

HARMFUL ERROR: HOW THE COURTS’ FAILURE TO APPLY THE HARMLESS ERROR DOCTRINE HAS OBSTRUCTED THE ADA’S STANDING SPECTATORS RULE

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INTRODUCTION

The Americans with Disabilities Act (ADA)¹ requires places of public accommodation—like sports stadiums—to make themselves accessible to patrons with disabilities.² Stadiums must, for example, provide adequate designated parking and make sure ticket windows, concession stands, and bathroom sinks are easy to reach.³ They must also install ramps and elevators so that people who use wheelchairs for mobility⁴ can get to their seats.⁵ Those seats must be designed and distributed so that their users have an experience comparable to any-

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1. 42 U.S.C. §§ 12101–12213 (2000 & Supp. V 2005).
2. 42 U.S.C. § 12182(a), (b)(2)(A)(iv).
3. 28 C.F.R. pt. 36, app. A §§ 4.1–7.4 (2008).
4. The authors use the terms “person with a disability” and “uses a wheelchair” or “uses a wheelchair for mobility” throughout this article. *See, e.g.*, Laura F. Rothstein, *Don’t Roll In My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act*, 19 REV. LITIG. 399, 401 & n.5 (2000). This “people-first” language is considered more respectful than the disfavored “disabled person” or “wheelchair-bound.” *Id.*; *see also* Kathie Snow, *People First Language*, DISABILITY IS NATURAL, Jan. 2008, at 3, *available at* <http://disabilityisnatural.com/documents/PFL8.pdf> (“If people with disabilities are to be included in all aspects of society, and if they’re to be respected and valued as our fellow citizens, we must stop using language that sets them apart and devalues them.”).
5. 28 C.F.R. pt. 36, app. A §§ 4.8, 4.10.

one else who paid the price of admission.⁶ Despite all these accommodations, the experiences of many persons with disabilities retain one fundamental difference from the experiences of patrons without disabilities: When other spectators stand up, individuals who use wheelchairs cannot see.

Robert Miller, “a big fan of NASCAR,”⁷ regularly experiences line of sight obstructions while attending sporting events. Miller attends three to six races at the California Speedway⁸ per year, and has done so since the Speedway opened over a decade ago, in 1997.⁹ He is also a person with a disability who watches the races from his electric wheelchair, which means that “[w]hen the fans immediately in front of Miller stand during the most exciting parts of the race, they block his view of the action.”¹⁰ Miller sued the Speedway, claiming that its failure to provide him an unobstructed view violated Title III of the ADA and a Department of Justice regulation requiring that wheelchair areas “provide people with physical disabilities . . . lines of sight comparable to those for members of the general public.”¹¹ In the latest case to address whether this Department of Justice regulation is valid, the District Court for the Central District of California sided with the Speedway on summary judgment,¹² but the Ninth Circuit reversed, joining the D.C. Circuit and a Minnesota District Court in holding that the DOJ’s regulation requires lines of sight over standing spectators.¹³ The Ninth Circuit thus rejected the position of the Third Circuit and its own Oregon District Court, which have held that the standing spectator rule is unenforceable for lack of notice and comment.¹⁴

6. *Id.* § 4.33.3.

7. *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1023 (9th Cir. 2008), *cert. denied*, 77 U.S.L.W. 3369 (U.S. Feb. 23, 2009).

8. The California Speedway is a racetrack and stadium facility that hosts NASCAR and other events. As a public accommodation built for first occupancy after January 26, 1993, the California Speedway is subject to Title III of the ADA. *See* 42 U.S.C. § 12183(a)(1) (2000).

9. *Miller*, 536 F.3d at 1023.

10. *Id.* at 1023.

11. *Id.* at 1024 (citing 42 U.S.C. §§ 12181–12213 (2000 & Supp. V 2005) and 28 C.F.R. pt. 36, app. A, § 4.33.3).

12. *Miller v. Cal. Speedway Corp.*, 453 F. Supp. 2d 1193 (C.D. Cal. 2006).

13. *Miller*, 536 F.3d at 1032–33; *see Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997); *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1269 (D. Minn. 1997).

14. *Miller*, 536 F.3d at 1024; *see Caruso v. Blockbuster-Sony Music Entm’t Ctr. at the Waterfront*, 193 F.3d 730, 736–37 (3d Cir. 1999); *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 742–43 (D. Or. 1997).

This Article will argue that the harmless error doctrine would resolve, both retroactively and prospectively, the circuit split in dealing with the standing spectators dilemma: Sports arenas must provide sightlines over standing spectators despite what may be a technical violation of the Administrative Procedure Act (APA). This clear resolution would avoid significant confusion among plaintiff wheelchair users, defendant sports arenas, and courts alike. Part I will briefly discuss the purpose and substance of the ADA with a focus on Title III. Part II will present the Architectural and Transportation Barriers Compliance Board's (Access Board's) Section 4.33.3 and the Department of Justice's (DOJ's) Standard 4.33.3—which both lay out sightline requirements—and their history. Part III will provide an overview of the standards of review applied in assessing whether or not a court should defer to an administrative agency's interpretation of its own regulation. Part IV will review the split in circuits on the issue of deference to the DOJ's interpretation of Standard 4.33.3 and thereby the split on whether stadiums must provide lines of sight over standing spectators. Part V will explain the harmless error doctrine and how, if it had been applied, courts would have consistently concluded that they should defer to the DOJ's requirement of lines of sight over standing spectators.

I.

TITLE III OF THE AMERICANS WITH DISABILITIES ACT

Four years prior to the passage of the ADA, the first nationwide poll of people with disabilities (the Harris survey) found that, while half of all adult Americans had attended a sporting event in the past year, only one-third of people with disabilities had ever attended a sporting event.¹⁵ The Harris survey cited two major reasons why people with disabilities experienced isolation and chose not to participate in ordinary activities: not feeling welcome and the lack of safe access to public facilities.¹⁶ Since 1964, federal law has prohibited discrimination on the basis of race, color, national origin or religion in places of public accommodation.¹⁷ Yet prior to the passage of the ADA, a

15. LOUIS HARRIS & ASSOC., *THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM* 3 (1986).

16. *See id.*, at 63–64; Robert L. Burgdorf, Jr., “*Equal Members of the Community*”: *The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 *TEMP. L. REV.* 551, 554 (1991) (explaining that the Harris survey revealed that “[d]isturbingly large numbers of those with disabilities either do not feel welcome or feel that it is physically unsafe to attend or visit ordinary places open to the public for socializing, doing business, recreation, or engaging in other major societal activities”).

17. 42 U.S.C. § 2000a(a)–(b) (2000 & Supp. V 2005).

place of public accommodation could discriminate with impunity against individuals with disabilities.¹⁸

The ADA, enacted in 1990 and amended in 2008,¹⁹ is the most sweeping civil rights legislation for people with disabilities ever passed.²⁰ Modeled after the 1964 Civil Rights Act,²¹ the ADA casts the claims of people with disabilities in the form of guaranteed rights.²² People with disabilities could then present their claims as imperatives as opposed to mere policy preferences.²³ When President George H. W. Bush signed the ADA into law, he declared:

18. See 42 U.S.C. § 12101(a) (amended 2009):

“(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities[.]”

Instances of disability discrimination prior to the passage of the ADA are too many to enumerate, though the court in one case discussed below did make the following observation: “Even before Congress enacted the ADA, it was comparatively rare for the owner of a public accommodation to stand on the front steps of the building holding a sign which read ‘no wheelchairs allowed.’ No sign was necessary. The imposing row of steps in front of the building already communicated the message that persons in wheelchairs were not welcome.” *Indep. Living Res.*, 982 F. Supp. at 733.

19. The ADA Amendments Act (ADAAA), which became effective January 1, 2009, was enacted to “restore the intent and protections of the Americans with Disabilities Act of 1990.” Pub. L. No. 110-325, 122 Stat. 3553. The ADAAA rejects the Supreme Court’s more limited definitions of “disability” in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), both of which had “narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.” Pub. L. No. 110-325, 122 Stat. 3553 § 2(a)(4)–(5) (found by Congress, but not codified).

20. Cf. *A Law for Every American*, N.Y. TIMES, July 27, 1990, at A26 (calling the ADA the “most sweeping anti-discrimination measure since the Civil Rights Act of 1964.”).

21. See Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377, 386 (2000); Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1808–09 (2005).

22. See 42 U.S.C. §§ 12101–12213 (2000 & Supp. V 2005).

23. Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L., 19, 36 (2000).

[The ADA] will ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, and the opportunity to blend fully and equally into the rich mosaic of the American mainstream. Legally, it will provide our disabled community with a powerful expansion of protections and then basic civil rights. . . . Let the shameful wall of exclusion finally come tumbling down.²⁴

Congress further made clear the sweeping intent of the ADA in stating that the Act would “bring individuals with disabilities into the economic and social mainstream of American life.”²⁵

One of the ADA’s five major sections directly relates to the accessibility of public accommodations to people with disabilities;²⁶ Title III of the ADA prohibits places of public accommodation from discriminating against people with disabilities.²⁷ This Title was passed in response to reports that “an overwhelming majority of individuals with disabilities lead isolated lives and do not frequent places of public accommodation.”²⁸ Of particular note, Congress found alarming the extent to which individuals with disabilities did not participate in social and recreational activities.²⁹

Title III provides 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 person who owns, leases (or leases to), or operates a place of public accommodation.”³⁰ It applies to those private entities that both affect commerce and provide public accommodations.³¹ Twelve categories of private entities—explicitly including stadiums—qualify as public accommoda-

24. President George H. W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), *available at* <http://www.eeoc.gov/ada/bushspeech.html>.

25. S. REP. NO. 101-116, at 58 (1989); H.R. REP. NO. 101-485, pt. II, at 22 (1990).

26. The five titles of the ADA are: Title I – Employment; Title II – Public Services; Title III – Public Accommodations and Services Operated by Private Entities; Title IV – Telecommunications; and Title V – Miscellaneous Provisions. 42 U.S.C. §§ 12111–12213; 47 U.S.C. § 225 (2000 & Supp. V 2005); *see also* Pub. L. No. 110-325, 122 Stat. 3553 (dividing the ADA into the five titles).

27. 42 U.S.C. § 12182.

