No. 03-1131

In the Supreme Court of the United States

CINEMARK USA, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Pursuant to Title III of the Americans With Disabilities Act, 42 U.S.C. 12181 *et seq.*, a Department of Justice regulation requires that wheelchair spaces in newly constructed assembly areas "provide people with physical disabilities * * * lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A, § 4.33.3. The questions presented are:

1. Whether, in stadium-style movie theaters with 300 or fewer seats, wheelchair seating that is limited to the very front rows of the theater and that is not part of the stadium-style seating complies with the regulation's requirement that "lines of sight" for individuals with disabilities be "comparable" to those enjoyed by the general public.

2. Whether courts must accord deference to an agency's interpretation of a regulation.

3. Whether an agency, in administering a regulatory scheme, can adopt and enforce its interpretation of a regulation without following the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 348 F.3d 569. The opinion of the district court (Pet. App. 31a-53a) is unreported.

JURISDICTION

The court of appeals entered its judgment on November 6, 2003. The petition for a writ of certiorari was filed on February 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION AND STATEMENT

The central question in this case is whether the Department of Justice has reasonably interpreted its own regulation, which requires that wheelchair users in movie

theaters be afforded "lines of sight" that are "comparable" to those enjoyed by the general public, to prohibit movie theaters from relegating all wheelchair users to the worst seats in the very front of the theater and excluding them entirely from the benefits of modern stadium-style theater designs. That issue does not warrant further review both because forthcoming regulatory amendments are expected to address and resolve the interpretive question that petitioner raises and because the Justice Department's application of its regulation fully comports with longstanding administrative principles. Beyond that, petitioner's attempt to obtain, on interlocutory appeal of a liability ruling, this Court's review of purely hypothesized equitable relief that has not been, and may never be, ordered by the lower court or any other court does not satisfy this Court's established criteria for granting certiorari.

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12101(b)(1), including in "such critical areas as * * * public accommodations * * * [and] recreation." 42 U.S.C. 12101(a)(3).[1] Title III of the Disabilities Act mandates that:

> [n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any per-

[1] A study submitted to Congress by the National Council on the Handicapped (currently known as the National Council on Disability) revealed that two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances. *On the Threshold of Independence* 16 (1988).

> son who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182(a). The "public accommodation[s]" covered by Title III include "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment," and an "auditorium, convention center, lecture hall, or other place of public gathering." 42 U.S.C. 12181(7)(C) and (D). Congress defined the prohibited forms of discrimination to include "a failure to design and construct facilities for first occupancy [after January 26, 1993], that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1).

Congress charged the Attorney General with investigating violations of Title III and bringing civil enforcement actions against those who "engage[] in a pattern or practice of discrimination" or whose discrimination on the basis of disability "raises an issue of general public importance." 42 U.S.C. 12188(b)(1)(A) and (B). In addition, to implement the Act's new construction requirements, Congress directed the Attorney General to promulgate regulations that are consistent with minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board (Access Board). See 42 U.S.C. 12186(b) and (c), 12204. The Department of Justice accordingly issued final regulations establishing accessibility requirements for new construction that incorporated the Access Board's Americans with Disabilities Act Accessibility Guidelines (Accessibility Guidelines). See 28 C.F.R. 36.406(a), Pt. 36, App. A; 56 Fed. Reg. 35,544, 35,546 (1991). One of the Department's regulations is Standard 4.33.3, which requires that, in movie theaters and other public assembly areas:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and

> lines of sight comparable to those for members of the general public.

28 C.F.R. Pt. 36, App. A, § 4.33.3 (Standard 4.33.3).

The Access Board is close to completing a multi-year revision of its Accessibility Guidelines. See Access Board, *Revision of ADA and ABA Accessibility Guidelines*, <http://www.access-board.gov/ada-aba/status.htm>. The Board published a notice of proposed rulemaking in 1999, 64 Fed. Reg. 62,248-62,538 (1999), and made public its "draft final guidelines" in April 2002. See 67 Fed. Reg. 15,509 (2002). Those amended guidelines make clear that, in assembly areas of more than 300 seats, wheelchair spaces shall be dispersed and shall provide wheelchair users a choice "of seating locations and viewing angles substantially equivalent to, or better than," those "available to all other spectators." Access Board, *Draft Final ADA and ABA Accessibility Guidelines* § 221.2.3 (Apr. 2002). The draft final guidelines also state that vertical dispersal of wheelchair spaces would not be required in assembly areas of 300 seats or less if the wheelchair seats provided "viewing angles that are equivalent to, or better than, the average viewing angle provided in the facility." *Id.* § 221.2.3.2 (emphasis omitted).

