UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| UNITED STATES OF AMERICA, | § | |
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| Plaintiff | § | CIVIL ACTION NO.1:99CV-705 |
| | § | |
| V. | § | Hon. Donald C. Nugent |
| | § | |
| CINEMARK USA, INC., | § | PLAINTIFF UNITED STATES' |
| | § | BRIEF IN OPPOSITION TO |
| Defendant. | § | DEFENDANT'S MOTION FOR |
| | § | SUMMARY JUDGMENT |
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PLAINTIFF UNITED STATES' BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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## I. PRELIMINARY STATEMENT

The Americans with Disabilities Act ("ADA") is a landmark civil rights law that requires that buildings and facilities be accessible to and usable by people with disabilities. The Defendant, Cinemark USA ("Cinemark"), owns and operates stadium-style movie theaters that, for individuals who use wheelchairs, are not accessible. Although Cinemark trumpets stadium-style seating as a major advantage for viewers and a major advance for the theater industry, it fails to provide wheelchair users with a means to sit in the stadium portion of its theaters, instead relegating such individuals to far less desirable seats on the floor of the theater. By filing this case, the United States is asking this Court to end that practice.

To date, however, Cinemark has chosen not to attempt to defend itself on the merits. Instead, it has raised a counterclaim, and now has filed this motion, asserting not that its theaters provide wheelchair users with stadium-style seating, but that under current regulations the Department of Justice is precluded from requiring that equal treatment. Specifically, Cinemark alleges that a regulation requiring it to provide wheelchair users with "lines of sight comparable" to those provided members of the general public cannot be interpreted to mean that wheelchair users should be provided with similar sight lines as other theater patrons. To enforce that interpretation, Cinemark says, would require a new regulation. The Department of Justice respectfully disagrees.

The Department of Justice has the statutory responsibility to enforce the ADA and myriad other federal statutes and regulations; to get that job done, it must be able to take a position as to the meaning of the statutes and the regulations it interprets. The Administrative Procedure Act, by exempting interpretations from notice and comment requirements, explicitly allows and encourages such action. Whether or not the Department of Justice's legal interpretation is

permissible and correct — and that is the ultimate issue for the Court to decide in this case — putting it forward is a required exercise of the Department of Justice's delegated authority, not a violation of law. To grant Cinemark's motion would hamper severely the Department of Justice's ability to enforce the ADA or other federal statutes and regulations. Cinemark's motion should be denied, and the Court should proceed to the important questions this case presents.

## II. ISSUE TO BE DECIDED

Whether the Department of Justice's interpretation of its own regulation as set forth in an amicus brief is an "interpretive rule" exempt from the Administrative Procedure Act's notice and comment requirements.

## III. STATUTORY AND FACTUAL BACKGROUND

### A. The Americans With Disabilities Act

The ADA is a comprehensive federal civil rights statute established to protect the rights of the disabled. Title III of the ADA requires that all commercial facilities and "public accommodations" designed and constructed for first occupancy after January 26, 1993 be "readily accessible to and usable by individuals with disabilities . . . in accordance with standards set forth or incorporated by reference in regulations" issued pursuant to the Act. 42 U.S.C. § 12183(a)(1). Movie theaters are among the specific types of entities considered to be a "public accommodation" and therefore subject to the requirements of the Act. 42 U.S.C. § 12181(7)(C).

The Department of Justice, through the Attorney General, was specifically designated by Congress as the agency authorized to issue regulations to carry out the requirements of the ADA with respect to new construction of public accommodations and commercial facilities. See 42 U.S.C. § 12186(b). The Department of Justice issued such regulations on July 26, 1991. See 56

Fed. Reg. 35,544 (1991), codified at 28 C.F.R. §§ 36.101 et seq. The regulations incorporate architectural standards for new construction that are known as the Standards for Accessible Design (the "Standards"). See 28 C.F.R. Part 36 App. A.

The regulation at issue in this case is Standard 4.33.3, governing the placement of wheelchair locations in assembly areas such as movie theaters. Standard 4.33.3 states in part:

> 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 ... When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location.
>
> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

28 C.F.R. Part 36 App. A, § 4.33.3. In particular, the dispute in this case is focused on the meaning of the requirement that wheelchair locations be provided "lines of sight comparable to those for members of the general public." The language of this section has not changed since the regulations implementing the ADA were effective. What *has* changed dramatically is the movie theater industry's standard design. See Cinemark Exh. B ¶ 4; Exh. D ¶ 11.

