons should be given deference. This court based its ruling on the conclusion that the DOJ's interpretation of its own regulation was not sufficiently distinct from its regulation as to require notice and comment. Because the DOJ never authoritatively adopted a position contrary to the TAM interpretation, the court concluded that the TAM constituted a permissible interpretation of the regulation. Additionally, the circuit court

58. See Ellerbe Becket Architects & Eng'rs, 950 F. Supp. at 399. The court commented that "[t]he Justice Department has not established a clear record of exactly what its interpretation requires. With the exception of a single, general diagram in a 1996 'Accessible Stadiums' release [regarding the Atlanta Olympic stadium], the Department has not defined or documented the technical specifications for compliance." Id.

59. See id. at 405 (noting that less than forty percent of wheelchair spaces in MCI Arena have unobstructed line of sight when patrons stand).

60. See id. The court noted that almost all wheelchair seats in the MCI Arena are located in the end zone area. See id. While the court addressed a few proposed remedies for the violation, the court concluded it was up to the defendants to design alterations for the stadium so substantial seating would comply with the dispersal and line of sight requirement. See id. at 405.

61. See id. at 401 (stating that "[t]he Court is unable and unwilling to poke through the myriad of announcements, press releases, and threatened legal actions and to extract specific, technical standards" where Justice Department has adopted a flexible approach). The court noted that the DOJ has never interpreted Standard 4.33.3 to require 100 percent of seating to require enhanced guidelines. See id. Based on the Olympic Stadium model, which the DOJ calls "the most accessible stadium in the world" and uses as "the model for all future stadiums," the court concluded that a facility is in compliance with the ADA if a substantial percentage of seats provide enhanced sightlines. Id. at 400.

62. See id. at 401. The court declared that substantial compliance is all that is required. See id. The court noted that by looking at the stadium designs, the number of seats in compliance were not substantial but could be modified with "moderate changes to achieve compliance." Ellerbe Becket Architects & Eng'rs, 950 F. Supp. at 401.

63. See Paralyzed Veterans of Am. v. D.C. Arena, 117 F.3d 579, 586 (D.C. Cir. 1997).

64. See id.

65. See id. at 587.
held that the interpretation was not a substantive rule, because even without the TAM interpretation, the government could have relied solely on the regulation to seek lines of sight over standing spectators.\(^66\)

The opinion, written by Judge Silberman, discussed the meaning of “lines of sight” and the level of deference to be given to the DOJ’s interpretation.\(^67\) The court began by noting that the phrase “lines of sight comparable” may be interpreted reasonably as a view for wheelchair users that is comparable to non-wheelchair users.\(^68\)

The court, however, noticed the ambiguity in the statute as to whether the phrase “lines of sight comparable” refers to permanent obstructions or those caused temporarily by standing spectators.\(^69\) Because the phrase is ambiguous, the court concluded the DOJ’s interpretation should be given substantial deference.\(^70\)

In the next portion of the opinion, the court stated the general rule of giving deference to an agency’s interpretation of its regulations unless it is “plainly erroneous or inconsistent” with the regulation.\(^71\) The defendants argued that the Supreme Court should abandon deference to agency interpretation of regulations due to the fact that it creates incentives to draft vague regulations.\(^72\) The court rejected this argument and stated that there is an outer limit to the deference imposed by the APA, which protects against draft-

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66. See id. at 583.

67. See id. The stadium operators presented three specific arguments. See id. First, the stadium operator argued that “the language of the regulation will not bear” the enhanced lines of sight interpretation. Id. Second, even if the regulation is ambiguous, appellants argued that the appellate court should construct its own interpretation of the regulation instead of granting deference to the DOJ’s interpretation. See id. (asking court to “approach the task of interpretation with fresh eyes”). Third, appellants argued that the DOJ never adopted the Board’s enhanced line of sight standard. See id.

68. See D.C. Arena, 117 F.3d at 582. Appellants argued that the phrase “lines of sight comparable” only requires wheelchair areas to be dispersed throughout a facility. See id. Further, appellants argued that the phrase “lines of sight comparable” had a specific meaning limited to permanent obstructions. Id. The court rejected this argument, however, and concluded that there was no uniformly understood construction of the language prior to the time it was picked up by the Board and the Department. See id. Because the words “had not taken on a well-understood meaning” this phrase had not developed “a universally accepted linguistic meaning contrary to the one [DOJ] assert[ed].” Id.

69. See id.

70. See id. at 584.


72. See D.C. Arena, 117 F.3d at 584 (citing John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612 (1996)).
ing ambiguous regulations. The court said it believed the regulation had sufficient content. Additionally, the DOJ's drafting of the regulation had no bearing on whether the interpretation should be granted deference.

Next, the court discussed appellants most compelling argument, namely "that the DOJ's present interpretation of the regulation constitute[d] a fundamental modification of its previous interpretation" and that the DOJ "cannot switch its position merely by revising a manual." The court rejected the government's argument that an agency may "change its interpretation of an ambiguous regulation so long as the regulation reasonably will bear the second interpretation." The court concluded that the DOJ did not clearly adopt a position contrary to its manual interpretation, and therefore, the TAM was a permissible interpretation of the regulation.

73. See id. To avoid the vagueness concern, substantive regulations "must have sufficient content and definiteness to be a meaningful exercise of agency lawmaking." Id. Further, the court stated that "[i]t is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'" Id.

74. See id. The court believed the regulation provided accurate notice because those who operated stadiums should have believed the phrase "lines of sight comparable" may "imply an unobstructed view over standing spectators." Id. at 585.