The Access Board unanimously approved its revised guidelines in their final form on January 14, 2004, <http://www.access-board.gov/ada-aba/status.htm>, and submitted them to the Office of Management and Budget for review and clearance pursuant to Executive Order No. 12,866, 58 Fed. Reg. 51,735 (1993). OMB has not yet completed that process. See Office of Info. & Regulatory Affairs Exec. Order Submissions Under Review (May 28, 2004) <http://www.whitehouse.gov/omb/library/OMBREGSP.html>.

2. a. The mid-1990s saw a revolution in movie theater design with the advent of "stadium-style" seating. Trad-

itional movie theaters were designed with rows of seats on gently sloping floors. In 1995, the first "stadium-style" movie theater opened in the United States. As the name suggests, the seating plan for such theaters mimics that of a stadium, where the seats are placed on elevated tiers, with each row of seats rising at a slope of more than five percent over the row in front of it. Pet. App. 2a-3a, 32a. Some stadium-style theaters retained a small, traditional-style area with a few rows of seats on a flat or sloped floor that are close to the movie screen and that are situated in front of and significantly lower than the stadium section. See *id.* at 4a. The stadium-style theaters proved to be very popular among customers, causing a boom in stadium-style theater construction across the country. See Pet. 4 & n.2; 64 Fed. Reg. at 62,278 (Access Board's discussion of the "superior-[ity]" and "popular[ity]" of stadium-style seating).

Some of the new theaters were designed in a manner that allows wheelchair patrons to enter the theater in the middle of the stadium-seating area, rather than at the bottom, so that all patrons can reach the elevated stadium section without climbing stairs. See C.A. App. 451 & n.1, 455. In other theaters, however, the stadium-style section can be accessed only by stairs, and wheelchair users are restricted to the traditional section immediately in front of the movie screen. Pet. App. 3a, 14a, 32a, 35a-36a; *Oregon Paralyzed Veterans* v. *Regal Cinemas, Inc.*, 339 F.3d 1126, 1127-1128 (9th Cir. 2003), petition for cert. pending, No. 03-641 (filed Oct. 27, 2003). That is how petitioner designed many of its stadium-style theaters. See Pet. App. 3a, 32a; C.A. App. 75, 150, 361, 451, 457. In at least 52 of petitioner's stadium-style theaters, *all* wheelchair seating is located in the very first row of the auditorium. C.A. App. 151 ¶ 7; see also *id.* at 75, 361, 451, 457. Seats that close to the movie screen have extreme viewing angles that often cause significant physical discomfort and high levels of image distortion for the

spectators who sit there. See Pet. App. 3a, 14a, 35a-36a, 41a; *Oregon Paralyzed Veterans*, 339 F.3d at 1128-1129. For that reason, the National Association of Theatre Owners previously acknowledged that seats in the very front rows are the "least desirable" and "the last to be taken." See *United States* v. *AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1101-1102 (C.D. Cal. 2002).

b. On March 24, 1999, the United States filed suit against petitioner on the ground that it had engaged in a pattern or practice of discrimination, in violation of Title III of the Disabilities Act and its implementing regulations. Pet. App. 32a-40a. The complaint alleged, among other things, that many of petitioner's stadium-style movie theaters failed to comply with the requirement in Standard 4.33.3 that lines of sight be comparable. *Id.* at 38a-39a. Specifically, the United States alleged that the wheelchair spaces in some of petitioner's theaters had extreme viewing angles that were inferior to those offered to most members of the general public and rendered the theaters "effectively unusable by persons confined to wheelchairs." *Id.* at 3a.

The district court granted summary judgment to petitioner on all of the United States' claims and denied the United States' cross-motion for partial summary judgment. Pet. App. 31a-53a. As relevant here, the court adopted the Fifth Circuit's decision in *Lara* v. *Cinemark USA, Inc.*, 207 F.3d 783, cert. denied, 531 U.S. 944 (2000), which held that the comparable-lines-of-sight provision of Standard 4.33.3 does not require "anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen," *id.* at 789. See Pet. App. 41a-47a.