28. H.R. REP. NO. 101-485, pt. 2, at 34 (1990).

29. *Id.* (“The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events.” (quoting NAT’L COUNCIL ON DISABILITY, IMPLICATIONS FOR FEDERAL POLICY OF THE 1986 HARRIS SURVEY OF AMERICANS WITH DISABILITIES 37 (1988))).

30. 42 U.S.C. § 12182(a).

31. 42 U.S.C. § 12181(7).

tions under Title III.³² Therefore, stadiums must not discriminate against customers with disabilities and must ensure that those individuals enjoy the same goods, services, facilities, privileges, advantages or accommodations as individuals without disabilities. In general, Title III guarantees that people with disabilities who use public accommodations will have an experience that is “functionally equivalent” to that of people without disabilities, “to the extent feasible given the limitations imposed by [each] person’s disability.”³³ Ready access and usability by individuals with disabilities are essential components of functional equivalence except where such access and usability are shown to be “structurally impracticable.”³⁴

II.

FROM SECTION 4.33.3 TO STANDARD 4.33.3

In order to implement the ADA’s general requirements, Congress directed the Department of Justice (DOJ) to issue regulations “that include standards applicable to facilities” covered by Title III.³⁵ But

32. 42 U.S.C. § 12181(7)(A)–(L).

“(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.” *Id.*

33. *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 733 (D. Or. 1997).

34. 42 U.S.C. § 12183(a)(1) (2000). These accessibility and usability requirements apply only to facilities built for first occupancy after January 26, 1993. *Id.*

35. 42 U.S.C. § 12186(b) (2000).

before the DOJ could issue its regulations, it was required by law to wait for the Access Board, a federal agency created by Congress in the 1970's, to draft guidelines on the subject.³⁶ The DOJ regulations had to “be consistent with the minimum guidelines and requirements issued by” the Access Board.³⁷ The ADA directed the Access Board to include in those guidelines additional requirements to ensure that buildings and facilities are accessible to individuals with disabilities, in terms of architecture and design.³⁸

A. The Access Board's Guidelines: Section 4.33.3

In January of 1991, the Access Board drafted the language of Section 4.33.3—on the particular topic of wheelchair seating—as part of its proposed accessibility guidelines.³⁹ The Board noted three issues for facilities to address when placing wheelchair seating: making the seating part of the fixed plan; integrating the seating throughout the seating area (the dispersal requirement); and providing “lines of sight comparable to those for all viewing areas.”⁴⁰ As the Access Board proposed Section 4.33.3, it also issued a public notice inviting comments about whether or not Section 4.33.3 should require full lines of sight over standing spectators.⁴¹ The notice highlighted the partial inadequacy of the dispersal requirement: while dispersal would likely provide adequate lines of sight for theaters and concert halls, it might “not suffice in sports arenas or race tracks where the audience frequently stands throughout a large portion of the game or event.”⁴²

One month later, in February of 1991, the DOJ published its own notice, announcing its intent to adopt the Access Board's proposed

36. The Rehabilitation Act of 1973, 29 U.S.C. § 792(a) (2000 & Supp. V 2005), created the Access Board. In what one court has called an “unusual twist,” *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1024 (9th Cir. 2008), the ADA required that within nine months of the passage of the ADA (July 26, 1990), the Access Board had to issue “minimum guidelines” to supplement its “existing Minimum Guidelines and Requirements for Accessible Design,” and that the DOJ had to promulgate regulations consistent with these guidelines. 42 U.S.C. § 12204(a) (2000).

37. 42 U.S.C. § 12186(c).

38. 42 U.S.C. § 12204(b).

39. Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 2296, 2313–14 (Architectural and Transp. Barriers Compliance Bd. proposed Jan. 22, 1991) (codified at 36 C.F.R. pt. 1191, app. A § 4.33.3 (amended 2004) (current version at 36 C.F.R. pt. 1191, app. D §§ 802.1.5–2.2.2 (2004))).

40. *Id.* at 2314.

41. *Id.*

42. *Id.*

guidelines as the accessibility standards applicable to the ADA.⁴³ The DOJ directed that all comments on the guidelines be sent directly to the Access Board.⁴⁴ Five months later, in July of 1991, the Access Board issued its final guidelines, the ADA Accessibility Guidelines (ADAAG),⁴⁵ but failed to include any reference to the specific problem of lines of sight over standing spectators.⁴⁶

While lines of sight were not addressed within the actual guidelines when codified, comments on the issue of sightlines over standing spectators in sports arenas and similar locations were included with the guidelines when published in the Federal Register.⁴⁷ Many commentators recommended that there should be lines of sight over standing spectators,⁴⁸ but the Access Board responded with commentary that the issue would be addressed later when it issued guidelines for recreational facilities.⁴⁹

B. *The DOJ's First Set of Guidelines: Standard 4.33.3*

The very same day that the Access Board issued the ADAAG, the DOJ adopted the Justice Department's Standards for Accessible Design (JDSAD).⁵⁰ Standard 4.33.3 in the JDSAD was worded identically to Section 4.33.3 in the Access Board's proposed guidelines.⁵¹

43. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 7452, 7478-79 (Dep't of Justice proposed Feb. 22, 1991) (codified at 28 C.F.R. pt. 36).

44. *Id.* at 7479.

45. Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 35,408 (Architectural and Transp. Barriers Compliance Bd. July 26, 1991) (codified at 36 C.F.R. pt. 1191, app. A (amended 2004) (current version at 36 C.F.R. pt. 1191, app. D §§ 802.1.5-.2.2.2 (2004)).

46. *Id.* at 45,699 ("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.").

47. *Id.* at 35,440.

48. *See id.*

49. *Id.* In a footnote in *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, the court made a point of distinguishing between Access Board guidelines and DOJ guidelines. "For the Access Board, guidelines are the substantive rules they develop and promulgate. Thus, in speaking of a future guideline, the Board was not referring to a future interpretation of 4.33.3, but rather, a separate substantive rule it would develop. By contrast, a DOJ guideline is an interpretation of a substantive rule, not the substantive rule itself." 193 F.3d 730, 734 n.5 (3rd Cir. 1999).

50. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35,544, 35,586 (Dep't of Justice July 26, 1991) (codified at 28 C.F.R. pt. 36, app. A).

51. *Compare* 28 C.F.R. pt. 36 app. A § 4.33.3 (Dep't of Justice 1991), *with* 36 C.F.R. pt. 1191 app. A § 4.33.3 (Architectural and Transp. Barriers Compliance Bd. 1991) (amended 2004) (current version at 36 C.F.R. pt. 1191, app. D

Unlike the Access Board, the DOJ did not include the comments regarding sightlines over standing spectators. Instead, the DOJ issued a general statement about how it had, through the proposed rule, put the public on notice of its intention to adopt the proposed guidelines as the accessibility standards, with any changes made by the Access Board.⁵² The DOJ further noted that it had participated in the public hearings and the preparation of the guidelines through its membership in both the Access Board and the ADA Task Force, and that the final guidelines adequately addressed all comments made about the proposed rule.⁵³

The DOJ's failure to address the issue of lines of sight over standing spectators in Standard 4.33.3 caused confusion regarding the DOJ's position on the issue in subsequent years. In 1992, the Deputy Chief of the DOJ's Public Access Section announced in a speech to operators of Major League Baseball stadiums that "[t]here is no requirement of line of sight over standing spectators."⁵⁴ Yet the following year, in 1993, when the DOJ began an investigation into the accessibility of venues in Atlanta for the 1996 Summer Olympic Games, it took the opposite position.⁵⁵ At that time, the DOJ argued that the phrase "lines of sight comparable to those for members of the general public" incorporated "line[s] of sight over standing spectators."⁵⁶ Ultimately, the investigation led to "a settlement that identified Olympic Stadium as the most accessible stadium in the world, in part because virtually all wheelchair seats have a comparable line of sight" and can see past standing spectators.⁵⁷

Congress required the DOJ to issue technical assistance manuals to assist with Title III compliance.⁵⁸ Initially, the DOJ said nothing about sightlines over standing spectators in the Americans with Disabilities Act Title III Technical Assistance Manual (TAM).⁵⁹ In the

§§ 802.1.5–.2.2.2 (2004). Please note that Section 4.33.3 refers to the Access Board's guideline, while Standard 4.33.3 refers to the DOJ's regulation.

52. Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 28 C.F.R. pt. 36, app. B (Dep't of Justice 1991).

53. *Id.*

54. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 581 (D.C. Cir. 1997).

55. *Id.* at 581.

56. *Id.*

57. *D.C. Arena*, 117 F.3d at 581 n.1 (internal quotations omitted).

58. *See* 42 U.S.C. § 12206(c)(3) (2000).

59. *See generally* U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL (1993), available at <http://www.usdoj.gov/crt/ada/taman3.html>.

December 1994 supplement to the TAM, however, the DOJ explicitly addressed the issue:

In addition to requiring companion seating and dispersion of wheelchair locations, [Standard 4.33.3] requires that wheelchair locations provide people with disabilities lines of sight comparable to those for members of the general public. *Thus, in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand.*⁶⁰

The DOJ suggested that this goal could be accomplished by several means, such as raising the elevation of seating in the rear sections for wheelchair users, allowing them to see over standing spectators.⁶¹

When the DOJ published the 1994 supplement to the TAM, it did not give any notice to the public, nor did it elicit any comments on the issue of lines of sight over standing spectators. This lack of notice and comment, along with a three-year gap between the DOJ's promulgation of Standard 4.33.3 and the publication of the 1994 TAM supplement, led to confusion regarding the exact obligations of sports arenas and similar assembly areas regarding lines of sight for wheelchair users. This confusion, in turn, led to inconsistent results in litigation against sports arenas, as courts struggled to decide whether the 1994 TAM should be given deference as the DOJ's reasonable interpretation of Standard 4.33.3.⁶²

C. *The DOJ's Proposed Revised Standards: Adopting an Updated ADAAG*

Since 1994, every newly-built stadium and other assembly area where spectators can be expected to stand during a performance has been subject to the confusion surrounding the standing spectator rule. The Access Board published a new ADAAG in 2004 which specifically addressed standing spectators as promised in 1991,⁶³ but this new regulation did not affect the DOJ's rule. In issuing the new

60. U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL § III-7.5180 (Supp. 1994), available at <http://www.usdoj.gov/crt/ada/taman3up.html> (emphasis added). For an illustration of the scoping required to provide sightlines over standing spectators published by the DOJ, see DISABILITY RIGHTS SECTION, U.S. DEP'T OF JUSTICE, ACCESSIBLE STADIUMS, <http://www.ada.gov/stadium.pdf> (last visited Jan. 26, 2009).