**B. Stadium-Style Movie Theaters**

In 1995, four years after promulgation of Standard 4.33.3, Cinemark began operating stadium-style movie theaters. See Cinemark Exh. B ¶ 4. Stadium-style seating, as the name suggests, has the look and feel of a sports stadium. In Cinemark's stadium-style theaters seating is placed on level tiers with each row/tier elevated approximately 16 inches above the row/tier immediately ahead.. While traditional-style seating is situated on a sloped floor, stadium-style tiers are accessed by stepped, rather than sloped, aisles. Thus, the stadium-style theater design, as

described by Cinemark, "eliminates virtually all obstructions to sight lines caused by lack of visual clearance over patrons seated immediately in front of any particular seat." Id. In other words, viewers in stadium seating have sight lines that are far superior than those found in traditional movie theater seating. As Cinemark admits, however, wheelchair users are denied access to the stadium portion of the theater and its enhanced sight lines that are unobstructed, and are relegated to the front of the theater, in traditional seating that is much closer to the screen (directly in front of and below it) and not elevated off the floor. Id. ¶ 5.[1]

Long before the challenged Department of Justice actions at issue, and indeed even prior to the commencement of the Department of Justice's investigation of Cinemark's theaters, individuals in wheelchairs and disability advocacy groups complained to Cinemark about the wheelchair placements in its stadium-style theaters, and at least one group of plaintiffs filed a lawsuit claiming that those placements violate the ADA. Id. ¶¶ 7-9. In that lawsuit, Cinemark's El Paso stadium-style theater was found to violate Title III of the ADA. See Lara v. Cinemark USA, 1998 WL 1048497, *2 (W.D. Tex. Aug. 21, 1998). The Court concluded that Cinemark's design fails to provide wheelchair users lines of sight that are comparable, instead forcing them to choose between sitting in craned-neck discomfort in the front of the theater (the "worst seats in the house") or foregoing movies. Id. Most of Cinemark's auditoria across the country use designs that are almost identical to those challenged in Lara. See Cinemark Exh. B ¶ 5.

[1]To the extent Cinemark's affiant testifies that wheelchair users have "unobstructed" lines of sight, see Cinemark Exh. B. ¶ 5, that iscontradictedbyhis prior testimony that stadium-style seating eliminates obstruction that would be present in non-stadium seating. See id. at ¶ 4. Both of these statements cannot be true.Instead, Cinemark's own designs graphically demonstrate that wheelchair seating locations, placed on the floor and not on the risers, are provided obstructed sight lines. See United States' Exhibit 2.

### C. Department of Justice Actions Relating to Standard 4.33.3

In July 1998, shortly before the court issued its judgement in Lara, the United States filed an amicus brief in that case offering its interpretation of Standard 4.33.3 as applied to the stadium-style theaters in dispute. See Cinemark Exh. M.[2] Cinemark describes this brief as "final agency rule concerning the placement of wheelchair seating in areas of public assembly." Cinemark Br.at 10. See also id. at 10-20 (referring to brief as "Lara rule"). The brief does not purport to be a rule, however, and Cinemark's characterization assumes that the legal arguments it advances in this motion will prevail.[3] Nor does the Lara brief purport to"create[]new construction requirements" for stadium-style theaters. See Cinemark Br. at 10. Instead, the operative portion of that brief reads as follows:

> Once measured, the lines of sight provided to wheelchair users must be comparable to those provided to members of the general public. "Comparable" is an ordinary word used in everyday parlance. Grider v. Cavazos, 911 F.2d 1158, 1161-62 (5th Cir. 1990) (courts forbidden from tampering with plain meaning of words in ordinary lay and legal parlance). Webster's defines "comparable" as "capable of or suitable for comparison; equivalent; similar." Webster's Ninth New Collegiate Dictionary (1990) (emphasis added). Consistent with this practical definition, the Department of Justice interprets the language in the Standards requiring "lines of sight comparable to those for members of the general public" to mean that in stadium style seating, wheelchair locations must be provided lines of sight in the stadium style seats within the range of viewing angles as those offered to most of the general public in the stadium style seats, adjusted for seat tilt. Wheelchair locations should not be relegated to the worst sight lines in the building, but neither do they categorically have to be the best. Instead, consistent with the overall intent of the ADA, wheelchair users should be provided equal access so that their experience equates that of members of the general public. In other words, to ensure that wheelchair users are provided lines of sight

[2]Although the Department of Justice brief was filed prior to the court's order, the court did not rely on the Department of Justice's views in ruling against Cinemark, finding that Cinemark's theaters violated the ADA and Standard 4.33.3 on their face. See Cinemark Exh. O, Order Denying Def.'s Mot. for Delay Ending Discovery. Cinemark's further statement that the Lara court ordered it to retrofit its theaters "in accordance with the Lara rule" is similiary inaccurate. See Cinemark Br. at 11. The Lara court did not hear from or rely on the Department of Justice in fashioning a remedy. See Cinemark Exh. O, Order Awarding Damages and Granting Injunctive Relief.

[3] The Lara brief is undisputedly a brief .Whether it is a rule, and if so what type, is for the Court to determine.

that are comparable to the viewing angles offered to the general public, the lines of sight provided to wheelchair users should not be on the extremes of the range offered in the stadium.