3. The court of appeals reversed and remanded the case for further proceedings. Pet. App. 1a-30a. Relying on the "plain meaning" of the regulation, *id.* at 9a-10a, 16a-17a, the court held that the requirement in Standard 4.33.3 that wheelchair users be afforded "comparable" "lines of sight"

mandates "that wheelchair patrons have something more than a merely unobstructed view in seating adjacent to other patrons," *id.* at 10a. The court reasoned that "lines of sight have a qualitative aspect: lines of sight can be 'inferior,' not simply obstructed or unobstructed." *Id.* at 14a. The text of Standard 4.33.3 thus "requires that wheelchair users be afforded comparable viewing angles to those provided for the general public." *Id.* at 12a. The court of appeals noted that, "within the field of theater design, 'lines of sight' are compared on the basis of viewing angles." *Id.* at 11a n.6.

The court of appeals also explained that the Department's interpretation of Standard 4.33.3 "furthers the central goals of Title III of the ADA," Pet. App. 11a, by promoting the "full and equal enjoyment," 42 U.S.C. 12182(a), of the benefits of movie theaters:

> Under the district court's interpretation, a wheelchair-using patron could be relegated to the worst seats in the theater (assuming it was still among some seats for the general public), so long as the disabled patron still had an "unobstructed view" of the screen. This does not comport with the "full and equal enjoyment" language of Title III.

Pet. App. 12a. In addition, the court determined that the Department's interpretation of its own regulation was entitled to deference because it was neither "plainly erroneous nor inconsistent with the regulation." *Id.* at 16a (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). The court noted that the Department's reading of its own regulation comported with the Access Board's conception of "lines of sight" in 1999. Pet. App. 14a (noting that wheelchair users in some stadium-style theaters "are afforded inferior lines of sight to the screen" because they are relegated to areas close to the screen where they "are required to tilt their heads back at uncomfortable angles and

to constantly move their heads from side to side to view the screen") (quoting 64 Fed. Reg. at 62,278).

The court of appeals rejected, as contrary to "a long-settled principle of federal administrative law" (Pet. App. 20a), petitioner's argument that the Department of Justice had an obligation to amend its regulation before it could enforce the requirement of comparable viewing angles. The court explained that "[a]n agency's enforcement of a general statutory or regulatory term against a regulated party cannot be defeated on the ground that the agency has failed to promulgate a more specific regulation." *Ibid.*

Finally, the court of appeals found no merit to petitioner's argument that certification by state or local officials under the Texas Accessibility Standards estopped the Justice Department's enforcement action. Pet. App. 19a-20a, 22a-26a. The court concluded, however, that the district court could take into account the Justice Department's certification of the Texas standards, as well as the Department's public statements about the certification process, in crafting an appropriate remedy on remand. *Id.* at 23a- 26a.[2]

DISCUSSION

1. A Department of Justice regulation implementing Title III of the Americans with Disabilities Act requires that patrons in all assembly areas be afforded "lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A, § 4.33.3. Petitioner seeks (Pet. 14-17) this Court's resolution of a circuit conflict over whether that regulation requires that individuals with disabilities be afforded a comparable ability to view the movie on the

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[2] In an enforcement action, such certification constitutes "rebuttable evidence" that the state or local law "meets or exceeds the minimum requirements of" Title III. 42 U.S.C. 12188(b)(1)(A)(ii). That certification, however, extends only to the content of the state or local law, and not to how it might be applied or interpreted by individual state or local officials.

screen or whether it merely requires that the view for disabled spectators not be obstructed. The Fifth Circuit has held that the regulation does not "require[] anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen." *Lara* v. *Cinemark USA, Inc.*, 207 F.3d 783, 789, cert. denied, 531 U.S. 944 (2000). By contrast, the court of appeals here, Pet. App. 1a-30a, and the Ninth Circuit, in *Oregon Paralyzed Veterans* v. *Regal Cinemas, Inc.*, 339 F.3d 1126, 1127-1128 (2003), petition for cert. pending, No. 03-641 (filed Oct. 27, 2003), have held that the regulation also requires comparable viewing angles to the screen for individuals with disabilities. That conflict does not merit this Court's review for three reasons.