61. U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL § III-7.5180 (Supp. 1994), available at <http://www.usdoj.gov/crt/ada/taman3up.html>.

62. See *infra* Parts IV.A–B.

63. Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, 69 Fed. Reg. 44,084, 44,151–455 (Architectural and Transp. Barriers Compli-

ADAAG, which followed a lengthy process of notice and comment,⁶⁴ the Access Board explicitly provided that “[w]here standing spectators are provided lines of sight over the heads of spectators standing in the first row in front of their seats, spectators seated in wheelchair spaces shall be afforded lines of sight over the heads of standing spectators in the first row in front of wheelchair spaces.”⁶⁵

Fourteen years after the 1994 TAM supplement first announced the standing spectator guidelines, the DOJ finally began the process of formalizing its position on the “lines of sight” rule to end the debate when it comes to new construction. On June 17, 2008, the DOJ issued a notice of proposed rulemaking (NPRM) to amend 28 CFR Part 36 entitled “Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities,” and opened a period for public comment that ended August 18, 2008.⁶⁶ The DOJ’s new regulations proposed to adopt the 2004 ADAAG, including the standing spectator requirements outlined in the new ADAAG Section 802.2.2.⁶⁷ The NPRM describes the inclusion of the standing spectator requirements as “merely the codification of longstanding Department policy.”⁶⁸ If the proposed rules are adopted,⁶⁹ the DOJ’s compliance

ance Bd. July 23, 2004) (codified at 36 C.F.R. pt. 1191, apps. B, D (2004)). *See generally supra* note 49 and accompanying text.

64. *See* 73 Fed. Reg. 34,510–11 (June 17, 2008) (describing Access Board’s receipt of more than 2,500 comments as part of a “ten-year effort to improve ADA compliance and enforcement”).

65. 36 C.F.R. pt. 1191, app. D § 802.2.2 (Architectural and Transp. Barriers Compliance Bd. 2004). The new ADAAG also introduced a major revision to the numbering system, as the issue of wheelchair seating in assembly areas had been treated in § 4.33.3 in the original ADAAG. For a chart of the relationship between the old and new numbering systems, see United States Access Board, ADA Accessibility Guidelines Side-by-Side Comparison, <http://www.access-board.gov/ada-aba/comparison/chapter8.htm> (last visited Jan. 26, 2009).

66. *See* Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,508 (Dep’t of Justice proposed June 17, 2008), *available at* http://www.ada.gov/NPRM2008/t3NPRM_federalreg.pdf (to be codified at 28 C.F.R. pt. 36).

67. *Id.* at 34,509; *see* U.S. DEP’T OF JUSTICE, PROPOSED ADA STANDARDS FOR ACCESSIBLE DESIGN (2008), *available at* http://www.ada.gov/NPRM2008/ada_standards/proposedadastds.htm (last visited Jan. 26, 2009). Because the proposed DOJ regulations have not yet been codified, the authors will continue to refer to the standing spectator rule as “Standard 4.33.3,” rather than the proposed “Standard 802.2.2.”

68. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. at 34,534.

69. That the proposed rules will be adopted is not guaranteed, however. On January 21, 2009, the DOJ withdrew the draft final rules. Department of Justice, Proposed ADA Regulations Withdrawn from OMB Review, <http://www.ada.gov/ADAregrwithdraw09.htm> (last visited January 26, 2009). According to an announcement posted on the DOJ’s ADA web site, President Obama’s Chief of Staff issued a memo “directing the Executive Branch agencies to defer publication of any new regulations until the

with notice and comment procedure would cure the purported administrative procedure defect for all stadiums and entertainment halls built thereafter. That compliance would not, however, put an end to the litigation over arenas and auditoriums built in the last 14 years. Thus, as will be argued in Part V, the harmless error doctrine remains the most certain means of ensuring that the standing spectator rule is applied to existing entertainment venues.

III.

DEFERENCE TO AN AGENCY'S REASONABLE INTERPRETATION OF ITS OWN REGULATIONS

Courts must follow a two-step process, to be elaborated upon in this Part, in determining whether to give deference to an agency's purported interpretation of its own regulation. First, courts must examine the reasonableness of the agency's rule under the test established in *Bowles v. Seminole Rock & Sand Co.*⁷⁰ Second, the court must classify the agency's rule as either an interpretive or substantive rule.⁷¹ If the rule is classified as interpretive, the court can conclude its inquiry and grant deference to the agency's interpretation of its regulation.⁷² However, if the rule is determined to be substantive, and the agency failed to follow notice and comment procedures required to implement substantive changes, the court may not grant deference.⁷³

A. *Determining Reasonableness*

In the formative administrative law case *Bowles v. Seminole Rock & Sand Co.*, the U.S. Supreme Court set the standard by which courts must judge if a regulatory agency's interpretation of its own regulation⁷⁴ should be given deference: reasonableness.⁷⁵ When interpreting an administrative regulation, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is

rules are reviewed and approved by officials appointed by President Obama." *Id.* According to the DOJ, it will not take further action "until the incoming officials have had the opportunity to review the rulemaking record. Incoming officials will have the full range of rule-making options available to them under the Administrative Procedure Act." *Id.*

70. See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

71. See *infra* Part III.B.

72. See *infra* Part III.B.

73. See *infra* Part III.B.

74. That the three administrative rules at issue merely interpreted a regulation, rather than made substantive changes to it, was not in dispute nor addressed by the court in *Bowles*. See *infra* Part III.B.

75. See *Bowles*, 325 U.S. at 414.

plainly erroneous or inconsistent with the regulation.”⁷⁶ The *Bowles* standard was recently applied in *Thomas Jefferson Univ. v. Shalala* where the U.S. Supreme Court considered whether the Secretary of Health and Human Services reasonably interpreted a provision of its own regulations concerning Medicare reimbursement.⁷⁷ The Court found that substantial deference must be given to an agency’s interpretation of its own regulation.⁷⁸ Quoting *Bowles*, the Court announced that it must defer to the Secretary unless the Secretary’s interpretation conflicted with the plain meaning of the regulation, rather than determine which was the best of the competing interpretations.⁷⁹ In other words, so long as an agency’s interpretation of its own regulation is reasonable—defined as being consistent with the regulation’s text⁸⁰ and the governing statute’s purpose⁸¹—the courts will give that interpretation deference over others.⁸²

The U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council* reached a similar conclusion regarding deference accorded to administrative agencies when Congress delegates to them the authority to develop regulations interpreting statutes;⁸³ courts must defer to the agency’s interpretive regulations “unless they are arbitrary, capricious, or manifestly contrary to the statute.”⁸⁴ The Court recognized the longstanding principle of deferring to adminis-

76. *Id.* (emphasis added).

77. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 506 (1994).

78. *Id.* at 512.

79. *Id.*

80. *See id.* at 518 (deferring to the agency’s interpretation because it was “faithful to the regulation’s plain language”); *Valkering, U.S.A., Inc. v. United States Dep’t of Agric.*, 48 F.3d 305, 307 (8th Cir. 1995) (stating that “[w]e 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))); *Marymount Hosp., Inc. v. Shalala*, 19 F.3d 658, 661 (D.C. Cir. 1994) (stating that courts must defer to an agency’s interpretation if it “is within the range of reasonable meanings that the words of the regulation admit” (quoting *Psychiatric Inst. of Washington, D.C., v. Schweiker*, 669 F.2d 812, 814 (D.C. Cir. 1981))).

81. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) (invalidating regulation, as interpreted by the Department of Defense, because it was found to be “contrary to the manifest purposes of Congress”); *Natural Res. Def. Council, Inc. v. United States Env’tl. Prot. Agency*, 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”); *Valkering*, 48 F.3d at 307 (“We must accept an agency’s interpretation of its own regulations, ‘if it is reasonable in terms of . . . the purposes of the statute.’” (quoting *Baker*, 730 F.2d at 1149)).

82. *See Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 94–95 (1995).

83. *Chevron U.S.A., Inc., v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984).

84. *Id.* at 844.

trative interpretations of an agency's regulations.⁸⁵ In *Chevron*, the Supreme Court found that the Environmental Protection Agency's (EPA) interpretation of a term in the Clean Air Act Amendments was reasonable and entitled to deference.⁸⁶ The Supreme Court overruled the D.C. Court of Appeals, which had based its decision on its own view of the regulation, rather than on the reasonableness of the EPA's policy choice.⁸⁷ The Court held that a court may not substitute its own judgment for that of the agency.⁸⁸ If the agency's interpretation of an ambiguous statute is reasonable, the court must defer to the agency.⁸⁹

Later courts relied on *Chevron* in finding that deference to an agency's interpretation of its own regulation is analogous to deference to an agency's interpretation of ambiguous statutory language.⁹⁰ If a statute's language is ambiguous, the agency's interpretation has a strong claim to deference because the agency has the congressionally delegated authority to administer the statute.⁹¹ The same consideration underlies deferring to an agency's reasonable interpretation of its own regulation.⁹² When the regulatory language is ambiguous, the reviewing court should defer to the agency's reasonable interpretation.⁹³ In situations where an administrative agency interprets a statute, as well as those where an agency interprets its own regulations, the reasonableness standard applies.⁹⁴

B. *Substantive Rules v. Interpretive Rules: Notice and Comment Requirements*

Once a court has determined that an agency's rule purporting to interpret its own regulation is reasonable, it must then consider whether the rule really is an "interpretation," or whether it is more accurately classified as a "substantive" rule. The classification of the rule determines whether the APA's notice and comment requirements must be followed. Where notice and comment are necessary, these

85. *Id.*

86. *Id.* at 866.

87. *Id.* at 845.

88. *Id.* at 844.

89. *Id.* at 844.

90. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 585 (D.C. Cir. 1997).

91. *Id.*

92. *Id.* at 585-86.

93. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991).