75. See id. The court noted that deference is given to a regulation because the agency is the sponsor of the regulation, not because it is the drafter of the regulation. See id. (citing Arkansas v. Oklahoma, 503 U.S. 91, 110, 112 (1992)); see also Am. Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 848 (D.C. Cir. 1995), cert. denied, 516 U.S. 1171 (explaining why deference is given to regulation). Because the Board's regulation was adopted by the DOJ, it became the DOJ's responsibility to enforce it. See id. (noting that regulation was "the Justice Department's and only the Justice Department's responsibility").

76. D.C. Arena, 117 F.3d at 586. As a general rule, once an agency issues an interpretation of a regulation it can only modify the regulation through the process of notice and comment. See id.

77. Id. The court noted that the APA specifically states that agencies must engage in notice and comment procedures before formulating "repeals" or "amendments" to regulations. Id. (citing 5 U.S.C. § 551(9)). If an agency alters its interpretation of a substantive regulation without notice and comment, the APA regulations would be undermined. See id. (interpreting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995)) (noting that Supreme Court has stated in dicta that APA requires interpretation to "adopt a new position inconsistent with . . . existing regulations").

78. See id. at 587. The court noted that in the Board's notice of proposed rule-making it stated that the guidelines "may not be sufficient in sports arenas or race tracks where the audience frequently stands." Id. at 586. The Board also "solicited comments on 'whether full lines of sight over standing spectators . . . should be required,' and in promulgating the final rule the Board acknowledged that '[m]any commentators . . . recommended that lines of sight should be provided over standing spectators' which implies that the Board did not believe its guidelines alleviated their concern." Id. (quoting 56 Fed. Reg. at 35,440).
2. United States v. Ellerbe Becket

The Minnesota District Court addressed the validity of the Justice Department’s interpretation of the enhanced line of sight standard in United States v. Ellerbe Becket. The government filed a suit against the architectural firm Ellerbe Becket, Inc., alleging a pattern of designing sports arenas across the United States that failed to comply with ADA standards. The court held that the DOJ’s interpretation of enhanced lines of sight at sports facilities was an interpretive rule entitled to deference.

After concluding that architects were subject to liability under the ADA, the court considered the issue of the line of sight requirement. The court relied primarily on the D.C. Circuit’s finding in D.C. Arena that the TAM Supplement was not a substantive rule requiring notice and comment under the APA. Although the court acknowledged that the Third Circuit had a different view, it indicated that it found the D.C. Circuit’s opinion to be more persuasive.

B. Cases That Do Not Require Patrons to Have Enhanced Sightlines

1. Caruso v. Blockbuster-Sony Music Entertainment Centre

The Third Circuit Court of Appeals addressed the question of whether enhanced lines of sight were required at the Blockbuster-Sony Music Entertainment Centre (“E-Centre”) in Caruso v. Block-

80. See id. at 1264. Ellerbe was not the owner or operator of any of the stadiums named in the complaint. See id. at 1266. Ellerbe, however, did design each of the five arenas contained “in the Complaint for a different owner.” Id.

Specifically the government argued that the arenas and stadiums constructed by the defendant did “not provide wheelchair users with lines of sight to the floor or field comparable to those enjoyed by non-disabled spectators.” Id. The government contended that the line of sight for patrons in wheelchairs was not comparable to ambulatory patrons “because they [did] not allow patrons in wheelchairs to see the facility’s floor when other patrons sit[ted].” Id. The government sought an injunction compelling Ellerbe to comply with the requirements of the ADA in designing arenas and stadiums in the future. Id.

81. See id. at 1262. The court also held that architects are subject to liability under the ADA. See id. The court, however, noted that substantial compliance with Title III of the ADA was sufficient to avoid liability. See id.
82. See id. at 1268.
83. See id. at 1269 (following approach from D.C. Arena).
This action was brought by a Vietnam veteran who filed a complaint asserting, *inter alia*, that the E-Centre was operated in violation of Title III of the ADA, because the wheelchair areas in the pavilion did not provide wheelchair users with lines of sight over standing spectators.

The court first examined whether DOJ Standard 4.33.3 requires the operators of the E-Centre to provide wheelchair users with lines of sight over standing spectators. Caruso argued that the phrase "lines of sight comparable to those for members of the general public" should be given its plain meaning and require wheelchair users to "be able to see the stage when other patrons stand." The Third Circuit, however, concluded that Standard 4.33.3 should be read in its context with the two other provisions concerning the dispersal of wheelchair locations in arenas with fixed seating plans. When interpreted in the context of the other provisions included in Standard 4.33.3, the phrase "lines of sight comparable" may also be read to require that members of the

85. 174 F.3d 166 (3d Cir. 1999). The E-Centre is located in Camden, New Jersey. See *id.* at 168. The interior pavilion of the E-Centre provides fixed seating for 6200 patrons and the uncovered lawn area accommodates approximately 18,000 spectators who may either sit or stand. *See id.*

86. *See id.* Caruso, who uses a wheelchair due to his disability "attended a concert at the E-Centre on July 13, 1995." *Id.* at 169. Additionally, the Advocates for Disabled Americans joined as plaintiffs in this case. *See id.* The plaintiffs asserted that the E-Centre violated Title III of the ADA because "the lawn area [was] not wheelchair accessible." *Id.*

87. *See id.* (noting "Placement of Wheelchair Locations" as stated in Standard 4.33.3).

88. *Id.* (quoting PVA Reply Br. at 23).