First, that conflict over interpretation of the Department's regulation is of no enduring importance because the dispute will be addressed and likely resolved by the Access Board's forthcoming promulgation of its updated Accessibility Guidelines, which will be followed by the Department of Justice's conforming amendments to its own regulations. See Access Board, *Draft Final ADA and ABA Accessibility Guidelines* §§ 221.2.3, 221.2.3.2 (Apr. 2002). Furthermore, given the substantial weight that the Fifth Circuit put on what it perceived to be the Access Board's ambivalence about the coverage of viewing angles, 207 F.3d at 789, issuance of the updated guidance will largely remove the analytical underpinnings of that decision and thus may well effectively eliminate the circuit conflict.

There is no need for this Court to exercise its certiorari jurisdiction to address an issue of regulatory interpretation that is presently being addressed directly by the relevant regulatory bodies themselves. Further, the issuance of the Access Board's guidance, to be followed by the Department of Justice's amendment of the regulation at the center of the present litigation (Standard 4.33.3), will fundamentally change the terms of the debate on the question presented.

The implications of those amendments should be addressed by the lower courts in the first instance.[3]

Second, the conflict petitioner identifies is also relatively shallow. Only the *Lara* court has rejected the Justice Department's interpretation of its own regulation. The Ninth Circuit, like the court of appeals here, has sustained the Department's interpretation. The issue is being actively litigated within the First and Second Circuits. See *United States* v. *Hoyts Cinemas Corp.*, Nos. 03-1646, 03-1787 & 03-1808 (1st Cir.) (argued Feb. 6, 2004); *Meineker* v. *Hoyts Cinemas Corp.*, 69 Fed. Appx. 19 (2d Cir. July 1, 2003) (remanding case). If those circuits join the rulings of the Sixth and Ninth Circuits, and if the Fifth Circuit is ever presented with another case raising the same issue, that court might reconsider its position—a prospect that is heightened by the forthcoming regulatory amendment.

Nor is this an area in which uniformity is especially vital. Building codes, design requirements, and zoning restrictions vary in manifold ways not just from circuit to circuit, or even from state to state, but often from county to county and town to town. Pet. App. 19a n.7 ("[A]ny chain of stores that extends across state lines is subject to the different building codes of the various states in which it chooses to build a store (and probably to a variety of different local ordinances at each location as well)."). In addition, every State has its own law providing (at varying levels) protection for the

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[3] Petitioner notes that, in the midst of litigation over this issue, the National Association of Theatre Owners (NATO) requested that the Justice Department undertake rulemaking to clarify the coverage of viewing angles. Pet. 10 n.9; Pet. App. 124a. That regulatory process is now underway. As explained in the Justice Department's response, moreover, the Department's obligation to ensure that its regulations comport with the Access Board's "minimum guidelines," 42 U.S.C. 12186(b) and (c), 12204, has caused the Department to postpone its own amendments until the Access Board completes its revisions. See Pet. App. 143a.

rights of individuals with disabilities. See *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 368 n.5 (2001). Theater owners and their construction companies and architects thus already confront and deal with variations in the laws and regulations governing theater design on a daily basis. The shallow conflict in the circuits thus "is not such an 'impossible position' as [petitioner] would lead us to believe," Pet. App. 19a n.7, and can certainly be tolerated for the time remaining until the clarifying amendments issue. To the extent that petitioner seeks a uniform model for new construction, nothing in the Fifth Circuit's *Lara* decision prevents it from complying with the requirements of the Disabilities Act as enforced by the Sixth and Ninth Circuits.

Third, and relatedly, the court of appeals' decision in the present case is correct—and the *Lara* court's analysis is such a stark departure from well-established principles of regulatory interpretation that the circuit split is unlikely to widen. The Justice Department's interpretation of "comparable" "lines of sight" as encompassing patrons' viewing angles must be sustained unless it is "plainly erroneous or inconsistent with the regulation." See, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Department's interpretation comports with the ordinary understanding of "lines of sight." See *Webster's Ninth New Collegiate Dictionary* 695 (1991) ("line[] of sight" is "a line from an observer's eye to a distant point toward which he is looking"). It also tracks long-established understandings of the phrase within the theater industry.[4]