94. Jonathan C. Fritts, "*Down in Front!*": *Judicial Deference, Regulatory Interpretation, and the ADA's Line of Sight Standard*, 86 GEO. L.J. 2653, 2663 (1998).

process requirements function as extra hurdles which the agency must clear before deference may be granted to the agency's rule.

An agency must engage in the APA's rulemaking process⁹⁵ only if it is adopting a new substantive rule.⁹⁶ Accordingly, substantive rules—i.e., rules inconsistent with or substantively changing a regulation, or rules providing meaning to an overly vague and otherwise meaningless regulation—may not be granted deference by the court unless the notice and comment requirements have been met.⁹⁷ On the other hand, a reasonable substantive rule, adopted after notice and comment, may be granted deference.⁹⁸

In contrast, notice and comment requirements do not apply to interpretive rules.⁹⁹ Unlike substantive rules that change existing regulations, interpretive rules “merely clarify or explain existing law or regulations.”¹⁰⁰ The Ninth Circuit, discussing the role of interpretive rules, stated that, “[b]y merely clarifying the law's terms as applied situationally, interpretive . . . rules are used more for discretionary fine-tuning than for general law making.”¹⁰¹ If an agency simply acts to clarify its existing regulations, no need exists for a notice and comment period, whereas the need does exist if an agency makes substantive changes to those regulations. In short, reasonable interpretive rules do not require additional action on the part of the agency before courts may grant the rule deference.

95. The APA requires that federal agencies, such as the DOJ, publish notice and receive comments as part of the rulemaking process. 5 U.S.C. § 553(b)–(c) (2006). An agency's published notice of a proposed rule in the Federal Register must include “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” § 553(b). Thereafter, the agency must afford “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” § 553(c). Finally, “[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.” *Id.*

96. *See* *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995).

97. *See id.*

98. *See id.*

99. 5 U.S.C. § 553(b).

100. *Powderly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983).

101. *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984) (citation omitted).

IV.

PAST JUDICIAL CONSIDERATION OF DEFERENCE TO THE
DOJ'S PURPORTED INTERPRETATION
OF STANDARD 4.33.3

As explained in Part II, the DOJ maintains that Standard 4.33.3's "comparable lines of sight" means that, "in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand."¹⁰² Since first publishing its rule in the 1994 TAM supplement, the DOJ has sought to enforce its standing spectators regulation through litigation as plaintiff or amici,¹⁰³ by entering into settlement agreements and consent decrees,¹⁰⁴ and by publishing materials to educate the public.¹⁰⁵ These efforts have met with substantial resistance, as defendants routinely argue—often successfully—that courts should reject the standing spectators rule because the DOJ failed to follow the APA's notice and comment procedures in promulgating it.¹⁰⁶

Until recently, the courts had been split down the middle on whether to defer to the DOJ's standing spectator rule as a reasonable interpretation of Standard 4.33.3. Two courts, the D.C. Circuit Court of Appeals and the District Court of Minnesota, had concluded that deference should be given to the DOJ because the DOJ did not explic-

102. U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE III TECHNICAL ASSISTANCE MANUAL § III-7.5180 (Supp. 1994), available at <http://www.usdoj.gov/crt/ada/taman3up.html>.

103. See, e.g., *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997); *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698 (D. Or. 1997) (DOJ joined as amicus curiae); *Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront*, 193 F.3d 730 (3d Cir. 1999) (DOJ joined as amicus curiae). But see *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 582 (D.C. Cir. 1997) (despite more than one invitation from the District Court, the DOJ refused to intervene in the case as a party, opting only to file an amicus brief which the court did not allow it to argue at hearing).

104. See, e.g., *Consent Decree, United States v. Madison Square Garden, L.P.* (S.D.N.Y. Nov. 1, 2007), available at <http://www.usdoj.gov/crt/ada/madisonsqgrnd.htm>; *Settlement Agreement Between the United States of America and West Michigan Baseball Limited Partnership*, Sept. 5, 2001, available at <http://www.usdoj.gov/crt/ada/wmibball.htm>; *Consent Order, United States v. Ellerbe Becket, Inc.*, No. 4-96-995 (D. Minn. Apr. 22, 1998), available at <http://www.usdoj.gov/crt/ada/ellerbe.htm>; *Settlement Agreement Concerning the Olympic Aquatic Center*, July 11, 1996, available at <http://www.usdoj.gov/crt/ada/aquatic.htm>; *Settlement Agreement Concerning the Olympic Stadium*, May 15, 1996, available at <http://www.usdoj.gov/crt/ada/stadiumo.htm>.

105. See, e.g., *DISABILITY RIGHTS SECTION, U.S. DEP'T OF JUSTICE, ACCESSIBLE STADIUMS 2* (1996), available at <http://www.ada.gov/stadium.pdf>.

106. See *Indep. Living Res.*, 982 F. Supp. at 737; *Caruso*, 193 F.3d at 733.

itly adopt the Access Board's commentary indicating that the issue of sightlines over standing spectators would be addressed in a future guideline.¹⁰⁷ These courts held that, as a result of this failure to adopt the commentary, the DOJ's 1994 TAM supplement requiring lines of sight over standing spectators did not represent a substantive rule triggering an APA notice and comment period.¹⁰⁸ Two courts, the Third Circuit and the District Court of Oregon, concluded the exact opposite—that deference should not be awarded to the TAM supplement because the DOJ did adopt the Access Board's comments and failure to have a notice and comment period violated the APA.¹⁰⁹

The balance among court decisions recently tipped in favor of deference, however, when a new decision by the Ninth Circuit Court of Appeals agreed with the D.C. Circuit Court of Appeals and the District Court of Minnesota.¹¹⁰ In reality, the issue remains far from settled.¹¹¹

Although each court approaches the issue of deference to the DOJ's rule in a different manner, the outcome of each case in essence depends upon the answers to two hotly-contested questions: 1) how divergent is the DOJ's standing spectator rule as articulated in the TAM supplement from the ambiguous language of Standard 4.33.3 (i.e. is the DOJ's standing spectator rule a reasonable interpretation of Standard 4.33.3); and 2) should the Access Board's comments be attributed to the DOJ (i.e. is the TAM supplement truly interpretive or is it a substantive change from the DOJ's prior rule)? The complex and controversial nature of answering these questions—of applying the deference analyses discussed in Part III—should highlight the poten-

107. *D.C. Arena*, 117 F.3d at 587; *Ellerbe Becket*, 976 F. Supp. at 1269.

108. *D.C. Arena*, 117 F.3d at 587; *Ellerbe Becket*, 976 F. Supp. at 1269.

109. *Caruso*, 193 F.3d at 736–37; *Indep. Living Res.*, 982 F. Supp. at 742–43.

110. *Miller v. California Speedway Corporation*, 536 F.3d 1020, 1032 (9th Cir. 2008), *cert. denied*, 77 U.S.L.W. 3369 (U.S. Feb. 23, 2009).

111. Only three Circuit-level courts have considered the issue; the Tenth Circuit ruled against deference and the D.C. and Ninth Circuits ruled in favor of it. *See infra* Parts IV.A–B.

tial for simplification and unification¹¹² that would be presented by an approach avoiding the deference analysis.¹¹³

A. Cases Rejecting Deference to the TAM Supplement

1. Caruso v. Blockbuster-Sony Music Entertainment Centre

In *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, a wheelchair user sued the Entertainment Centre (E-Centre) for not providing lines of sight over standing spectators after attending a concert at the E-Centre, which provides fixed seating for over 6,000 people.¹¹⁴ The District Court granted summary judgment for the facility owner, and Caruso appealed to the Third Circuit Court of Appeals.¹¹⁵

The court first considered the divergence of the standing spectator rule from Standard 4.33.3. Caruso argued “that the plain meaning of the phrase ‘lines of sight comparable to those for members of the general public’ requires that ‘if standing spectators can see the stage even when other patrons stand, wheelchair users, too, must be able to see the stage when other patrons stand.’”¹¹⁶ The Third Circuit acknowledged the logic of the argument, but found that the “lines of sight” phrase should be read in conjunction with two dispersal provi-

112. A unified approach may result from a simple logical approach or may result from a ruling by the United States Supreme Court, should the Court grant certiorari to resolve the split in the circuits. While “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion[.]” the Supreme Court will consider granting a cert petition where “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” SUP. CT. R. 10. Other ADA cases regarding access to facilities and programs that the Supreme Court has considered recently include *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005) (access to cruise ships); *Tennessee v. Lane*, 541 U.S. 509 (2004) (access to courthouses); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (access to professional sports tour); *Pa. Dept. of Corrs. v. Yeskey*, 524 U.S. 206 (1998) (access to prison programs).

113. Adopting the harmless error approach suggested by one amicus curiae brief would eliminate the deference issue as the determining factor and simplify the analysis for future courts faced with this issue, including the United States Supreme Court should it grant certiorari in order to resolve the split in the circuits. Brief of San Diego Polio Survivors as Amici Curiae in Support of Reversal at 18–22, *Miller v. Cal. Speedway Corp.*, 453 F. Supp. 2d 1193 (C.D. Cal. 2006) (No. 06-56468); see *infra* Part V.

114. *Caruso v. Blockbuster-Sony Music Entm’t Ctr. at the Waterfront*, 193 F.3d 730, 731 (3d Cir. 1999).