89. *See id.* at 169-70. Appellants conceded that the provisions in Standard 4.33.3 requiring a "choice of admission prices" and "more than one location" when "the seating capacity exceeds 300" concerned the dispersal of wheelchair areas throughout an arena. *Id.* at 170 n.3. Appellants, however, rejected any suggestion that the lines of sight requirement might require dispersal and not vertical enhancement. *See id.* The appellants argued:

Standard 4.33.3 . . . contains an explicit dispersal provision, wholly independent of the "comparable" line of sight provision. It requires, in pertinent part that "[w]heelchair areas . . . shall be provided so as to provide persons with disabilities a choice of admission prices." For facilities, such as modern sports and entertainment venues, that offer tickets at a range of prices depending on seating location, dispersal of wheelchair locations is required by this provision. Moreover, a requirement for dispersal is also derived from the language in Standard 4.33.3 that "[w]hen the seating capacity exceeds 300, wheelchair spaces shall be provided at more than one location." Construing the phrase "lines of sight comparable to those provided to members of the general public" as simply requiring dispersal of wheelchair locations, as the E-Centre urges, is contrary to the plain language of that regulation and would deprive important parts of the regulation of any meaning.

*Id.* (quoting PVA Reply Br. at 6-7).
general public are provided with different lines of sight to the field or stage, wheelchair users must also be given a comparable opportunity to view the field or stage from a variety of angles. Because both interpretations were plausible, the court ruled that Standard 4.33.3 was ambiguous.

After concluding that Standard 4.33.3 was ambiguous, the court examined whether it should defer to the interpretation given to the rule by the DOJ. To determine whether to give deference to the DOJ's interpretation of Standard 4.33.3, the court was forced to decide whether the interpretation was an interpretive rule or a new substantive requirement. After examining the history of Standard 4.33.3, the court concluded that the 1994 TAM supplement constituted a fundamental change in interpretation that could only be made by adopting a substantive rule pursuant to notice and comment. Because the DOJ did not follow the notice and comment procedure, the Third Circuit concluded that the E-

90. See Caruso, 174 F.3d at 170 n.4 (stating that additional reason for not clearly requiring sightlines over standing spectators might be that because Standard 4.33.3 concerns seating plans and seating arenas, drafters may have assumed regulations should only affect seated spectators and not standing patrons).

91. See id. at 171. The court concluded that appellants' reading of 4.33.3 was plausible because it would benefit wheelchair users by allowing them to see when other patrons stand. See id. The E-Centre interpretation, however, was also valid because it would benefit wheelchair users by providing them with a greater opportunity to see a performance or event from different angles. See id.

92. See id. (discussing appellants' contention that court should give DOJ's interpretation deference).

93. See id. (noting appellants' and appellees' positions regarding whether rule is interpretive or substantive). If the rule is an interpretive rule, the court noted that the DOJ's interpretation should be given deference. See id. If the rule, however, is a substantive rule, the rule is subject to the notice and comment requirements of the APA. See id.

94. See id. (describing history of sightlines issue). Instead of concluding that the DOJ consciously ignored the issue raised in the Board's notice of proposed rulemaking and debated by commentators, the court concluded that the DOJ implicitly adopted the Board's analysis of Standard 4.33.3. See id. at 175. The factors supporting this conclusion included:

1) the DOJ referred all comments to the Board; 2) the DOJ relied on the Board to make adequate changes based on those comments; 3) the Board specifically changed the language of 4.33.3 in response to comments and explained that change in its commentary; 4) the DOJ was a "member of the Board" and "participated actively . . . in preparation of both the proposed and final versions of the [guidelines]; and 5) the DOJ's commentary stated that the final guidelines promulgated by the Board adequately addressed all comments.

Centre did not violate Title III of the ADA by failing to provide wheelchair users with sightlines over standing spectators.95

Finally, the court discussed in detail its disagreement with the D.C. Circuit’s decision in D.C. Arena.96 This disagreement surrounded the issue of whether the DOJ promulgated an ambiguous rule, and the Third Circuit tried to resolve the ambiguity through an interpretive rule.97 The court noted that the D.C. Circuit relied on the fact the defendant in that case did not argue that Standard 4.33.3 was vague.98 Consequently, the court distinguished this case from the D.C. Circuit’s ruling.99 The Third Circuit, however, agreed with the D.C. Circuit’s conclusion that “an agency is completely free to change its interpretation of an ambiguous regulation so long as the regulation reasonably will bear the second interpretation.”100

95. See Caruso, 174 F.3d at 177. The court concluded that if the DOJ believed the ADA should be interpreted to require wheelchair users to have sightlines over standing spectators, the DOJ could accomplish this through notice and comment procedures. See id. The court noted that the DOJ probably could have achieved this interpretation by now if it would have followed notice and comment procedures earlier. See id.

96. See id. at 174-77 (discussing differences in opinion between D.C. Circuit and Third Circuit).

97. See id. at 174 (noting that D.C. Arena court ruled that DOJ’s promulgation of Standard 4.33.3 did not violate this principle). The D.C. Arena court discussed this principle stating that “[i]t is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations.’ That technique would circumvent section 553, the notice and comment procedures of the APA.” Paralyzed Veterans of Am. v. D.C. Arena, 117 F.3d 579, 584 (D.C. 1997).

98. See Caruso, 174 F.3d at 175 n.7 (discussing E-Centre’s argument that “DOJ’s rule would be impermissibly vague on the issue of sightlines if the Access Board’s commentary were not attributed to the DOJ.”) (quoting Appellees’ Br. at 33).