See Cinemark Exh. M at 8-9. Notably, nowhere in the Lara brief or anywhere else did the Department of Justice say that wheelchair locations "must take into account certain viewing angle 'discomfort thresholds,'" see Cinemark Br. at 10, let alone "a 'discomfort threshold' of thirty-five degrees as the maximum for viewing positions." Id. at 15.[4] Indeed, the Lara brief does not urge the court to adopt any required minimum or maximum fixed angle, let alone an angle of thirty-five degrees. See Cinemark Exh. M. The regulatory requirement for "lines of sight comparable" instead requires in every case a comparison between lines of sight for wheelchair users and lines of sight for the rest of the public. See Cinemark Exh. P at 1 (fixed measurement "would conflict with the relevant language of the ADA and its implementing regulation").

Prior and subsequent to the filing of the Lara brief, the Department of Justice has engaged in settlement negotiations with various theater owners in which the Department of Justice has attempted to enforce Standard 4.33.3, consistent with its interpretation as set forth above.[5] See, e.g., Cinemark Exhs. P, R. No evidence is presented, however, nor is there any, that the Department of Justice has made any official pronouncements on Standard 4.33.3 that interpret that

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[4]This is only one example — there are at least four — of an instance where Cinemark's brief purports to quote language from a document that does not contain any such language. See also Cinemark Br. at 10 ("industry-wide"), 11 ("better than median"), 11 ("less than 35 degrees"). Nor is it a case of merely mistyping words but accurately reflecting ideas; as shown in the text above, the ideas Cinemark suggests are represented in these documents do not so appear. Cinemark's "factual" recitations should therefore be read skeptically.

[5]The Defendant included only excerpts of a settlement agreement in Arnold, et al. v. United Artists Theatre Circuit and then misrepresented that the agreement "placed no restriction on the location of wheelchair placements in small movie theaters..." Cinemark Br. at 8, ¶16. The United States encloses a complete copy of the agreement, demonstrating that such restrictions are included. See e.g., §§ 3.1.1; 3.1.4; 4.4; 5.1.2; 5.3.2 of United States' Exhibit 3.

regulation differently than in the Lara brief as applied to stadium-style theaters.[6]

## IV. ARGUMENT

### A. The Interpretation of Standard 4.33.3 in the Lara Brief is a "Quintessential Example" of an Interpretive Rule Exempt from Notice and Comment Requirements

Under the APA, notice-and-comment rulemaking is not required for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A).[7] Interpretive rules are those rules or statements that are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." Shalala v. Guernsey Mem. Hosp., 514 U.S. 87, 99 (1995) (internal quotation marks omitted). As such, interpretive rules "explain[] what the more general terms of the Act and regulations already

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[6]Another incorrect factual assertion relates to Cinemark's claims that the Department of Justice had, until the Lara brief, consistently informed that the "exception" in Standard 4.33.3 applied to auditoria with a floor slope of greater than five percent (and therefore applied to Cinemark's theaters). Cinemark Br. at 7, ¶ 15. In support of its self-serving construction of the Department's position, Cinemark relies on two affidavits, Def. App. Ex. D and E, to establish that a staff attorney made oral statements in 1991 supporting NATO's and Cinemark's reading of Standard 4.33.3. Even if the statements were made, they clearly could not have constituted official interpretations of the Department's position, and it is unreasonable for Cinemark or NATO to rely upon them. See e.g., Heckler v. Community Health Services, 467 U.S. 51, 65 (1984); Schweiker v. Hansen, 450 U.S. 785, 788 (1981) (per curiam).

More substantively, the facts concerning events since the time of the speech do not support Cinemark's assertions. On December 9, 1991, NATO informed its members that Standard 4.33.3 "applies only to balconies and mezzanines and was never intended to apply to the primary seating area in a public seating area." United States' Exhibit 4 at 2. Further, since the alleged Kaltenborn speech NATO has contacted the Department of Justice repeatedly regarding the exception language and urged that the Department adopt NATO's position. United States' Exhibit 5. Surely, if NATO and its members, including Cinemark, had believed that the Department officially endorsed their reading of the section 4.33.3 exception to the wheelchair seating dispersal, there would have been no need for the letters requesting meetings on the subject.

NATO itself has rejected Cinemark's contention that "comparable lines of sight" is relevant only to "degrees of obstruction." Since January, 1994, it has been NATO's position that Standard 4.33.3 "is included to ensure that wheelchair patrons are not always placed in the worst seats in an auditorium." United States' Exhibit 6 at 3. While Cinemark has relied on NATO affiants, it failed to rely on NATO's position when constructing its theaters.

[7]As a threshold matter, the Lara brief, and the interpretation within it, is not even "final agency action" subject to challenge under the APA. See United States' Motion to Dismiss Counterclaim, filed Nov. 17, 1999 (pending). The only federal district court to issue a decision on this issue agrees. See AMC decision attached hereto as United States' Exhibit 7. The Magistrate Judge's recommendation to which Cinemark refers, see Cinemark Br. at 3, is still pending before the Northern District of Texas, along with the United States' objections to that recommendation.

provide." Your Home Visiting Nurse Servs. v. Secretary of Health and Human Servs., 132 F.3d 1135, 1139 (6th Cir. 1997), aff'd, 525 U.S. 449 (1999) (internal quotation marks omitted). Thus, although distinguishing interpretive rules from other agency actions has sometimes been described as a difficult process, the most basic truth about an interpretive rule is that it is one that "states what the administrative agency thinks the statute means." Friedrich v. Secretary of Health & Human Servs., 894 F.2d 829, 834 (6th Cir. 1990) (citation omitted).