115. *Id.*

116. *Id.* at 732 (quoting Reply Brief of Plaintiff-Intervenor-Appellant Paralyzed Veterans of Am. at 23, *Caruso v. Blockbuster-Sony Music Entm’t Ctr. at the Waterfront*, 193 F.3d 730 (3d Cir. 1999) (Nos. 97-5693 & 97-5764)).

sions in Standard 4.33.3.¹¹⁷ The court found that when read in the context of the dispersal requirements, the phrase could mean that if members of the public have different lines of sight to view the game, show, or other event, then wheelchair users should have the same variety of angles available to them.¹¹⁸ Finding plausible, or reasonable, both readings of the line of sight requirement, the court concluded that the phrase was ambiguous.¹¹⁹

In light of the reasonableness of the DOJ's explanation of Standard 4.33.3 in the TAM supplement, the court next considered whether notice and comment were required for the courts to accord deference to the TAM supplement.¹²⁰ E-Centre claimed that because of the history of Standard 4.33.3, particularly the Access Board's decision to leave the resolution of the standing spectators issue to a future date, the TAM supplement was not an interpretation but rather a substantive rule.¹²¹ The court noted that while the DOJ was welcome to adopt a new substantive rule, it could not do so without first proceeding with a notice and comment period.¹²² In response to the E-Centre's argument, Caruso relied on the holding of the D.C. Circuit which classified the TAM supplement as an interpretative rule.¹²³

The Third Circuit agreed with the D.C. Circuit only regarding the conclusion that "the issue is not easy."¹²⁴ Instead of granting deference to the DOJ's TAM supplement, the Third Circuit decided that the Access Board's comments should be imputed to the DOJ¹²⁵ and that the TAM supplement's elaboration on Standard 4.33.3 should not be granted deference because it represented a substantive change to its previous position without an accompanying issuance of notice and comment.¹²⁶ The court cited several reasons for imputing the Access Board's comments to the DOJ. First, the court pointed out that the DOJ referred all comments on the proposed rule to the Access Board and relied on the Board to make changes based on those comments.¹²⁷ Next, the court cited actual changes by the Access Board in response

117. *Id.*

118. *Id.*

119. *Id.* at 733.

120. *Id.* at 733–37.

121. *Id.* at 733.

122. *Id.* at 737.

123. *Id.* at 736; *see infra* Part IV.B.1.

124. *Caruso*, 193 F.3d at 736 (quoting *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997)).

125. *Id.*

126. *Id.* at 736–37.

127. *Id.* at 736.

to those comments.¹²⁸ Finally, the court noted that not only was the DOJ an active member of the Access Board, but that its commentary stated that the Board had adequately addressed all comments.¹²⁹

Importantly, the *Caruso* court, like all that followed it, failed to consider that, even if the APA notice and comment requirements were not met, the DOJ's failure in this regard might have been harmless error.¹³⁰

2. Independent Living Resources v. Oregon Arena Corp.

The Oregon District Court faced the standing spectators question when a wheelchair-using attorney, along with an advocacy group for people with disabilities, sued the owner and operator of the Rose Garden—a large multipurpose arena in Portland.¹³¹ In a lengthy opinion addressing multiple issues surrounding Standard 4.33.3, the court ultimately reached the same conclusion as did the court in *Caruso*: the 1994 TAM supplement represented a new substantive obligation, impermissible without an accompanying notice and comment period.¹³²

When examining the question of lines of sight over standing spectators, the court first considered whether the DOJ could require that wheelchair users be provided with a line of sight over standing spectators.¹³³ In answering the question affirmatively, the court stated that the DOJ could have reasonably concluded that lines of sight over standing spectators are necessary to comply with Standard 4.33.3.¹³⁴ Accordingly, the TAM supplement did not diverge unreasonably from Standard 4.33.3.

The court rejected Oregon Arena's argument that, since there are times when an ambulatory spectator's view is blocked, providing lines of sight over standing spectators would afford wheelchair users preferential treatment.¹³⁵ Because wheelchair users cannot stand to see a winning goal, basket or concert, "patrons seated in wheelchairs at the Rose Garden typically can see only the backs (or backsides) of those

128. *Id.*

129. *Id.*

130. *See infra* Part V.C.

131. *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp 698, 706 (D. Or. 1997). In addition to being home to the Portland Trail Blazers NBA basketball team and the Portland Winter Hawks of the Western Hockey League, the arena is also used for events such as ice shows, concerts, soccer games and the circus. *Id.*

132. *Id.* at 743.

133. *Id.* at 732.

134. *Id.* at 733–34.

135. *Id.* at 733.

standing in front of them.”¹³⁶ Further, wheelchair users cannot angle their bodies or move around to obtain an unobstructed view as can ambulatory spectators.¹³⁷ The court noted that even assuming that wheelchair users “would enjoy a slightly better sightline than some ambulatory spectators, that is preferable to the alternative suggested by the defendant, which is to provide wheelchair users with sightlines that are guaranteed to be the worst in the house. In no way can the latter be construed as ‘comparable’ sightlines.”¹³⁸

The court held that complying with the ADA may require more than providing nominally “identical” facilities for patrons with disabilities, noting the “difference between *physically* identical facilities and *functionally* equivalent facilities.”¹³⁹ A building with stairs and no ramp provides physically identical facilities to both wheelchair users and non-wheelchair users, but obviously wheelchair users would not be able to make much use of the stairs. The court stated that the ADA requires more than the provision of physically identical facilities;¹⁴⁰ it requires that public accommodations not only refrain from active discrimination, but it may also require that operators of public accommodations “take affirmative steps to ensure that the ‘opportunity’ to patronize the facility is a meaningful one.”¹⁴¹ Following this reasoning, the court held that the DOJ could have reasonably concluded that providing wheelchair users with sightlines physically identical to those of ambulatory spectators would not provide wheelchair users with a functionally equivalent experience because “[s]uch facilities may be facially neutral but in practice have a disparate impact upon those in wheelchairs.”¹⁴² Therefore, enhanced sightlines might be necessary so that wheelchair users “may obtain a benefit comparable to that received by ambulatory spectators.”¹⁴³

136. *Id.* at 732–33.

137. *Id.* at 733. The District Court in the *Miller* case used this point to admonish defense counsel for arguing that being “height-disadvantaged” was analogous to being a wheelchair user. *Miller v. Cal. Speedway Corp.*, 453 F. Supp. 2d 1193, 1204 (C.D. Cal. 2006).

138. *Indep. Living Res.*, 982 F. Supp. at 733 (citation omitted).

139. *Id.* (emphasis in original). The court gave as an example of identical facilities providing both men’s and women’s restrooms with two stalls and seventeen urinals. While the restrooms would be physically identical, “[t]he benefits and services derived by one group would be substantially less than the benefits and services derived by the other.” *Id.*

140. *Id.*

141. *Id.* (quoting H.R. REP. NO. 101-485(II), at 104 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 387).

142. *Id.* at 733–34.

143. *Id.* at 734. In response to the argument that wheelchair users could end up with *better* sightlines than ambulatory spectators, the court noted that it did not anticipate

Next, the court considered whether the Access Board's comments should be imputed to the DOJ and the effect this would have on judicial deference.¹⁴⁴ In finding imputation necessary, the court was compelled to classify the TAM supplement as substantive rulemaking, thereby triggering the APA's notice and comment requirements.¹⁴⁵ Ultimately, the court concluded that because there had not been a notice and comment period, it could not grant deference to the TAM supplement.¹⁴⁶

In deciding whether the Access Board's comments should be imputed to the DOJ, the court did not find persuasive the DOJ's argument that, while it had adopted the Access Board's language exactly for Standard 4.33.3, it had not adopted the Access Board's commentary and was therefore not bound by it.¹⁴⁷ If the DOJ adopted the Access Board's commentary then the TAM supplement would have to be classified as a substantive rule because the promulgation of a line of sight requirement clearly would be inconsistent with the Access Board's comments. In finding that the DOJ adopted the Access Board's commentary, the court focused upon the initial promulgation of Standard 4.33.3;¹⁴⁸ the necessity of notice and comment for the promulgation of the initial regulation was unquestioned. The APA's notice and comment requirements impose an obligation on the agency to explain the proposed rule's purpose and justification, respond to criticisms of the rule, and explain why the agency chose to follow or change the proposed rule.¹⁴⁹ If the DOJ did not adopt the Access Board's commentary to satisfy these requirements, then the DOJ's own commentary on the accessibility guidelines had to be sufficient to satisfy the notice and comment requirements.¹⁵⁰ The court found the DOJ's commentary to be inadequate.¹⁵¹ Therefore, if the DOJ's initial promulgation of Standard 4.33.3 is to be found valid, then the DOJ must have implicitly adopted the Access Board's commentary.¹⁵²

In considering the promulgation of Standard 4.33.3, the court noted that although the notice and comment rules do not “‘require [an]

“a rush of volunteers choosing to have their legs amputated so they may watch a basketball game from a wheelchair and thereby enjoy ‘preferential’ sightlines.” *Id.*

144. *Id.* at 740–42.

145. *Id.* at 743.

146. *Id.*

147. *Id.* at 740.

148. *Id.*

149. *Id.* See generally 5 U.S.C. § 553(b)–(c) (2006).

150. *Indep. Living Res.*, 982 F. Supp. at 733, 740.

151. *Id.* at 741–42.

152. *Id.*

agency to respond to every comment, or to [analyze] every issue or alternative raised by comments’” the DOJ’s separate commentary did not respond to any comment or analyze any issue or alternative.¹⁵³ The court expressed puzzlement at the DOJ’s disavowal of the Access Board’s limiting interpretations of Guidelines and other responses to public comments.¹⁵⁴ After all, the DOJ had specifically instructed the public to submit comments to the Access Board and not to the DOJ.¹⁵⁵ The court stated that if the Access Board’s commentary was not binding on the DOJ, “then that commentary and the entire notice and comment procedure were largely an empty exercise.”¹⁵⁶ Additionally, the court highlighted the DOJ’s representation that the comments received by the DOJ had been addressed adequately by the changes made by the Access Board in the final ADAAG to those comments.¹⁵⁷ As a result, the court found that the DOJ implicitly endorsed the Access Board’s responses to and revisions made because of those comments.¹⁵⁸ Further, the court concluded that the DOJ implicitly adopted the Access Board’s response to public comments regarding the proposed Guidelines when the DOJ announced that it would, and then did, adopt as its own accessibility standard the Access Board’s draft guidelines, “‘with any amendment made by the [Access Board] during its rulemaking process.’”¹⁵⁹

Finally, the District Court concluded that, because the DOJ had implicitly adopted the Access Board’s comments and the Access Board had expressly postponed addressing the standing spectators issue, the phrase “lines of sight comparable for members of the general public” referred only to wheelchair dispersal requirements, and not sightlines over standing spectators.¹⁶⁰ Therefore, the DOJ’s explanation of Standard 4.33.3 in the 1994 TAM supplement was inconsistent with the meaning of the Standard and constituted substantive rulemaking.¹⁶¹ Because the court found that the supplement attempted to im-

153. *Id.* at 741 (alteration in original) (quoting *Am. Mining Congress v. EPA*, 907 F.2d 1179, 1187–88 (D.C. Cir. 1990)). The court pointed to the DOJ’s failure to “respond to *any* comments or analyze *any* issues or alternatives raised by comments regarding *specific* standards.” *Id.* (emphasis in original).