99. See id. at 176 (noting differences between D.C. Arena and Caruso).

100. Id. at 175 (citing D.C. Arena, 117 F.3d at 586). The appellants contended that the Third Circuit should not follow the view of the D.C. Circuit because it is contrary to cases allowing agencies to change the interpretation of their regulation. See, e.g., Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) (allowing agency to change interpretation of its regulation); C.K. v. N.J. Dep’t of Health & Human Servs., 92 F.3d 171 (3d Cir. 1996) (same); Beazer East v. EPA, 963 F.2d 603 (3d Cir. 1999) (same). The court distinguished Thomas Jefferson because the inconsistency in that case “did not involve a ‘fundamental change’ of a prior interpretation that had general applicability, but rather, an agency’s adoption of a position that was arguably inconsistent with some past actions taken by the Secretary in individual cases.” See Caruso, 174 F.3d at 175 (citing Thomas Jefferson, 512 U.S. at 517). The court distinguished C.K. because, like Thomas Jefferson, “it did not address the situation where an agency publicly announces one interpretation of a regulation that will presumably be applied to all covered parties and then attempts to change its regulation.” Id. Finally the court distinguished Beazer East for two reasons. See id. First, Beazer East involved agency adjudication, which is guided by different principles than agency rule-making. See id. (citing Beazer East, 963 F.2d at
2. Independent Living Resources v. Oregon Arena Corp.

The Oregon District Court addressed the issue of whether enhanced lines of sight were required at the Rose Garden Arena in Independent Living Resources v. Oregon Arena Corp. A disabled attorney and a non-profit advocacy organization for the disabled brought this action against the owner and operator of the Rose Garden Arena. The plaintiffs alleged that the arena engaged in discriminatory practices in violation of Title III of the ADA due to the location of wheelchair spaces and lack of adequate lines of sight to view the action in the arena. Both parties sought, inter alia, summary judgment as to the issues in dispute.

First, the court addressed the plaintiffs' argument that although there are 191 wheelchair spaces at the Rose Garden, most of those spaces are concentrated in the upper levels. The court ruled that the placement of 191 wheelchair spaces in the arena violated the dispersal requirement of the ADA because these seats were concentrated in the upper level of the arena. The court concluded that without this dispersal requirement a stadium opera-

609). Second, although Beazer East stated "that agencies could adopt or revise their substantive rules in adjudication, it made clear that it was not dealing with a situation where 'the agency inconsistency interpreted a standard over time or changed its interpretation." Id. (quoting Beazer East, 963 F.2d at 610).

101. 982 F. Supp. 698 (D. Or 1997). The Rose Garden is the home arena of the NBA basketball team, the Portland Trailblazers, and the Western Hockey League team, the Portland Winter Hawks. See id. at 706. Additionally, the arena is used for other events such as ice shows, concerts, soccer, indoor football and the circus. See id.

102. See id. Independent Living Resources is a non-profit corporation "organized . . . for the purpose of promoting the rights and needs of persons with disabilities for full inclusion and equal access in all aspects of life and providing education, training, and independent living services to persons with disabilities." Id. The defendant was the Oregon Arena Corporation, a private company that constructed, owns, and operates the Rose Garden. See id.

103. See id. Since the Rose Garden was constructed for first occupancy after January 26, 1993 and the last building permit was certified after January 26, 1992, the Rose Garden is subject to the rules regarding "new construction." See id. (citing 42 U.S.C. § 12183(a)(1)).

104. See id. (detailing numerous motions before court).

105. See id. at 708 (noting that both parties agreed that there were 191 wheelchair spaces designed at Rose Garden). Plaintiffs, however, argued that these spaces were "improperly concentrated in 'wheelchair ghettos' in comparatively undesirable locations of the arena." Id.

106. See Indep. Living Res., 982 F. Supp. at 715 (noting "that 124 of the Rose Garden's 191 wheelchair spaces - or 65 percent - [were] located in the corners of the endzone"). The court also concluded that seventeen percent of the wheelchair spaces were located on level seven. See id. Taken together these made up more than eighty-two percent of the wheelchair locations. See id. at 708. Because level seven was not an integral part of the Rose Garden's seating plan, the dispersal of thirty-three wheelchair spaces in that area violated the ADA's requirements. See
tor could designate a few wheelchair seats in a better seating area and cluster the rest of the seats in an undesirable location. Although absolute homogeneity is not required in the arena, the court stated that stadium operators "may not relegate wheelchair users to the dark corners of the arena."108

After determining that defendants had violated the dispersal requirement of the ADA, the court examined whether defendants were in compliance with the "one percent plus one" requirement set forth in Standard 4.13. Once the court subtracted the excess spaces in level seven, the court concluded that the arena violated the "one percent plus one rule."109 The court determined that the sole reason for placing the extra seats on level seven was so that the arena could be in compliance with the "one percent plus one rule."110

Along with the dispersal requirement of Title III, the district court discussed the issue of sightlines over standing spectators.111 The court divided this topic into three issues. First, the court looked at whether the DOJ could require that wheelchair users be provided with a line of sight over standing spectators.112 Second, the court examined whether such a requirement for lines of sight would be binding on the defendant.113 Third, the court inquired whether there is any defense to the requirement of providing lines of sight over standing spectators.114

107. See id. at 709 (noting that this action was contrary to congressional intent of Title III of ADA).

108. Id. The court rejected the defendant's argument that the ADA requirements for seat dispersement were satisfied as long as an unspecified number of seats are made available in each price category. See id. (stating that "in large assembly arenas wheelchair spaces must be an integral part of the seating plan and be dispersed so as to provide wheelchair users with a choice of sightlines and ticket prices comparable to those available to the general public.").

109. See id. at 714. The court subtracted exactly thirty-three spaces from level seven because they were in excess of the dispersal requirement. See id.