The agency action at issue here is the Lara brief,[8] in which the Department of Justice explicitly stated that the purpose of the brief was to "provide the Court with the United States' interpretation" of the ADA and Standard 4.33.3. Cinemark Exh. M at 2. Furthermore, the most important part of the brief was a statement interpreting the phrase "lines of sight comparable," and in particular defining the word "comparable," in Standard 4.33.3 as applied to stadium-style theaters. Cinemark Exh. M at 8. Classifying this brief as interpretive is simple. An interpretation of generally applicable regulatory language (Standard 4.33.3) to a particular set of facts (stadium-style theaters) is exactly the type of agency action that this Circuit has said cannot be determined to be a legislative rule requiring notice and comment. See Friedrich, 894 F.2d at 837; see also Guernsey Mem. Hosp., 514 U.S. at 99. Instead, it is a statement seeking to interpret a regulatory provision — "the quintessential example of an interpretive rule." Orengo Caraballo v. Reich, 11 F.3d 186, 195 (D.C. Cir. 1993).

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[8]To the extent Cinemark argues that the Department has subsequently further modified or clarified the interpretation set forth in the Lara brief, see Cinemark Br. at 11, that argument is based solely on inadmissible (or non-existent) evidence and should be disregarded. See United States' Motion to Strike, filed contemporaneously with this brief, at 1-4; see also supra at 6 (noting that, contrary to Cinemark's assertion, nowhere in Lara brief does U.S. say anything about taking into account "discomfort thresholds"). In any event, while Cinemark seeks to cloud the issue by referring to the challenged act as the "Lara rule" it is clear that the focus of its challenge is no more than the interpretation of Standard 4.33.3 set forth in the Lara amicus brief. See Cinemark Br. at 10.

**B. Under Any Accepted Test For Distinguishing Interpretive From Legislative Rules, the Lara Brief Would Be Classified as Interpretive**

Because courts have often stated that the distinction between interpretive rules and legislative rules is "enshrouded in considerable smog," see Friedrich, 894 F.2d at 834, they have employed a variety of analytical tools to help in the task. The D.C. Circuit, in an opinion that has won scholarly praise, summarized these tools in four questions, the answers to which can help determine whether a rule is interpretive. See American Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993); see also Robert A. Anthony, "Interpretive Rules, Legislative Rules and Spurious Rules: Lifting the Smog," 8 Admin. L.J. Am. U. 1, 5, 16-17 (1994) (American Mining opinion is "best judicial expression on the subject"). Those questions are:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

American Mining, 995 F.2d at 1112. Two of these are the questions previously deemed most important by this Circuit as well. See Friedrich, 894 F.2d at 834-35 (citing questions of agency intent and pre-existing legal basis for duties). Thus, answering these questions illuminates the proper characterization of the Department of Justice's statements in the Lara brief.

(1) Standard 4.33.3 provides an adequate legal basis for agency action independent of any statement of its interpretation of that regulation by the Department. It is Standard 4.33.3, and not anything in the Lara brief or any other interpretive document, that requires that wheelchair spaces be provided "lines of sight comparable" to members of the general public. The Lara brief is the Department of Justice's attempt to clarify the application of this requirement to stadium-style

theaters in a particular case, and as such it defines the term "comparable"and provides suggestions as to ways to determine when comparability is achieved. But it does not purport to, nor does it, add new legal duties. The "lines of sight comparable" language of Standard 4.33.3, a valid, legislative rule promulgated after notice and comment and pursuant to a delegation of legislative authority, is the source of any and all relevant rights and duties. See Paralyzed Veterans v. D.C. Arena, 117 F.3d 579, 588 (D.C. Cir. 1997) (specifically holding that "lines of sight comparable" language provides adequate legal basis to ensure performance of duties within meaning of American Mining); see also Lara v. Cinemark USA, 1998 WL 1048497, *2 (W.D. Tex. Aug. 21, 1998) (finding that certain of Cinemark's theaters violate ADA because they do not provide "comparable lines of sight" without mention of Department of Justice's interpretation of Standard 4.33.3).

Cinemark asserts that the only duty created by Standard 4.33.3 is one of dispersal of wheelchair spaces to different locations, and that therefore the Department of Justice's interpretation adds new requirements not present in the rule. See Cinemark Br. at 6. This reading of the regulation is not only contrary to precedent, but also to common sense. The regulation on its face contains several requirements for each wheelchair space in addition to the requirement that wheelchair locations be provided comparable lines of sight: each one is to be "an integral part of any fixed seating plan;" to "adjoin an accessible route;" and to have "at least one companion fixed seat" next to it. See Standard 4.33.3. In addition to these requirements, when seating capacity exceeds 300, wheelchair spaces are to be dispersed in more than one location. Id. None of the other requirements is contingent on the seating capacity exceeding 300, nor could they be. Certainly the drafters of the ADA Accessibility Guidelines ("ADAAG") or the Standards did not

intend that, for example, wheelchair locations in small theaters need not be on an accessible route that serves as an exit. Indeed, Cinemark itself concedes that this requirement applies to theaters of any size. See Cinemark Br. at 18. To read the regulation as Cinemark suggests would be to fail to give effect to any provisions requiring something other than dispersal, a violation of one of the primary tenets of statutory and regulatory construction. See, e.g., FederalExpress v.United States Postal Serv., 151 F.3d 536, 542 (6th Cir. 1998); Silverman v. Eastrich Multiple Investor Fund, 51 F.3d 28, 31 (3d Cir. 1995) (both statutes and regulations should be construed so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another).[9]