154. *Id.* at 740–41.

155. *Id.* at 741.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 742 (quoting *Nondiscrimination on the Basis of Disability by Public Accommodations and In Commercial Facilities*, 56 Fed. Reg. 7452, 7478–79 (Dep’t of Justice proposed Feb. 22, 1991) (codified at 28 C.F.R. pt. 36)).

160. *Id.* at 743.

161. *Id.*

pose a new obligation, it could not be granted deference as an interpretive regulation.¹⁶² Notice and comment—which here was lacking—would be required before the TAM supplement could be accorded deference.

Like the *Caruso* court, however, the District Court in this case stopped its analysis short of completion when it failed to consider the harmless error rule.

B. Cases Granting Deference to the TAM Supplement

1. Paralyzed Veterans of America v. D.C. Arena, L.P.

Prior to the Third Circuit Court of Appeal's decision in *Caruso*, the D.C. Circuit Court of Appeal reached the opposite result when it considered the issue of sightlines over standing spectators. In 1996, two years after the DOJ published the TAM supplement, the Paralyzed Veterans of America (PVA) and several sports enthusiasts who were wheelchair users brought suit against the architects, owners, and operators of the MCI Center¹⁶³ in Washington, D.C. for not complying with the ADA's seating requirements.¹⁶⁴ They argued that the arena's wheelchair seating arrangement was not sufficiently integrated with other seating, nor was it sufficiently dispersed throughout the stadium, in violation of Standard 4.33.3.¹⁶⁵ They also argued that the seating arrangement violated the DOJ's interpretation of Standard 4.33.3 in the 1994 TAM supplement, which required lines of sight over standing spectators.¹⁶⁶ The District Court judge found that while the seating arrangement was sufficiently integrated, it was not adequately dispersed.¹⁶⁷ The only issue appealed was the District Court judge's ruling in favor of granting deference to the TAM supplement requiring lines of sight over standing spectators.¹⁶⁸ PVA challenged the District Court's decision that there must only be substantial, as opposed to total, compliance with the line of sight over standing spectators re-

162. *Id.*

163. The MCI Center was being built to act as a sports stadium for the National Basketball Association's Washington Wizards and the National Hockey League's Washington Capitals, as well as to host concerts and other special events. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 580 (D.C. Cir. 1997).

164. *Id.* at 582.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

quirement.¹⁶⁹ The arena disputed any requirement that wheelchair users must have that line of sight.¹⁷⁰

The District of Columbia Circuit Court first considered the language of Standard 4.33.3—specifically, the phrase “lines of sight comparable to the general public”—and found that it did not have a universally accepted meaning.¹⁷¹ The phrase could be read either as requiring a view without permanent obstructions, or as requiring a view without temporary obstructions (standing spectators).¹⁷² This ambiguity raised the question of whether the DOJ’s explanation of the phrase in the TAM supplement was reasonable and should be given deference.¹⁷³ Referring to the standards set forth in both *Seminole Rock* and *Chevron*, the Circuit Court noted that agency interpretations of their own regulations, even ambiguous regulations, are entitled to deference so long as the interpretations are reasonable.¹⁷⁴

The key word in Standard 4.33.3—a word which keeps the TAM supplement consistent with that Standard—is “comparable.” The reasonableness of the DOJ’s rule turns on the line of sight available to ambulatory spectators.¹⁷⁵ While ambulatory spectators can recover their line of sight by standing if spectators in front of them stand, wheelchair users cannot. A view over standing spectators clearly is more comparable to the view enjoyed by ambulatory spectators than is an obstructed view.¹⁷⁶ Therefore, the DOJ’s rule requiring lines of sight over standing spectators is a reasonable reading of the requirement that wheelchair users must have comparable lines of sight to members of the general public.¹⁷⁷

Once the Circuit Court decided the reasonableness issue, it next considered whether the DOJ’s TAM supplement constituted “a fundamental modification of its previous interpretation” which should trig-

169. *Id.*

170. *Id.*

171. *Id.* at 583.

172. *Id.*

173. *Id.* at 583–84.

174. *Id.* at 584–85 (“Under *Chevron*, an agency’s interpretation of ambiguous statutory language is entitled to deference because of the agency’s delegated authority to administer the statute, and the same consideration underlies deference to an agency’s interpretation of its own regulation.”).

175. Adam A. Milani, “*Oh, Say, Can I See – and Who Do I Sue if I Can’t?*”: *Wheelchair Users, Sightlines Over Standing Spectators, and Architect Liability under the Americans with Disabilities Act*, 52 FLA. L. REV. 523, 560 (2000). *But see* Mark A. Conrad, *Wheeling through Rough Terrain – the Legal Roadblocks of Disabled Access in Sports Arenas*, 8 MARQ. SPORTS L.J. 263 (1998) (generally critical of the decision in *D.C. Arena*).

176. Milani, *supra* note 175, at 562.

177. *D.C. Arena*, 117 F.3d at 584–85.

ger the notice and comment process under the APA.¹⁷⁸ The court noted that under the APA, agencies must engage in notice and comment periods both when formulating regulations and when “repealing” or “amending” a rule.¹⁷⁹ D.C. Arena’s strongest argument, according to the court, was that the TAM supplement “constitutes a fundamental modification of its previous interpretation and, even if it legitimately could have reached the present interpretation originally, it cannot switch its position merely by revising the technical manual.”¹⁸⁰ The court reviewed the history leading up to the DOJ’s promulgation of Standard 4.33.3, including the Access Board’s comments that the issue of lines of sight over standing spectators would be revisited at a future time.¹⁸¹ Had the DOJ adopted the Access Board’s comments and its implications that the standing spectators issue was not encompassed by the text of 4.33.3, then clearly the establishment of the standing spectators rule in the TAM supplement would represent a fundamental modification to Standard 4.33.3. Such an amendment to the regulation would require compliance with notice and comment rulemaking under the APA. By not explicitly referencing the standing spectators issue, however, the DOJ’s Standard 4.33.3 could arguably be read to include the issue in its plain language requiring wheelchair users to have “lines of sight comparable to those of members of the general public.”¹⁸²

Ultimately, the court could find no evidence of a substantive change in the DOJ’s interpretation of Standard 4.33.3; the court found no prior position held by the DOJ which was contrary to the TAM supplement.¹⁸³ The court explicitly rejected the Deputy Chief’s remarks as evidence of an authoritative prior position in conflict with its inclusion of a sightline requirement.¹⁸⁴ The court dismissed the comments by stating that a speech made by a mid-level official of the DOJ is not “an authoritative departmental position” and “is not equivalent

178. *Id.* at 586.

179. *Id.*; see also 5 U.S.C. § 551(5) (2006) (defining “rule making” as including the amendment and repeal of a rule).

180. *D.C. Arena*, 117 F.3d at 586.

181. *Id.* at 586–87.

182. While Congress mandated that the DOJ follow the Access Board’s “minimum guidelines,” the Circuit Court noted that nothing prevented the DOJ “from imposing a greater burden on those entities covered by its regulation” as long as the DOJ did not act in substantive rulemaking by imposing this burden. *D.C. Arena*, 117 F.3d at 587. It could be argued that the DOJ’s Standard 4.33.3 merely imposed the greater burden of requiring sightlines over standing spectators.

183. *D.C. Arena*, 117 F.3d at 587–88.

184. *Id.* at 587.

to the technical assistance manual.”¹⁸⁵ Therefore, the court concluded that the TAM supplement was not a fundamental modification of an earlier position, as the DOJ “never authoritatively adopted a position contrary to its manual interpretation.”¹⁸⁶

According to the court, substantive changes from past positions are not the only reason a rule might be found to be “substantive” and to thereby require notice and comment under the APA; labeling a rule “interpretive” without consideration of how the rule relates to the underlying statute does not end the inquiry.¹⁸⁷ “The distinction between an interpretive and substantive rule more likely turns on how tightly the agency’s interpretation is drawn linguistically from the actual language of the statute or rule.”¹⁸⁸ If the statute or rule itself is very general, and the interpretation is what gives meaning to the statute or rule, the interpretation is more likely a substantive one.¹⁸⁹ In this case, the phrase “lines of sight comparable to those of members of the general public” is arguably quite clear. The court noted that the DOJ potentially “could have relied on the regulation itself, even without the manual interpretation, to seek lines of sight over standing spectators.”¹⁹⁰ The court concluded that the TAM supplement was “not sufficiently distinct or additive to the regulation to require notice and comment.”¹⁹¹

In sum, because the court found the TAM supplement to be merely interpretive (as opposed to substantive), and because the court found its interpretation to be reasonable, the court held that the TAM supplement is entitled to judicial deference despite a lack of notice and comment by the DOJ.¹⁹²

185. *Id.*

186. *Id.*

187. *Id.* at 588.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* The court also considered whether the D.C. arena had to comply with the TAM supplement’s standing spectators requirements completely or just substantially, concluding that the latter would suffice. *Id.* at 588–89. For discussion of the substantial compliance issue not addressed in this article, see Milani, *supra* note 175, at 545, 566.

192. One commentator and at least one court have argued that a notice and comment period is only necessary where “the [later] rule . . . [is] inconsistent with another rule having the force of law, not just any agency interpretation regardless of whether it had been codified.” Milani, *supra* note 175 at 564 (first alteration in original) (quoting *Warder v. Shalala*, 149 F.3d 73, 81 (1st Cir. 1998)). Yet neither the Access Board’s guidelines nor its commentary have the force of law. Even if the DOJ implicitly adopted the Access Board’s comments—particularly those referring to revisiting the standing spectators issue—the TAM supplement was not “inconsistent with another rule having the force of law.” *Id.* at 565 (quoting *Warder v. Shalala*, 149 F.3d at 81).