110. See id. at 713. The court cited the testimony of defendant's Senior Project Manager, Bob Collier, who testified that "defendant was not concerned with what representatives of the disabled community wanted, but was concerned only with satisfying the minimum requirements of the ADA." Id. at 714.


112. See id. at 732-34 (noting that objective of Title III was to provide disabled person experience equivalent to that of other patrons).

113. See id. at 734-36 (discussing whether DOJ's interpretation was valid or invalid attempt to promulgate new regulation).

114. See id. at 747-55 (identifying and articulating any possible defenses).
In response to the first issue, the court observed that the DOJ could have reasonably concluded that lines of sight over standing spectators are necessary. The court noted that many ADA requirements may be facially neutral but may have a disparate impact among wheelchair users. Additionally, the court stated that the ADA had adequate legal authority to support such a requirement.

Next, the court examined whether a requirement for lines of sight did exist and whether it was binding upon the defendant. The court noted that both courts that have considered the case have been split on the issue. Each court found that the central issue was whether the TAM supplement was a valid interpretive regulation or an invalid attempt to promulgate a new legislative regulation. Although the Independent Living Resources court followed the Caruso court's interpretation, it did not consider that the date on which construction of the Rose Garden commenced occurred before the TAM supplement was released. Instead, the court an-

115. See id. at 734.
116. See Indep. Living Res., 982 F. Supp. at 734. The court found that if the ADA only required public accommodations to provide physically identical facilities for wheelchair patrons and non-disabled patrons, "there would be no need to provide ramps and elevators; both groups would be given an 'equal opportunity' to use the stairs." Id. at 733.
117. See id. at 738. The court recognized that the ADA requires more than refraining from active discrimination; it further requires stadium operators to take affirmative steps to ensure that a disabled patron is accommodated. See H.R. Rep. No. 101-485, pt. 2, at 104 (1990), reprinted in 1990 U.S.C.A.A.N. 267, 387. The objective of Title III is to provide individuals with disabilities an opportunity functionally equivalent to other non-disabled patrons. See Standards, supra note 19, §§ 36.202, 36.203, 36.302.

The court rejected the plaintiff's argument that this constituted preferential treatment to disabled patrons. See Indep. Living Res., 982 F. Supp. at 734. The court noted that the class of wheelchair members is always open to new members should anyone believe they are receiving preferential treatment. See id. The court stated, however, that it did not anticipate "a rush of volunteers choosing to have their legs amputated so they [might] watch a basketball game from a wheelchair and thereby enjoy 'preferential' sightlines." Id.

118. See id. at 734.
119. See id. (noting that "[t]he only courts to have considered the issue . . . have reached different conclusions."). Compare Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, 950 F. Supp. 393, 398 (D.D.C. 1996) (upholding DOJ's interpretation of Standard 4.33.3 as it appeared in TAM Supplement), with Caruso v. Blockbuster-Sony Music Entm't Ctr., 174 F.3d 166, 171 (3d Cir. 1999) (concluding that builder of arena was not required to provide lines of sight over standing spectators before DOJ published its formal interpretation of Standard 4.33.3).
121. See id. (rejecting defendant's timing argument). The court concluded that although the TAM supplement may have been the first time the DOJ explicitly declared its interpretation of the lines of sight standard, enforcement of an
alyzed the administrative law aspects of the case and concluded that the TAM supplement was not a valid interpretive regulation.122

Unlike the D.C. Circuit, the Independent Living Resources court rejected the assertion that the DOJ "did not adopt the commentary published by the Access Board which discussed [the Board's] guidelines."123 The court recognized that when a legislative regulation is issued pursuant to the notice and comment provisions of the APA, an administrative agency is required to explain the purpose and justification for the proposed rule in its commentary.124 Moreover, an agency's commentary is required to respond to criticisms of the rule.125 Because the DOJ did not adopt the Access Board's commentary, the court concluded that "in order for the regulations to be valid, the separate commentary published by the DOJ must be sufficient to satisfy the notice and comment requirement."126

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agency's regulation did not have to wait until a formal opinion interpreting its application. See id. Moreover the court noted that Congress explicitly stated that "failure in the development or dissemination of any technical assistance manual authorized by this Section does not excuse compliance with the ADA." 42 U.S.C. § 12206(e).


123. Id. at 740 (emphasis in original).

124. See id. at 740 (citing Gamboa v. Rubin, 80 F.3d 1338, 1346 (9th Cir. 1996); see also Reyblatt v. U.S. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997) (finding that agency must respond in reasoned manner to those comments that raise significant problems); Int'l Fabricare Inst. v. EPA, 972 F.2d 384, 389 (D.C. Cir. 1992) (stating that agency is required "to give reasoned responses to all significant comments in a rule[-]making proceeding"); DAVIS & PIERCE, ADMINISTRATIVE LAW TREATISE 7.4 (3d ed. 1994 & Supp. 1996)).

125. See Indep. Living Res., 982 F. Supp. at 740 (noting that "DOJ did not respond to public comments regarding individual Standards, nor did DOJ explain the agency's reasoning in adopting a specific standard or why it had rejected alternative language suggested by persons commenting on the proposed standards."). Further, the court contrasted the "macro-level commentary by DOJ . . . to the detailed commentary" of the Board. Id. Although notice and comment rules have "never been interpreted to require [an] agency to respond to every comment, or to [analyze] every issue or alternative raised by comments," the separate commentary adopted by the DOJ did not respond to any comments or analyze any issue that arose from the proposed Standards. See id. (quoting Am. Mining Cong. v. EPA, 907 F.2d 1179, 1187-88 (D.C. Cir. 1990); cf. U.S. Satellite Broad. Co. v. FCC, 740 F.2d 1177, 1188 (D.C. Cir. 1984) (stating that "agency need not respond to every comment so long as it responds in a reasoned manner to significant comments received"); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1404 (9th Cir. 1995) (holding that agency must respond to significant comments that would require change in agency's proposed rule if adopted).