The history of the adoption of Standard 4.33.3 confirms that the requirement that wheelchair users be provided comparable lines of sight was always considered to be independent from the requirement that wheelchair seating be dispersed. When the Access Board originally proposed the ADAAG, it included this statement of explanation of Section 4.33.3:

> Section 4.33.3 provides that seating locations for people who use wheelchairs shall be dispersed throughout the seating area and shall be located to provide lines of sight comparable to those for all viewing areas.

56 Fed. Reg. 2296, 2314 (1991) (emphasis added). The final guidelines adopted by the Access Board, in response to comments from the theater industry and others, modified the dispersal requirement such that dispersal would only be required in theaters with seating capacity larger than 300, but left intact the requirement that, in all assembly areas, wheelchair "spaces be situated so as to provide wheelchair users . . . lines of sight comparable to those available to the rest of the

[9]Similarly, the exception language of Standard 4.33.3 is an exception to the dispersal requirement in that regulation, but could not be read as an exception to other requirements for wheelchair spaces such as that they adjoin an accessible route, have companion seats, and be provided comparable lines of sight.

public."  See 56 Fed. Reg. 35,408, 35,440 (1991).  Indeed, the Access Board specifically noted again that the line of sight and dispersal requirements were independent.  See id. at35,418 (noting mandated compliance with "line of sight and dispersion requirements of 4.33.3").[10]

Similarly, the Justice Department's final rule adopting the ADAAG text (including 4.33.3) as its Standards for Accessible Design explicitly treats dispersal and comparable lines of sight as two separate requirements.  While noting in several places that dispersal would only be required in assembly areas with seating capacity over 300, see 56 Fed. Reg. 35,544, 35,586, 35,587, the Standards include the separate, operative language of Standard 4.33.3 requiring provision of comparable lines of sight in all assembly areas.  Furthermore, the Department simultaneously adopted regulations that provide that wheelchair seating in theaters that predated the new construction requirements is to both provide lines of sight comparable to those for members of the general public, see 28 C.F.R. § 36.308(a)(ii)(B), and, in cases where seating capacity exceeds 300, be dispersed throughout the seating area.  See 28 C.F.R. § 36.308(a)(ii)(A); see also 56 Fed. Reg. at 35,572.  Because, as this history shows, the legal duty to provide comparable lines of sight preceded the Lara brief, the refinements of that duty advocated by the Department of Justice are interpretive.  See American Mining, 995 F.2d at 1110.

(2)  The American Mining Court suggested that whether an agency had published a rule in

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[10]Caruso v. Blockbuster-Sony Music Entertainment Centre, 193 F.3d 730 (3d Cir. 1999), is not to the contrary.  The issue in that case (like in Paralyzed Veterans) was whether Standard 4.33.3's "lines of sight comparable" language was sufficiently broad to require lines of sight over standing spectators.  Based on specific regulatory language that seemed to reserve that issue for future regulation, the Third Circuit found that Standard 4.33.3 could not be read as covering that topic.  See Caruso, 193 F.3d at 734-36; but see Paralyzed Veterans, 117 F.3d at 587 (D.C. Circuit reached opposite conclusion).  Cinemark cites no comparable regulatory history in this case, nor is there any, that would support Cinemark's notion that the "lines of sight comparable" language is devoid of meaning in assembly areas where dispersal is not also required.  Thus, the Third Circuit's analysis in Caruso, even if it were correct, would be inapplicable.

the Code of Federal Regulations was indicative of its status as interpretive orlegislative. The Lara brief (even if referred to by Cinemark as a "rule") was not so published.

(3) The question of whether an agency has explicitly invoked its legislative authority in promulgating a rule is simply another way of asking what "label" the agency has itself put on the action in question. See Friedrich, 894 F.2d at 834. In this case, the Lara brief itself uses interpretive language and purports to be an interpretation, not an exercise of legislative authority. See Cinemark Exh. M. That characterization, while not dispositive of the ultimate question of whether the rule is interpretive or legislative, is relevant because it is further evidence that the action in question was not intended to create new rights or duties. See Truckers United for Safety v. FHA, 139 F.3d 934, 939 (D.C. Cir. 1998); American Mining, 995 F.2d at 1112; Friedrich, 894 F.2d at 834-35 (agency's characterization is "important").[11]

(4) Finally, the Lara brief is interpretive because it does not amend any prior legislative rule adopted by the Department of Justice. In this context, the teaching of the D.C. Circuit is instructive:

> A rule does not, in this inquiry, become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted. If that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another.