2. United States v. Ellerbe Becket, Inc.

The same year that the D.C. Circuit Court of Appeals decided *D.C. Arena*, the Minnesota District Court considered a case brought by the government against architectural firm Ellerbe Becket, Inc. for ADA violations.¹⁹³ The government alleged that Ellerbe designed sports arenas and stadiums across the country that failed to provide wheelchair users with lines of sight comparable to those of other spectators in violation of both Title III of the ADA and Standard 4.33.3.¹⁹⁴ In a motion to dismiss, Ellerbe argued, among other things, that the TAM supplement was not entitled to deference.¹⁹⁵ The District Court, however, agreed with the reasoning of the court in *D.C. Arena* rather than the court in *Caruso*.¹⁹⁶ The court found that the DOJ's interpretation of the lines of sight requirement was reasonable, and that as an interpretive rule, the TAM supplement was not subject to the APA.¹⁹⁷ Accordingly, the court held that the TAM supplement was entitled to judicial deference and denied Ellerbe's motion to dismiss on the sight-line requirement.¹⁹⁸

3. Miller v. California Speedway Corporation

In the most recent case to consider the standing spectators question, the Ninth Circuit Court of Appeals held that the TAM supplement was a valid and reasonable interpretive rule entitled to deference, and therefore that the Speedway violated the ADA by not providing plaintiff Miller a line of sight over standing spectators.¹⁹⁹

The District Court in *Miller* had granted summary judgment to the Speedway, finding that, like in *Caruso*, the Access Board's commentary must be attributed to the DOJ, and that once it was, the DOJ was not free to change its reading of Standard 4.33.3 in the 1994 TAM

Because the TAM supplement serves merely as a clarification and explanation of the DOJ's interpretation of Standard 4.33.3, the supplement should be classified as an interpretive rule exempt from notice and comment requirements. *Id.* at 565–66.

193. United States v. Ellerbe Becket, Inc., 976 F. Supp. 1262 (D. Minn. 1997).

194. *Id.* at 1264.

195. *Id.* at 1266. Ellerbe's other arguments were that: "(1) the plain language of the ADA excludes architects as potentially liable entities; (2) only entities which design *and* construct facilities may be liable under § 303(a) of the ADA, and architects by definition only design buildings; (3) the Department of Justice's interpretation of § 303(a) of the ADA is not entitled to deference because the plain language of the statute is not ambiguous" *Id.*

196. *Id.* at 1269.

197. *Id.*

198. *Id.*

199. Miller v. Cal. Speedway Corp., 536 F.3d 1020, 1024 (9th Cir. 2008), *cert. denied*, 77 U.S.L.W. 3369 (U.S. Feb. 23, 2009).

supplement without complying with APA notice and comment period requirements, which it had not done.²⁰⁰ Without considering whether failure to comply with the APA requirements was harmless, the California District Court concluded that despite the reasonableness of its position, the DOJ should not be given deference on the standing spectator issue.²⁰¹

The Ninth Circuit reversed.²⁰² The Court summarized its analysis by reaffirming that the 1994 TAM supplement “‘is entitled to significant weight as to the meaning of the regulation’” it is meant to interpret.²⁰³ This substantial deference is owed if “the meaning of the regulatory language is ambiguous,” and the interpretation of the ambiguous language is reasonable, “that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulation.”²⁰⁴ The Court found both to be true.²⁰⁵

First, the Court reviewed the various interpretations to which the “lines of sight” language of Standard 4.33.3 is subject, thereby demonstrating ambiguity. These potential interpretations include (1) that patrons who use wheelchairs must be provided views without physical obstruction,²⁰⁶ a view the Court previously rejected as too narrow;²⁰⁷ (2) that wheelchair areas must be “dispersed throughout a facility,” such that wheelchair users can choose from a “variety of horizontal viewing angles;”²⁰⁸ (3) that the phrase “would encompass both the notion of a horizontal line of sight and a vertical line of sight,” allowing patrons a choice of seats, “for example, between the orchestra and the loges” as well as between centerfield and the end zone;²⁰⁹ and (4) that in addition to unobstructed views from seats dispersed both horizontally and vertically, the wheelchair-user must have a line of sight comparable to that of a non-wheelchair-using patron “who has chosen the same seat.”²¹⁰ As the court explained, under this last possibility, “it is easy to see that at some events (principally sporting

200. *Miller v. Cal. Speedway Corp.*, 453 F. Supp. 2d 1193, 1203 (C.D. Cal. 2006).
201. *Id.*

202. *Miller*, 536 F.3d at 1024.

203. *Id.* at 1028 (quoting *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 875–76 (9th Cir. 2004)).

204. *Id.* (internal quotations omitted).

205. *Id.* at 1028–30.

206. *Id.* at 1028–29.

207. *Id.* at 1029 (citing *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1132 (9th Cir. 2003)).

208. *Id.*

209. *Id.*

210. *Id.*

events), a ‘comparable’ line of sight would encompass an unobstructed line of sight when other patrons are standing.”²¹¹

Having established the ambiguity of Standard 4.33.3, the Ninth Circuit reasoned that, “[a]s a linguistic matter it is perfectly reasonable” that DOJ would read the regulation as requiring “lines of sight that are comparable in the actual conditions under which a facility operates.”²¹² As the Court so vividly described, “[i]f the spectators stand during the singing of the national anthem, routinely jump to their feet. . . or insist on standing on their chairs. . . , it does not take a fertile legal imagination to understand that relatively immobile patrons will not have a comparable line of sight.”²¹³

Next, the Ninth Circuit rejected the conclusion of *Caruso*, with which the District Court had agreed, that the DOJ must be held to the Access Board’s comment that it would address the standing spectator issue at a later date.²¹⁴ The court found the District Court’s conclusion to be reasonable but not compelled:²¹⁵ “Whatever the *Access Board* thought of its own guidelines, the *Department of Justice* adopted the text of the guidelines themselves, not the Access Board’s interpretation of that text.”²¹⁶ While the DOJ was charged by the ADA with using the Access Board’s guidelines as a minimum standard, the DOJ could use those guidelines as a “launching point” for more strict standards.²¹⁷

Finally, the court reasoned that, “[e]ven if we were persuaded that the DOJ initially adopted the Access Board’s interpretation that [Section] 4.33.3 simply did not address the problem of standing spectators, the DOJ may change its mind” without following notice and comment procedures.²¹⁸ The standing spectator guidelines in the 1994 TAM supplement was an interpretive rule because it “‘merely ex-

211. *Id.*

212. *Id.*

213. *Id.* at 1029–30. A court can also find support for requiring lines of sight over standing spectators in the more general ADA requirements that facilities be “readily accessible to and usable by” persons with disabilities. *Id.* at 1030 (citing 42 U.S.C. § 12183(a)(1) (2000)). In fact, the court has previously held, in an earlier movie theatre case, that the DOJ’s understanding of “comparable line of sight” encompasses “the ‘actual line extending from the viewer’s eye’ to the movie screen, or in the case at hand, a playing field.” *Id.* (quoting *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1131 (9th Cir. 2003)).

214. *Id.* at 1031–32.

215. *Id.* at 1031.

216. *Id.* (emphasis in original).

217. *Id.* at 1032.

218. *Id.* at 1032–33.

plain[ed], but [did] not add to, the substantive law that already exist[ed] in the form of a statute or legislative rule”²¹⁹

The court conceded that, “from the perspective of facility owners such as Speedway, the 1994 supplement appears to be a legislative rule,”²²⁰ but neatly rejected the argument:

[T]he 1994 Supplement added nothing to the existing rule except a definition of an ambiguous term; That is the purpose of an interpretive rule. A rule does not become a legislative rule because it effects some unanticipated change; otherwise, only superfluous rules could qualify as interpretive rules. We do not think that interpretive rules must be so useless.²²¹

As a result of the reasonableness of the DOJ’s interpretive rule imposing the standing spectator rule, the court held that the TAM supplement was entitled to judicial deference despite the agency’s failure to first issue notice to and solicit comments from the public.²²²

V.

APPLYING THE HARMLESS ERROR DOCTRINE TO RESCUE THE STANDING SPECTATORS RULE

As discussed in the previous Part, the courts and commentators that have wrestled with the standing spectators issue have based their analyses on the reasonableness of the TAM supplement, the difference between a substantive rule and interpretive guideline, the complicated relationship between the Access Board and the Department of Justice, and ultimately on the technical requirements of the APA’s notice and comment rule. These efforts have been scrupulous but flawed. For example, several cases²²³ and commentators²²⁴ have recognized substantial merit in the argument that the TAM supplement is merely interpretive and therefore free from the APA’s requirements. The fact

219. *Id.* at 1033 (quoting *Hemp Indus. Ass’n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003)).

220. *Id.*

221. *Id.* (citation omitted).

222. *Id.*

223. See *Miller*, 536 F.3d at 1033; *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1268–69 (D. Minn. 1997).

224. See James Kurack, *Standing in Front of the Disabled: Judicial Uncertainty over Enhanced Sightlines in Sports Arenas*, 8 *VILL. SPORTS & ENT. L.J.* 161, 186–88 (2001) (hereinafter Kurack, *Standing in Front of the Disabled*); see also Milani, *supra* note 175 at 562–64.

that other courts have rejected this argument,²²⁵ however, should signal the argument's instability and demonstrate the need for another approach by the DOJ. Similarly flawed is the DOJ's contention that the Access Board's Section 4.33.3 covers standing spectators,²²⁶ or if it does not, that oversight is chargeable to the Access Board alone.²²⁷ Under either of these alternative arguments, the DOJ contends that a new round of notice and comment was not required before it issued its 1994 TAM supplement.²²⁸ These contentions, too, have met with mixed results.²²⁹

Surprisingly, no court or academic, not even the DOJ itself, has looked beyond the surface mechanics of the APA to the purpose behind it: to allow the public to learn about and comment on proposed rules before they are implemented.²³⁰ Were the courts or the DOJ to take this additional step, then they would recognize that this purpose has already been met in the case of the standing spectators rule. Under the APA's infrequently-used harmless error doctrine,²³¹ as will be expanded upon in this Part, nothing more is required for courts to defer to the DOJ's position in the TAM supplement. Just a few years before the DOJ issued its standing spectators guidelines in the 1994 TAM supplement, the Access Board gave notice and accepted comments on the identical question: whether lines of sight should be pro-

225. See, e.g., *Caruso v. Blockbuster-Sony Music Entm't Ctr. at the Waterfront*, 193 F.3d 730, 735–37 (3rd Cir. 1999); *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 740–42 (D. Or. 1997).