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[4] See Society of Motion Picture & Television Engineers (SMPTE), *EG 18-1989, Engineering Guideline: Design of Effective Cine Theaters*, at 3 (Dec. 19, 1989), *reprinted in* 99 Soc'y Motion Picture & Television Engr's J. 494 (June 1990) ("Since the normal line of sight is 12° to 15° below the horizontal, seat backs should be tilted to elevate the normal line of sight approximately the same amount. For most viewers, physical discomfort

Indeed, the National Association of Theatre Owners (NATO), which is the national trade association of the motion picture theatre industry, took the position immediately prior to the first construction of stadium-style theaters in this country, that "lines of sight are measured in degrees," not just in terms of whether a view is obstructed. See NATO, *Position Paper on Wheelchair Seating in Motion Picture Theatre Auditoriums* 6 (Jan. 27, 1994); see *United States* v. *AMC Entm't, Inc.*, 232 F. Supp. 2d 1092, 1101-1102 (C.D. Cal. 2002) (discussing repeated statements of NATO, prior to a change in position by 2000, acknowledging that "lines of sight are most commonly measured in degrees").

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occurs when the vertical viewing angle to the top of the screen exceeds 35°, and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15°."); *id.* at 495 ("The nearest viewer's vertical line of sight should not exceed 35° from the horizontal to the top of the projected image."); SMPTE, *EG 18-1994, Engineering Guideline: Design of Effective Cine Theaters* (Mar. 25, 1994) (same); American Institute of Architects, *Ramsey/Sleeper Architectural Graphic Standards* 17 (student ed. 1989) (discussing the "sightline from the first row to the top of the screen" in terms of maximum recommended angle); George C. Izenour, *Theater Design* 4 (1977) ("A good sight line is one in which there are no impediments to vision and angular displacement (vertical and horizontal) of the eyes and head falls within the criteria for comfort."); *id.* at 3 (diagram showing "Normal Sight Line" as 15 degrees below horizontal); *id.* at 284 ("distance and angular displacement" are among the types of "sight line problems" found in auditoriums); *id.* at 71, 598-599 (excerpting a treatise from the 1830s, John Scott Russell, *Treatise on Sight Lines and Seating* (1830), which provided that the "best" seats in an auditorium "are not so far forward as, by being immediately under the speaker, to require [one] to look up at a painful angle of elevation"); Harold Burris-Meyer & Edward C. Cole, *Theaters and Auditoriums* 69 (2d ed. 1964) ("Maximum tolerable upward sight line angle for motion pictures" was 30 degrees from the horizontal to the top of the movie screen.); *ibid.* (viewing experience will be adversely affected by "upward sight lines in the first two or three rows which are uncomfortable and unnatural for viewing stage setting and action").

Another major movie theater chain, Hoyts Cinemas, was aware in 1991 that sight lines included viewing angles. *Meineker*, 69 Fed. Appx. at 25 nn.7 & 9. The Justice Department's interpretation thus rests upon plain meaning, backed by an established industry understanding that the phrase "lines of sight" encompasses far more than a binary inquiry into whether the viewer's vision is obstructed.

Petitioner's suggestion (Pet. 11-12) that the Access Board interpreted "lines of sight" to exclude viewing angles is flatly incorrect. In 1998, the Access Board published a technical assistance manual that explained, in a section titled "Sight Lines," that "[b]oth the horizontal and vertical viewing angles must be considered in the design of assembly areas." Access Board, *Americans with Disabilities Act Accessibility Guidelines Manual* 117 (1998). Likewise, in November 1999, the Board explained that,

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

64 Fed. Reg. 62,248, 62,278 (1999). The Access Board's simultaneous statement in 1999 that it was considering whether to include "specific requirements," *ibid.*, on viewing angles in its final rules was simply an acknowledgment that the Accessibility Guidelines did not yet "include specific technical provisions to assist design professionals." *Id.* at 62,277. But the fact that the Access Board's own technical publication lacked design specifications does not mean that

the Justice Department's regulation lacked the substantive coverage of viewing angles.