American Mining, 995 F.2d at 1112. At issue in American Mining was enforcement of a Mine Safety and Health Administration ("MSHA") rule requiring mine operators to report the "diagnosis" of certain occupational injuries. The MSHA issued a letter indicating that it would

[11]Contrary to Cinemark's suggestion, see Cinemark Br. at 13-14, neither this Circuit nor the D.C. Circuit considers the agency's own label of its action to be irrelevant in determining whether a particular action is interpretive or legislative. Cf. State of Ohio Dep't of Human Servs. v. United States Dep't of Health & Human Servs., 862 F.2d 1228, 1234 (6th Cir. 1988) (agency characterization "relevant" but not dispositive)..

consider a chest x-ray of a miner that showed at least a certain level of evidence of disease (on a 12-step scale) to constitute a "diagnosis" for purposes of that rule. The court found this to be an interpretation of the diagnosis requirement, and not an amendment of it. See id. at1107-08, 1112-13. The same is true here. The Department of Justice stated that it views the "lines of sight comparable" language as requiring provision of lines of sight that are "within the range" of those provided to most other patrons and neither the worst nor the best. While this is more detailed than Standard 4.33.3, that does not mean it is not interpretive. See also Orengo Caraballo, 11 F.3d at 195 ("mere paraphrase would hardly be interpretive at all").

Relying exclusively and extensively on alleged prior interpretations of Standard 4.33.3 by the Department of Justice, Cinemark contends that the Lara brief is legislative because it marks a "clear change" from preexisting law. See Cinemark Br. at 7-9, 17-18. This contention is both legally and factually flawed. As a legal matter, interpretive rules need not merely "restate consistent agency practice." Orengo Caraballo, 11 F.3d at 196. An agency can change its interpretation of an existing statute or legislative rule at any time. An otherwise interpretive rule, even when representing such a change, does not require notice and comment unless it is inconsistent with another rule having the force of law, not just any agency interpretation regardless of whether it had been codified. See Warder v. Shalala, 149 F.3d 73, 81-82 (1st Cir. 1998)(citing cases); see also Guernsey Mem. Hosp., 514 U.S. at 100.[12]

Regardless, as a factual matter, the Lara brief is not inconsistent with prior interpretations of Standard 4.33.3. First of all, there are no such prior interpretations in the context of stadium-

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[12]The cases cited by Cinemark are to the same effect. See, e.g., Phillips Petroleum Co. v. Johnson, 22 F.3d 616, 619 & n.3 (5th Cir. 1994) (rule required notice and comment because inconsistent with existing legislative rule); National Family Planning & Reproductive Health Ass'n v. Sullivan, 979 F.2d 227, 235, 239 (D.C. Cir. 1992) (same).

style theaters. As Cinemark itself acknowledges, prior to 1998 the Department of Justice had never interpreted Standard 4.33.3 in the context of stadium-style theaters. See Cinemark Exh. L ¶ 5. The "historical pronouncements" on which Cinemark places such importance date to an era when stadium-style theaters did not even exist. See Cinemark Br. at 7. But as agencies can apply existing regulations to new facts without engaging in rulemaking at all, see, e.g., Guernsey Mem. Hosp., 514 U.S. at 96, they cannot be bound by interpretations that may have been developed before those facts even existed. Similarly, the primary "pronouncement"on which Cinemark relies — an alleged oral statement from April 1991 — pre-dates the promulgation of Standard 4.33.3. See Cinemark Br. at 7, 18. Obviously, even if this reported oral statement were otherwise worthy of credence, the Department of Justice cannot be bound by alleged interpretations that pre-date the authority being interpreted.

Furthermore, even if one believed Cinemark's "historical pronouncements" occurred and were relevant, they are not inconsistent with the Lara brief. The gravamen of Cinemark's position is that it believes the Department of Justice said that in theaters of fewer than 300 seats, the dispersal requirement did not apply and thus wheelchair locations could be in a single, integrated location. See Cinemark Br. at 7. The Lara brief does not contradict that, nor does the Department of Justice dispute that there is no dispersal requirement for such theaters. But nowhere does Cinemark suggest that the Department of Justice ever said that the single, integrated location could be placed without regard to comparability of lines of sight; that may have been Cinemark's wish or assumption, but it was without foundation.[13]

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[13]Similarly without foundation is any expectation by Cinemark arising out of the Department of Justice's certification that the Texas Accessibility Standards — the state accessibility code of Texas — meet or exceed the
(continued...)

Nor does the Lara brief create any "new" requirements. The three requirements Cinemark claims are new are that wheelchair spaces must be in the stadium-style seats, must provide lines of sight within the range of those provided the general public, and must take into account viewing angle "discomfort thresholds." See Cinemark Br. at 10. Taking them in reverse order, the last of the three, as noted earlier, is something Cinemark made up. See supra at 6-7. The second is merely a way of describing what the "lines of sight comparable" language always provided. See Cinemark Exh. M at 8. And as to the first, Standard 4.33.3's requirements that wheelchair locations be an integral part of a fixed seating plan and be provided lines of sight "comparable" to those for members of the general public surely encompass a duty to provide wheelchair users the same basic product (i.e., stadium seating) offered to everyone else, especially when that product's primary purpose is to improve sight lines.