126. Indep. Living Res., 982 F. Supp. at 740. Although the DOJ argued that its "commentary on the final rule fully satisfied the [APA's] requirements," the court disagreed. See id.
Therefore, the court ruled that the DOJ implicitly adopted the Board’s comments regarding the proposed guidelines.\(^{127}\)

Finally, the court examined whether the defendant had any available defenses to the enforcement of a requirement for lines of sight over standing spectators.\(^{128}\) The court concluded that the defendant “ha[d] no other defense, equitable or otherwise, to the enforcement of the line of sight requirement.”\(^{129}\) The court rejected the notion that the government misled the defendant in its interpretation, as the evidence indicated that the defendant should be aware that the law might require lines of sight over standing spectators.\(^{130}\)

IV. IMPACT OF THE CIRCUIT SPLIT

Support for the objectives and purposes of laws enacted under the ADA are undisputed.\(^{131}\) Under current case law, however, the

127. See id. at 741 (noting that “[i]f the Access Board’s commentary was not binding upon DOJ, then that commentary and the entire notice and comment procedure were largely an empty exercise.”). Another factor influencing the court’s reasoning was that the DOJ’s statement regarding comments received “from the public regarding the proposed rule had been ‘addressed adequately in the final ADAAG’ by the ‘numerous changes’ that the Access Board had made.” Id.

128. See id. at 747 (asking whether there is defense to such requirement if it exists). Although the court reasoned that there was no requirement to provide enhanced sightlines for wheelchair patrons, it sought to “simplify matters for the Ninth Circuit, and to expedite [sic] any appeal” in determining whether defendant had an existing defense to enhanced sightlines requirement. Id.

129. Id. The court rejected the notion that defendant may have the defense of “structural impracticability” because that defense is limited to circumstances in which sites contain unusual topographical features that preclude compliance with the Standards. Id. (concluding that Rose Garden lacks such features).

130. See id. (determining that defendant did not rely “‘in good faith’ upon an earlier interpretation of the law”). The court noted that the defendant designed the Rose Garden after the ADA regulations became law and at that early date the courts “had not explored the full extent of Title III’s impact upon the design and operation of indoor arenas.” Id. The court, however, believed that “any competent attorney would advise their [sic] client to proceed with great caution knowing their client was investing a quarter of a billion dollars in a project subject to untested standards.” Id. Further, the court dismissed any contention by the defendant that wheelchair users have never had enhanced sightlines. See id. at 748 (concluding that it is no defense to say “we’ve always discriminated against persons with disabilities.”).

issue of enhanced sightlines for disabled patrons is in a confused state.\textsuperscript{132} The confused state of this area is due to the DOJ’s failure to define adequately its enhanced sightlines standard through proper notice and comment procedures.\textsuperscript{133} As a result, for many disabled spectators, the ADA has not accomplished its goal in providing “effective access to sports arenas.”\textsuperscript{134}

The recent settlement between Ellerbe Becket and the DOJ, however, may bring some stability to this area of the law.\textsuperscript{135} If this does not occur, the United States Supreme Court may be the only forum that can obtain consistency in this area of the law.\textsuperscript{136} It is interesting to note that people tend to agree on the overall purpose of the ADA but disagree when it comes to applying the ADA to real life situations.\textsuperscript{137}

V. \textbf{SUGGESTED SOLUTIONS}

Although most people support the ADA, disagreement exists regarding proposed solutions to the problem of enhanced sightlines for wheelchair users.\textsuperscript{138} There is the interest of the disabled patrons who cannot see key moments of an event when those in front of them stand. Also, there is the interest of the stadium operator who must bear the increased cost of providing disabled patrons enhanced sightlines – although these patrons constitute a small number of the overall audience attending sporting events. In order to accommodate both of these interests a number of solutions have been proposed.

\begin{itemize}
\item \textsuperscript{132} See Conrad, supra note 1, at 286 (noting confused state of current law); see also Katherine C. Carlson, \textit{Down in Front: Entertainment Facilities and Disabled Access under the Americans with Disabilities Act}, 20 HASTINGS COMM. & ENT. L.J., 897, 912 (1998) (stating that “[n]o one . . . seems to know exactly what the ADA requires.”); \textit{id.} at 915 (stating that because regulations fail to provide concrete guidance, “courts are forced to step in to enforce compliance on a case-by-case basis.”).
\item \textsuperscript{133} See Conrad, supra note 1, at 286 (noting that failure of DOJ to interpret convincingly its own regulations “gives everyone involved in the [D.C. Arena], Ellerbe Becket, Caruso, and Or[egon] Arena cases unneeded headaches.”); see also Carlson, supra note 132, at 915 (acknowledging that “while the Department of Justice issued broad [regulations], it has not seen fit to step up its statutorily mandated role by providing concrete guidelines for architects and builders.”).
\item \textsuperscript{134} Conrad, supra note 1, at 286.
\item \textsuperscript{135} See id. (noting that this settlement may bring “stability to a standard that should have been adequately defined in the first place.”).
\item \textsuperscript{136} See id. (stating that even if Supreme Court resolves this area of law, this may just be first of many ambiguous issues in area of disability access).
\item \textsuperscript{137} See Carlson, supra note 132, at 912-15 (noting that disagreements arise when ADA is applied to real life situations).
\item \textsuperscript{138} See id. at 912 (noting that problems with ADA are easy to see, but enforcement is inconsistent).
\end{itemize}
A. Removable Seats

The “one percent plus one” formula included within the ADA determines the number of wheelchair spaces required. This requirement, however, does not “account for the financial impact unfulfilled wheelchair spaces may have on an owner of a facility.” If a stadium owner is forced to create spaces for wheelchair users, it results in less space available for conventional seating. As a result the stadium operator is forced to lose ticket sales.