That ordinary understanding of the phrase "lines of sight" also serves the central purpose of Title III of the Disabilities Act, which is to preclude the "outright intentional exclusion" of individuals with disabilities and to ensure their "full and equal enjoyment of the goods, services, facilities, privileges, [and] advantages" offered by public accommodations. 42 U.S.C. 12101(a)(5), 12182(a). The advent of stadium-style seating in movie theaters marked a sea change in the viewing experience for theater patrons. The Department's interpretation of its regulation ensures that theater designs do not leave customers in wheelchairs on the sidelines and do not *completely exclude* them from experiencing and enjoying the benefits of that new innovation in movie-watching vantage points. Indeed, petitioner's position would have the perverse effect of causing the advent of stadium-style seating to enhance the viewing experience of patrons without disabilities while simultaneously immiserating patrons with disabilities.

Moreover, petitioner's and the *Lara* court's reading of the regulation as prohibiting only obstructed views lacks any anchor in the regulatory text. The word "unobstructed" appears nowhere in Standard 4.33.3—a conspicuous omission if that were the regulation's sole *raison d'être.* Their cramped reading of the regulation also overlooks that Standard 4.33.3 applies not just to movie theaters, but to the entire swath of public assembly areas, including stadiums, live theaters, opera houses, and concert and lecture halls. It would confound congressional purpose to reduce the broad promise of "full and equal enjoyment" of "comparable" "lines of sight" in all those different venues to nothing more than a requirement that wheelchair users not be seated behind poles.

2. Petitioner also seeks this Court's review (Pet. 17-24) of the court of appeals' holding that the Department's interpretation of its own regulation should be accorded deference. That claim does not merit further review. This Court has repeatedly held that an agency's interpretation of its own regulation is entitled to substantial deference. See, *e.g.*, *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 387-388 (2003) ("[T]he Commissioner's interpretation of her own regulations is eminently sensible and should have been given deference under *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).").[5] Certiorari review is not warranted to say again what the Court said unanimously just last year.[6]

Petitioner contends (Pet. 18-19) that *Christensen* v. *Harris County*, 529 U.S. 576 (2000), and *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), cast doubt on the propriety of deference in this case. They do not. *Christensen* and *Mead* both concerned the level of deference due to agency interpretations of *statutes*, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Mead*, 533 U.S. at 227-238; *Christensen*, 529 U.S. at 587. Neither of those opinions called into question the longstanding rule of deference to an agency's interpretation of its own regulation. Indeed, with respect to the separate

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[5] See also *Barnhart* v. *Walton*, 535 U.S. 212, 217 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway."); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001); *Auer*, 519 U.S. at 461 (agency interpretation will be sustained unless it is "plainly erroneous or inconsistent with the regulation") (citation omitted); *Thomas Jefferson Univ.*, 512 U.S. at 512 (same); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (same); *Bowles*, 325 U.S. at 414 (same).

[6] Petitioner does not argue that the courts of appeals are in conflict on the legal standard governing deference to agency interpretations of their own regulations, nor is the United States aware of any such conflict.

question of deference to an agency's interpretation of its own regulation, *Christensen* simply applied *Auer* and concluded that the particular agency interpretation before the Court did not merit deference because it was inconsistent with the regulation's text. 529 U.S. at 588. The Court has expressly reaffirmed the rule of deference to agency interpretations since *Christensen* and *Mead*. See *Keffeler*, *supra*; *Barnhart* v. *Walton*, 535 U.S. 212, 217 (2002).[7]

In any event, this case is not an appropriate vehicle for addressing the level of deference due to an agency interpretation of its own regulations. First, in holding that "comparable" "lines of sight" encompasses the viewing angle to the screen, the court of appeals here (Pet. App. 9a, 10a) and the Sixth Circuit (03-641 Pet. App. 15a) both relied on the "plain meaning" of the regulatory text, which makes this case a particularly inapt vehicle for fixing the precise level of deference owed to an agency's interpretation of its own regulation. Cf. *Edelman* v. *Lynchburg College*, 535 U.S. 106, 114 & n.8 (2002) (declining to address the precise level of deference owed to an agency interpretation of a statute that reflected the best view of the statute's plain meaning).[8]

Second, petitioner does not contend that its proposed interpretation—that only obstructed views are prohibited—flows ineluctably from the statutory text. Indeed, it is

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[7] Petitioner's argument (Pet. 18) that deference should be diminished because the Justice Department expressed its interpretation in a brief overlooks that the government's position is also reflected in the numerous enforcement actions it has prosecuted, including this very case. See *United States* v. *Hoyts Cinemas*, *supra*; *AMC Entm't*, *supra*; *Lonberg & United States* v. *Sanborn Theaters, Inc.*, No. 97-6598 (C.D. Cal.). Cf. *Shalala* v. *Guernsey Mem. Hosp.*, 514 U.S. 87, 96 (1995); *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