Finally, Cinemark can take no solace from the fact that the Architectural and Transportation Barriers Compliance Board ("Access Board") has recently proposed amending its Section 4.33.3 as part of a revision of the entire ADAAG, and has submitted those proposed revisions for notice and comment. The Access Board continued to make clear in its proposed rule, consistent with the Department of Justice's interpretation, that the "lines of sight comparable" requirement is a separate requirement from the dispersal requirement, and applies in assembly

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[13](...continued)
standards of the ADA. As ADA regulations make clear, the Department of Justice can and does certify that state codes meet ADA standards, but it cannot and does not say anything about a state or local government official's application or interpretation of that code. See 28 C.F.R. pt. 36, App. B at 668 ("the fact that the Department has certified the code itself will not stand as evidence that [an approved] facility has been constructed or altered in accordance with the minimum accessibility requirements of the ADA"). Indeed, the City of El Paso's Department of Public Inspection, which is a TAS Plan Review Municipal Contract Provider, specifically states on its cover form granting "conditional approval" of Cinemark's El Paso theater: "This determination does not address applicability of the Americans with Disabilities Act (ADA)." Cinemark Exh. B.

areas of all sizes. See 64 Fed. Reg. 62,248, 62,277 (2d. col.) (1999). The Access Board also announced that it would consider including specific requirements consistent with the Department of Justice's interpretation of Standard 4.33.3 as part of a legislative rule. Id. at 62,278. But the fact that an agency can adopt requirements via a legislative rule does not mean that an agency must do so. On the contrary, agencies are free to use notice and comment procedures incases in which t hey are not required by the APA. See, e.g., Hoctor v. United States Dep't of Agric., 82 F.3d 165, 171-72 (7th Cir. 1996); American Postal Workers Union v. United States Postal Serv., 707 F.2d 548, 565 (D.C. Cir. 1983). The Access Board's discussion of the Department of Justice interpretation therefore says nothing about whether the interpretation is itself legislative or interpretive.

### C. The Analytical Methods Suggested by Cinemark Are Not Accepted Bases for Distinguishing Interpretive From Legislative Rules

Cinemark's brief does not, for the most part, address any of the modes of analysis cited above that this Circuit and the D.C. Circuit have employed to define interpretive rules and distinguish them from other agency actions. Instead, Cinemark suggests that the Lara brief is legislative, and not interpretive, because it creates a "binding norm," because it has been enforced by the Department of Justice, and because it "eliminates agency discretion." See Cinemark Br. at 14-17. Courts, however, have specifically rejected the notion that any of these factors are relevant to the question of whether a rule is interpretive.

First, whether a rule creates a "binding norm," "eliminates agency discretion," or uses mandatory language "tells one little about whether a rule is interpretive." American Mining, 995 F.2d at 1111. As the D.C. Circuit explained, the inquiry as to whether a rule creates a binding

effect arose in the context of attempting to distinguish legislative rules from policy statements, not legislative and interpretive rules. Id.; see also Ryder Truck Lines v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983). Policy statements and interpretive rules, although both exempt from notice and comment requirements, are different types of agency actions, and what distinguishes one from a legislative rule does not similarly distinguish the other. See Attorney General's Manual on the Administrative Procedure Act (1947), at 30 n.3. In particular, while policy statements are not binding, do not eliminate agency discretion, and do not use mandatory language, "[a]gencies may permissibly attempt to make their interpretive rules binding upon private parties without having issued them through notice-and-comment procedures." Anthony, "Lifting the Smog," 8 Admin. L.J. Am. U. at 12. Thus, the "two-part test" that Cinemark invents has no application to the question before this Court.

Second, the fact that the Department of Justice has attempted to enforce compliance with Standard 4.33.3, and has done so in a manner consistent with its interpretation of that rule as set forth in the Lara brief, does not change the proper characterization of the Lara brief under the APA. Instead, as one commentator has explained:

> an agency can attempt to make an interpretive document binding upon private parties as a practical matter. The agency does this in the course of taking action — typically, initiating an enforcement proceeding or passing upon an application — based on the interpretive rule it has adopted. For purposes of that action, the agency treats the document as determinative of the interpretive issue in question. In this way, the agency has attempted to make the document binding in a practical sense, since affected private parties must abide by it or get the courts to set it aside. This is a normal use of interpretive rules, and there are important theoretical and practical reasons that interpretive rules so used come within Section 553's exemption from notice-and-comment requirements.

Anthony, "Lifting the Smog," 8 Admin. L.J. Am. U. at 12-13 (emphasis added). A court is, of course, free to adopt a different interpretation, and thus the agency's action is not legally binding.