One proposal to accommodate stadium owners and comply with the ADA would be for stadium owners to replace these unoccupied areas with removable seats. Section 4.33.3 allows “readily removable seats [to] be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.” This solution could provide stadium operators the most economic flexibility. Furthermore, this solution will provide wheelchair users the most convenience and the greatest choice of seating and pricing.

The drawback to the solution of removable seats is that it gives stadium owners “a powerful incentive to discourage wheelchair

139. See Standards, supra note 19, at pt. 36, App. A (stating that requirement comes from Section 4.13(19) of ADAAG). For an explanation of the “one percent plus one” requirement, see supra notes 26, 109-10 and accompanying text.

140. Carlson, supra note 132, at 913 (citing 28 C.F.R. § 36.406 (1996)).

141. See, e.g., Conrad, supra note 1, at 285 (noting that Rose Garden’s operators filled areas of wheelchair seating with conventional seats on regular basis); see also Indep. Living Res. v. Or. Arena, 982 F. Supp. 698, 717 (D. Or. 1997) (noting that at Portland Trailblazer basketball games, 133 wheelchair seats were replaced with 1028 conventional seats resulting in $50,000 increase in ticket revenue for each game and $2 million extra revenue for season).

142. See Standards, supra note 19, § 36.301(c) (stating that public accommodation may not impose surcharge only on persons with disabilities to cover cost of compliance with ADA); see also TAM Supplement, supra note 38, §§ 3-4.1400, 3-4.4600 (expressing DOJ’s position that “[p]eople with disabilities may not be subjected to additional charges related to their use of a wheelchair.”).

143. See Carlson, supra note 132, at 913; see also Robert P. Bennett, ADA Goes to the Movies, PARAPLEGIA News, Apr. 1994, at 53 (stating “[t]he new baseball stadium in Baltimore has a seating arrangement most people seem to like: About 400 conventional seats simply fold out of the way to make room for wheelchairs . . . . This same technology can be used effectively in a movie theatre [or other places of exhibition], and it would not cause the same reduction of conventional seating wheelchair stalls now cause.”).

144. Standards, supra note 19, at pt. 36, App. A.

145. See Carlson, supra note 132, at 913 (stating that seats need only be removed when there is use for them).

146. See id. (stating that owners could charge wheelchair users and other able bodied patrons same amount because neither would be forced to sit in disabled designated areas).
use." Because most tickets for professional teams are sold on a season ticket basis and the majority of season ticket holders are non-disabled, the availability of disabled seating may diminish. This problem does not exist if a professional team moves into a new arena with more seating or if ticket demand for games is not high enough to sellout an arena.

B. Refusing to Sell Seats in Front of Wheelchair Patrons

The plan to refuse to sell seats in front of wheelchair patrons was first proposed in Ellerbe Becket Architects & Engineers. The problem with this solution is that in order to ensure that patrons in other sections do not move to seats in front of wheelchair patrons, these seats in front of wheelchair patrons would have to be “removed or altered . . . to keep them unoccupied.” By using folding chairs, however, these seats could be removed only if the wheelchair spaces behind them were occupied. Further, unlike the policy to discourage patrons from standing, the no sell policy does not force other patrons to accommodate wheelchair users, “since everyone in the arena would be able to stand and cheer if they wished.”


148. See id. at 719 (citing Portland as example of team whose majority of tickets go to season ticket holders). The result of the Rose Garden’s policy to sell most seats on a season ticket basis is that “most wheelchair locations exist only on paper, having been infilled [sic] with conventional seats and sold to ambulatory patrons on a season ticket or longer basis.” Id. Therefore, only fifteen percent of the lower level seating accessible for wheelchair users were available to be purchased. See id. (noting decreased availability of lower level wheelchair seating).

149. See Conrad, supra note 1, at 285 (predicting that season ticket holder problems will appear in future if these factors are not present).

150. See Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng’rs, 950 F. Supp. 393, 403 (D.D.C. 1996) (noting that this is more “design feature than an operational measure.”).

151. Id. (noting that this solution would not require patrons to alter their activities).

152. See id.

153. Id. The Ellerbe Becket Architects & Engineers court concluded that because a similar measure was approved by the DOJ at the Olympic Aquatic Center, this seemed to be an option for stadium operators. See id. (recognizing policy as option). By implementing this solution, a certain degree of integration is lost because the seats in front of wheelchair patrons remain empty. See id. at 403 n.22 (noting integration loss). This does not create a compliance problem because reasonable loss of integration does not affect compliance under Standard 4.33.3. See id. (recognizing that same problem would occur if wheelchair locations were moved to front row).
C. Policy to Discourage Patrons from Standing During Play

In *Ellerbe Becket Architects & Engineers*, the policy of discouraging patrons from standing during events was also proposed as a solution to the enhanced sightlines requirement.\(^\text{154}\) This policy mandates stadium operators to make periodic announcements during games that instruct patrons, with wheelchair users sitting behind them, to refrain from standing during key moments of events.\(^\text{155}\) The *Ellerbe Becket Architects & Engineers* court recognized two problems with this solution.\(^\text{156}\) First, this policy is likely to be less effective than a design solution because people tend to stand in reaction to excitement on the field.\(^\text{157}\) Second, this solution would subject the wheelchair user to increased attention and possibly increased hostility when seeking to enforce the "no standing" policy.\(^\text{158}\)