[8] There is no conflict on the agency deference point between the Fifth Circuit in *Lara* and the court of appeals here. The Fifth Circuit never discussed the issue. See 207 F.3d at 787-789.

petitioner's non-textual position that is a "modif[ication]" of the regulation without "notice and comment" (Pet. 24, 30). Furthermore, petitioner's reading of the regulation as prohibiting obstructed views necessarily agrees, at some level, with the Department's quite natural reading of "comparable" "lines of sight" as referring to the ability of a wheelchair user to view a performance. Petitioner does not dispute that the regulation prohibits a theater design where wheelchair users cannot view the movie because there are heads, headrests, or poles right in front of them. Petitioner simply disagrees that the regulation also prohibits designs where wheelchair patrons cannot view the movie because the screen is right in front of them. That difference does not bespeak a fundamental divergence in the legal rules governing agencies' authority to interpret their own regulations; it is simply the byproduct of a case-specific disagreement about which forms of physical barriers to viewing a movie are covered by the regulation. That type of programmatic linedrawing does not present any broad legal question for this Court's review.

Petitioner's attempted reformulation (Pet. 19) of its deference argument as preventing the "subver[sion] [of] an established statutory scheme" fares no better. By ensuring that individuals in wheelchairs are not segregated in movie theaters and completely excluded from the benefits of stadium-style design, the Department's interpretation promotes, rather than subverts, the central purpose of the Disabilities Act. Petitioner, for its part, does not even attempt to square its counter-interpretation of the regulation—a reading that would render "stadium-style theaters effectively unusable by persons confined to wheelchairs" (Pet. App. 3a)—with Title III's goals.

Petitioner's real complaint (Pet. 17-18) appears to be less with the Department's interpretation of its own regulation than with the Department's failure to provide prospective

design specifications. Petitioner effectively attempts to wring out of the Disabilities Act an absolute immunity for any design decisions not precisely delineated by the Justice Department, in inches and degrees, as "construction standards" (Pet. 24). But that argument provides no sound basis for this Court's review. If, as petitioner argues (Pet. 22), "Congress [went] to great lengths" to proscribe the enforcement of any less reticulated regulations, one would expect that directive to appear somewhere in Title III's text. It does not. Petitioner cites nothing (Pet. 20-22) beyond the statutory provision requiring the Access Board's and Justice Department's regulations to be on the books by specified dates, 42 U.S.C. 12186(b) and (c), which they were.

The enactment of a schedule for regulations simply does not amount to a congressional prohibition on the routine regulatory exercise of applying established legal standards to new contexts. And that is all that has happened here. The meaning of "lines of sight" in the regulation never changed. The plain text of the regulation, industry practice, and petitioner's own reading of the regulation as prohibiting obstructions all indicate that, from the outset, "lines of sight" has encompassed patrons' ability to view the movie on the screen. What changed in the mid-1990s was not the regulatory interpretation, but the movie theaters' design. It was not until 1995 that movie theaters first offered stadium-style seating and, as part of that development, began marketing to consumers the enhanced lines of sight that are the defining feature of stadium-style seating.

With respect to most of the theaters at issue here, however, petitioner closed that new market to patrons with disabilities by completely excluding them from the sight-line benefits of the stadium-style design. It was against that backdrop that the Justice Department went on record, in its 1998 amicus brief in the *Lara* case, to make clear how the "comparable" "lines of sight" requirement in Standard 4.33.3

applies in the specific context of stadium-style movie theaters. But that does not mean that the underlying meaning of the regulation changed; it means only that a new opportunity for its application arose.

After all, while stadium-style seating was new to movie theaters, it was not new to stadiums and other assembly areas.[9] That application of extant regulatory standards and agency expertise to a specific factual scenario is what regulators routinely do; it is not an event that triggers the duty to engage in notice-and-comment rulemaking. And it is not the type of broad or enduring legal question that merits an exercise of this Court's certiorari jurisdiction, especially given that ten years have elapsed since stadium-style movie theaters first appeared and six years have now passed since the *Lara* brief was filed.[10]

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[9] See, *e.g.*, Letter from Merrily Friedlander, Acting Chief of the Coordination & Review Section, Civil Rights Div., Dep't of Justice, to Daniel L. Hesse, Director/Eng'r, Yakima County Public Works Dep't, regarding Yakima County Stadium 3 (Nov. 21, 1994) (" 'Line of sight' in an assembly area refers to both the ability to see performance areas and the angle from which performance areas are seen.") (cited in *Independent Living Res.* v. *Oregon Arena Corp.*, 982 F. Supp. 698, 709 n.9 (D. Or. 1997)).