Nor, in this respect, does it matter that the agency's interpretation is entitled to some deference from a court. Cf. Cinemark Br. at 16. It is well-established that courts defer to the reasonable interpretations of agencies, and such deference does not transform an otherwise interpretive rule into a legislative rule. See Guernsey Mem. Hosp., 514 U.S. at 94-95, 99 (Court defers to agency interpretation it describes as "prototypical example" of interpretive rule).

Cinemark also cites several random cases in which courts found the rules before them to be legislative in nature, but fails to explain how any of those cases is similar to this one. See Cinemark Br. at 18-20. In fact, the obvious differences further emphasize why the Lara brief is interpretive. For example, in National Family Planning, the court was faced with a “unique”set of circumstances: an agency that had promulgated a legislative rule interpreting a statute as barring abortion counseling by health care professionals, and that had defended exactly that interpretation of the rule to the Supreme Court, subsequently suggested that the proper interpretation was that doctors were exempt from the ban. See National Family Planning, 979 F.2d at 231-34, 236. Here, on the contrary, there is no allegation that the Department of Justice has ever taken an official position, and certainly not to the Supreme Court, that lines of sight provided to wheel chair users in theaters need not be comparable to those provided to the general public. Indeed, the only court to interpret Standard 4.33.3 in this context has interpreted the regulation the same way the Department of Justice does, see Lara, 1998 WL 1048497, at *2, further distinguishing this case from National Family Planning. See 979 F.2d at 234, 236.

Similarly unhelpful to Cinemark are Hoctor and American Frozen Food Inst. v. United States, 855 F. Supp. 388, 396 (Ct. Int’l Tr. 1994). In each of these cases, the courts found that specific numerical requirements which purported to be interpretations of more general

requirements were in fact legislative because of their specificity. Thus, for example, the Seventh Circuit said that an 8 foot fence requirement was not an interpretation of a regulation requiring "secure" containment, because it was no more drawn from the language of the regulation than would have been a 7 or 9 foot fence. See Hoctor, 82 F.3d at 170. No analogous circumstances exist here. Despite Cinemark's unsupported (and false) statements to the contrary, the Department of Justice has never suggested that the duty to provide "lines of sight comparable" requires wheelchair spaces to be provided lines of sight at or below any particular viewing angle. Compare Cinemark Br. at 10, 11, 15 (implying Department of Justice insists on viewing angles of better than 35 degrees) with Cinemark Exh. P at 1 (noting that Department of Justice cannot agree to settlement which provides fixed viewing angles for wheelchair spaces). Rather, the Department's interpretation is merely that comparable means similar, or within the range provided to others. If an entire theater provided vertical lines of sight only between 50 and 60 degrees, wheelchair spaces with vertical sight lines between 50 and 60 degrees would be comparable notwithstanding the fact that they, like every other seat in the theater, would have sight lines greater than 35 degrees that would cause viewers great discomfort. Hoctor and similar cases, therefore, have no relevance here.[14]

## V. CONCLUSION

For these reasons, Cinemark's Motion For Summary Judgment should be denied.

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[14]Furthermore, a rule that provides numerical absolutes as an interpretation of a more general requirement is not necessarily legislative. See, e.g., St. Francis Health Care Centre v. Shalala, 10 F. Supp.2d887,889-90, 894 (N.D. Ohio 1998); see also Hoctor, 82 F.3d at 171; American Mining, 995 F.2d at 1112-13.

Respectfully submitted,

BILL LANN LEE
Acting Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH, Chief
L. IRENE BOWEN, Deputy Chief
Disability Rights Section

Dated: February 14, 2000

_____________________________
EDWARD MILLER
PHYLLIS M. COHEN
Trial Attorneys
Disability Rights Section
Civil Rights Section
U.S. Department of Justice
Post Office Box 66738
Washington, D.C. 20035-6738
Telephone: (202) 514-3882
Facsimile: (202) 305-9775

Counsel for Plaintiff

United States of America

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1(g)

As of today's date this case has not been assigned a particular track for case management purposes. I hereby certify that this memorandum does not exceed twenty(20) pages and therefore complies with the page limits for unassigned cases contained in Local Rule 7.1(g).

Dated: February 14, 2000

EDWARD MILLER

CERTIFICATE OF SERVICE

I hereby certify that today I served copies of Plaintiff United States' Brief in Opposition to Defendant's Motion for Summary Judgment, together with the Exhibits to that Brief, upon Defendant's counsel in the above matter, via prepaid Federal Express overnight mail, to the following address:

Laura M. Franze, Esquire
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1700 Pacific Avenue, Suite 4100
Dallas, Texas 75204-4675

A courtesy copy was also sent to the following address by first class mail:
Mary Adele Springman, Esquire
Millisor & Nobil Co., L.P.A.
1228 Euclid Avenue, Suite 840
Cleveland, Ohio 44115-1802

DATED: February 14, 2000

EDWARD MILLER
Trial Attorney
Disability Rights Section
Civil Rights Division
U. S. Department of Justice
P. O. Box 66738
Washington, D.C. 20035-6738
(202) 514-3442