VI. CONCLUSION

The 1994 TAM Supplement should be interpreted to require wheelchair locations to provide lines of sight over standing spectators. When Congress delegates authority to an administrative agency to interpret its own regulations, the agency's interpretation should be given deference "unless it is plainly erroneous or incon-
sistent with the regulation."\textsuperscript{159} In order for courts to substitute their own interpretation for an agency's, the agency's interpretation must be unreasonable.\textsuperscript{160} To be considered unreasonable, an agency's interpretation must (1) be consistent with the text of the regulation;\textsuperscript{161} and (2) be consistent with the purpose of the governing statute.\textsuperscript{162} Therefore, because the DOJ's interpretation of Standard 4.33.3 is consistent with the text of Standard 4.33.3 and consistent with the overall purpose of Title III of the ADA, the DOJ's interpretation is reasonable and must be given deference.

Standard 4.33.3 states that wheelchair patrons must be provided "lines of sight comparable to . . . members of the general public."\textsuperscript{163} When members of the general public have their view inhibited by standing spectators, most can regain their view by standing.\textsuperscript{164} Wheelchair patrons, however, cannot stand and there-

\begin{itemize}
  \item \textsuperscript{159} Bowles v. Seminole Rock \& Sand Co., 325 U.S. 410, 414 (1945); see also Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 698 (1991) (stating that "from this congressional delegation derives the Secretary's entitlement to judicial deference."); Martin v. OSHRC, 499 U.S. 144, 151 (1991) (stating that "we presume that the power authoritatively to interpret its own regulations is a component of the agency's lawmaker powers."); Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 844 (1984) (stating that administrative agency's interpretation of its own regulations should be given deference "unless they are arbitrary, capricious, or manifestly contrary to the statute."); Amerada Hess Pipeline Corp. v. FERC, 117 F.3d 596, 600-01 (D.C. Cir. 1997) (stating that "courts defer to agency interpretation in large part because Congress has chosen to delegate to the agency decision making in the field" and deferring to FERC's interpretation of regulations that were adopted from ICC); Manning, \textit{supra} note 72, at 630 n.104 (noting that "[a]uthorship is not an essential predicate to deference under \textit{Seminole Rock}."); Fritts, \textit{supra} note 2, at 2664 (noting that rule of deference applies to DOJ's interpretation of Standard 4.33.3 even though Board adopted regulation).
  \item \textsuperscript{161} See \textit{Thomas Jefferson}, 512 U.S. at 518 (deferring to agency's interpretation because it was "faithful to the regulation's plain language"); Valkering, U.S.A., Inc. v. U.S. Dep't of Agric., 48 F.3d 305, 307 (8th Cir. 1995) (stating that "we must accept an agency's interpretation of its own regulations, if it is reasonable in terms of the words of the regulation") (quoting Baker v. Heckler, 730 F.2d 1147, 1149 (8th Cir. 1984)).
  \item \textsuperscript{162} See \textit{Larionoff}, 431 U.S. at 872-73 (invalidating regulation, as interpreted by Department of Defense, because it was found to be "contrary to the manifest purposes of Congress"); see also \textit{Nat'l Res. Def. Council}, Inc. v. EPA, 25 F.3d 1063, 1070 (D.C. Cir. 1994) (stating that "however reasonable the agency's interpretation of its regulations, we must not give those regulations effect if they conflict with the governing statute.").
  \item \textsuperscript{163} Standards, \textit{supra} note 19, at pt. 36, App. A.
  \item \textsuperscript{164} See Indep. Living Res. v. Or. Arena Corp., 982 F. Supp. 698, 733 (D. Or. 1997) (finding that "ambulatory spectators have the option of standing with the rest of the crowd and can thereby recapture most of the lost view"); see also Para-
fore lose their view when spectators stand. Because a complete view is more comparable to what the general public receives, requiring wheelchair locations to have lines of sight over standing spectators is a reasonable interpretation of Standard 4.33.3.

The overall purpose of Title III of the ADA is "to bring individuals into the economic and social mainstream of American life." Attending concerts or sporting events at local arenas are an important component of everyday life for most people. Wheelchair users, however, are not likely to attend concerts or sporting events if they cannot see the most important moments of the event. If wheelchair locations in stadiums are required to have lines of sight over standing spectators, this measure will further the goal of social integration because more disabled patrons will attend concerts and sporting events. By furthering the goal of social integration, Standard 4.33.3 is consistent with the intent of Title III and, therefore, is reasonable and requires deference.

James Kurack

lyzed Veterans of Am. v. D.C. Arena, 117 F.3d 579, 582 (D.C. Cir. 1997) (finding that ambulatory spectator can regain ninety percent of view by standing).

165. See Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs., 950 F. Supp. 393, 400 n.16 (D.D.C. 1996) (stating that wheelchair users "will be afforded nearly no visibility" when spectators stand); Indep. Living Res., 982 F. Supp. at 733 (noting that although short ambulatory patrons have their view blocked when they stand, degree of blocked view is not as severe as wheelchair user's blocked vision).


167. See Maryann Haggerty, Pollin Sued Over Design of MCI Center: Setup Will Leave Wheelchair Users With Impeded View, Group Says, WASH. POST, June 15, 1996, at Cl (quoting deputy executive director of Paralyzed Veterans of America, "The bottom line here is if you can't See [sic] the game, you might as well stay at home and watch it on TV, and that's the message we're getting from the MCI Center.").