[10] Petitioner wrongly asserts (Pet. 22-23 & n.16) that the Department of Justice has repeatedly changed its interpretation of the comparable lines of sight requirement. Petitioner offers *no* evidence that the Department ever said that viewing angles are not an aspect of "lines of sight." And four courts have specifically found that the Department's interpretation has been consistent. Pet. App. 17a; *Oregon Paralyzed Veterans*, 339 F.3d at 1133; *United States* v. *Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 90 (D. Mass. 2003); *AMC Entm't*, 232 F. Supp. 2d at 1112-1113. Petitioner's complaint (Pet. 26 n.19) that the Justice Department has not established a single, numerical "viewing angle standard" overlooks that the comparability of "lines of sight" is required only on a theater-by-theater basis. The view for wheelchair users need only be comparable to the view of other patrons in the same theater; it need not be as good a view as is offered in a different theater down the street. Furthermore, petitioner's

3. Lastly, petitioner's argument (Pet. 24-27) that it lacked "fair notice" of the regulation's operation does not merit this Court's review. As an initial matter, petitioner's contention (Pet. 25) that it "could not reasonably have been known" that "lines of sight" considers whether the angle for viewing the performance is physically debilitating flies in the face of the numerous industry publications that accord "lines of sight" that natural reading. See pages 11-13 & n.4, *supra*.

Petitioner's contention (Pet. 24-27) that this Court should address whether agencies may apply new substantive requirements in regulations retroactively is likewise without merit. The court of appeals did not decide that question. To the contrary, as petitioner concedes (Pet. 24), the court of appeals held (Pet. App. 20a-22a & n.8) that the Department's enforcement of the regulation was interpretive not substantive. Application of a reasonable agency interpretation of its own regulation—particularly one that is reflected in the regulation's "plain" language (*id.* at 9a, 10a)—does not implicate retroactivity. The agency is simply enforcing what the regulation has always meant.

In any event, the only thing the court of appeals decided, in reversing the district court's grant of summary judgment, was that the "comparable" "lines of sight" provision of the regulation requires comparable viewing angles, and not just an absence of physical obstructions to the patrons' view. The issue of fair notice and the appropriate equitable remedy has not yet been decided in this case, or by any other appellate court in the country. Indeed, petitioner concedes (Pet. 29) the "lack of a final judgment" in this case. This Court rarely grants review of such interlocutory chal-

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central attack on the Department's interpretation has always been that it overreaches, not that it is insufficiently restrictive and regimented. In any event, that concern is expected to be resolved by the forthcoming regulatory amendments.

lenges.[11] Further, because "this is a court of final review and not first view," *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (quoting *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 399 (1996)), it would not promote "judicial economy" (Pet. 14 n.12) for this Court to address, for the first time in this litigation, the fact-intensive and record-bound question of fair notice, see *Meineker*, 69 Fed. Appx. at 25, or to attempt to outline in the abstract any possible limitations on purely hypothesized equitable relief —relief that has not and may never be ordered by any court in this country.[12]

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[11] See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); compare *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J.) (denial of certiorari on interlocutory appeal), with *United States* v. *Virginia*, 518 U.S. 515 (1996) (review after final judgment).

[12] The "ruinous" remedial consequences that petitioner portends (Pet. 28) need never occur. See Pet. App. 24a-25a & n.10; *id.* at 25a n.10 (government's representation at oral argument that "the United States is not—has not and is not going to argue, for example, that the entire interior of the theater be gutted or torn down. We are going to work with the defendants to come up with a reasonable approach."); *Paralyzed Veterans*, 117 F.3d at 589 ("[T]here [is] a good deal of wiggle room in the degree of compliance contemplated by the regulation and manual, and * * * a judge sitting in equity[] ha[s] ample discretion to fashion the remedial order.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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