226. See, e.g., Brief for the United States as Amicus Curiae in Support of Appellant at 15, 18, *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008) (No. 06-56468), available at <http://www.usdoj.gov/crt/briefs/speedway.pdf> (arguing that, while the Access Board's commentary "certainly suggests that more detailed standards would be developed in the future," the Board "never expressly stated that its guidelines do not require lines of sight over standing spectators."). No court addressing the standing spectator conundrum has adopted this argument.

227. See, e.g., *Miller*, 536 F.3d at 1031–32 (favoring DOJ's position that it adopted only the Access Board's guidelines and not the commentary to those guidelines, leaving the DOJ free to develop its own interpretation of Section 4.33.3).

228. See Brief for the United States as Amicus Curiae in Support of Appellant, *supra* note 226, at 24–27.

229. See, e.g., *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587–88 (D.C. Cir. 1997) (finding that the DOJ's interpretation of the standard was entitled to deference and did not require notice and comment); *Caruso*, 193 F.3d at 736–37 (deciding that the Access Board's comments should be attributed to the DOJ and that, thus, the DOJ may not change its position without notice and comment).

230. See, e.g., *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1486 (9th Cir. 1992) ("It is a fundamental tenet of the APA that the public must be given some indication of what the agency proposes to do so that it might offer meaningful comment thereon.").

231. See *infra* Part V.A. See generally 5 U.S.C. § 706 (2006).

vided over standing spectators.²³² This first round of notice and comment provided interested parties with both notice of the proposed rule and a chance to comment on its implementation. Under the harmless error doctrine—a sort of “procedural equity”²³³—nothing more was required. Thus, applying the harmless error doctrine to the standing spectators morass is a simple solution to what has become an overly technical and complicated problem. While the DOJ is poised to adopt a new standing spectator rule,²³⁴ this time following the APA’s notice and comment regulations, doing so only remedies the problem for future construction; for any stadium or theater built in the last decade and a half, the harmless error doctrine remains the best path.

In order to appreciate the harmless error exception, it helps to remember the purpose that the APA’s notice and comment regulations usually serve. The notice and comment period allows interested parties the opportunity to be heard on a proposed administrative rule before the agency issues its final regulation.²³⁵ Strict adherence to the APA’s rulemaking requirements is intended to ensure “fairness and mature consideration of rules of general application and to allow parties who would be prejudiced by the absence of an opportunity to mount a credible challenge to a proposed rule to have an opportunity to present their case first before the agency.”²³⁶

As a balance to the formalism embodied in the APA and to protect public interest, Congress codified several exceptions to the notice and comment rules that apply when “the countervailing considerations of effectiveness, efficiency, expedition, and reduction in expense” are

232. Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 2296, 2314 (Architectural and Transp. Barriers Compliance Bd. proposed Jan. 22, 1991) (codified at 36 C.F.R. pt. 1191, app. A § 4.33.3).

233. Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 319 (1989) (“Therefore, a sense of procedural equity requires departure from procedural formalism in meritorious circumstances. Excessive formalism leads to unfairness, while good judgment and well exercised discretion promote fairness.”).

234. *See supra* Part II.C.

235. *See, e.g.,* *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1483–84 (9th Cir. 1992) (“The Administrative Procedure Act ensures that the massive federal bureaucracy remains tethered to those it governs – or so the theory goes.”); Arnold Rochvarg, *Adequacy of Notice of Rulemaking under the Federal Administrative Procedure Act - When Should a Second Round of Notice and Comment be Provided?*, 31 AM. U. L. REV. 1, 1 (1981) (“The perceived advantage of rulemaking stems in part from the belief that it permits broad public participation in bureaucratic decisionmaking.”).

236. Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1792–93 (2007) (internal quotations omitted).

of paramount importance.²³⁷ Courts should have applied one of these exceptions, “harmless error,” to their standing spectator analyses.²³⁸

A. *General Application of the Harmless Error Doctrine*

The harmless error exception is grounded in Section 706 of the APA.²³⁹ This section directs that, when reviewing agency action, a court must decide all relevant legal questions and interpret relevant constitutional, statutory, and regulatory language.²⁴⁰ On one hand, the reviewing court shall, among other things, “compel agency action unlawfully withheld or unreasonably delayed” and “hold unlawful and set aside agency action, findings, and conclusions found to be . . .

237. Lavilla, *supra* note 233, at 320–321.

238. The other exceptions to the notice requirement, besides the harmless error doctrine, are for interpretive rules and good cause. 5 U.S.C. § 553(b)(A), (B) (2006). As explained in Part III.B., only substantive rules, as opposed to mere interpretive ones, need to comply with the notice and comment requirements of the APA. Because courts have been split as to whether the DOJ’s standing spectators rule is interpretive or substantive, this exception is not helpful in resolving the standing spectator debate. The good cause exception, on the other hand, applies “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b)(B). In order to invoke the good cause exception, the agency generally must demonstrate “the presence of exigent circumstances.” Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 719–720 (1999) (“In general, only in compelling situations will a court subordinate the values embodied in public participation to claims of administrative necessity.”). With regard to notice and comment that are impracticable or contrary to the public interest, such exigencies may include the need to meet an imminent implementation deadline, a public health or safety emergency, or an environmental crisis. *Id.* at 920. With regard to “unnecessary” notice and comment periods, good cause may be invoked where “the agency action in question is ‘a minor rule or amendment in which the public is not particularly interested.’” Hickman, *supra* note 236, at 1782 (quoting U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 26 (1947)). In any of these circumstances, the agency cannot invoke the good cause exception post hoc, as the statute requires that the agency articulate the finding of and reason for invoking good cause contemporaneously with the rule itself. 5 U.S.C. § 553(b)(B). *But see* Asimow, *supra*, at 721–22 (noting that courts require that an “agency must articulate the factual basis for its claim of exigent circumstances when it adopts a rule under the good cause exception, even though the statute calls only for a good cause finding and ‘a brief statement of reasons therefore . . .’”). As one commentator put it, “the good cause exception exists principally to give agencies flexibility in dealing with emergencies and typographical errors, plus the occasional situation in which advance notice would be counterproductive.” Hickman, *supra* note 236, at 1782. Given the above standard, the standing spectators regulation does not satisfy the good cause exception, as the DOJ did not publish a statement invoking its application at the time of publication, and has never claimed as much.

239. *See* 5 U.S.C. § 706 (2006).

240. *Id.*

without observance of procedure required by law”²⁴¹ At the same time, however, the court shall take “due account . . . of the rule of prejudicial error.”²⁴² It is from this last directive that the harmless error doctrine has sprung.²⁴³

Although the doctrine of harmless error has been called “as much a part of judicial review of administrative action as of appellate review of trial court judgments,”²⁴⁴ it is a disfavored remedy.²⁴⁵ In the interest of avoiding abuse, courts “must exercise great caution”²⁴⁶ in applying the harmless error doctrine. This caution is warranted because, a broad application of the harmless error doctrine, would allow an agency “to adopt a rule that [does not] conform[] in any way to the comments presented to it. So long as [the agency] explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary.”²⁴⁷ Such an application of the harmless error doctrine, looking solely at the results, would allow an agency to claim that these comments would not have changed the rule eventually promulgated.²⁴⁸ Instead, to avoid “gutting” the purpose of the APA’s procedural requirements, “harmless error analysis in administrative rulemaking must . . . focus on the process as well as the result.”²⁴⁹

Thus, the harmless error doctrine has been limited to situations where some significant effort at complying with notice and comment was actually undertaken.²⁵⁰ If the agency engaged the public in some significant way, though still short of full APA compliance, a court is

241. *Id.* § 706(2)(D).

242. *Id.* § 706.

243. Hickman, *supra* note 236, at 1791 (“The courts occasionally employ this ‘harmless error’ rule to excuse deviations from APA rulemaking requirements.”).

244. *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 61 (1st Cir. 2001).

245. As one commentator noted, “courts concede harmless error sparingly, and an agency that depends upon such a rule to justify regular noncompliance is playing with fire.” Hickman, *supra* note 236, at 1795; *see also Save Our Heritage, Inc.*, 269 F.3d at 61 (“Obviously, a court must be cautious in assuming that the result would be the same if an error, procedural or substantive, had not occurred, and there may be some errors too fundamental to disregard.”).

246. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992).

247. *Id.*

248. *Id.*

249. *Id.*

250. *See, e.g., Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 769 (9th Cir. 1986) (applying harmless error doctrine where notice issued and hearings held previously on same issue “afforded the public a full and fair opportunity to be heard.”); *Little Bay Lobster Co. v. Evans*, 352 F.3d 462, 468 (1st Cir. 2003) (stating that harmless error applied where agency “held public hearings” and objector was “informally involved in the new plan and commented on it to the Secretary”); *Conservation Law Found. v. Evans*, 360 F.3d 21, 29–30 (1st Cir. 2004) (applying doctrine where agency gave actual notice of multiple public meetings).

more likely to find that the error was harmless.²⁵¹ If the purpose of notice and comment are satisfied despite some partial deviation from their procedural requirements, then the harmless error doctrine may be properly applied.²⁵²

Courts generally reject harmless error as a remedy where an agency issued no notice and offered only informal comment opportunity.²⁵³ In *Sugar Cane Growers Coop. v. Veneman*,²⁵⁴ a group of sugar cane growers, processors, refiners, and marketers sued the Department of Agriculture, alleging that the Department violated the APA when it announced a new “payment-in-kind” program by “press release . . . without using APA rulemaking.”²⁵⁵ Prior to the press release, “Department employees had approximately a dozen contacts with sugar industry representatives regarding the possibility of a [payment-in-kind] program,” but indicated that it would not implement the program without notice and comment.²⁵⁶ The District Court entered summary judgment for the Department, finding that the Department’s “failure to comply with [APA] procedures was harmless.”²⁵⁷ The Court of Appeals reversed, holding that the agency’s “utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure.”²⁵⁸ The court specifically rejected the government’s argument that “informal consultation” with interested parties satisfied the APA unless the challengers could identify a new argument not previously presented.²⁵⁹ While in APA cases the challenging party generally bears the burden

251. See, e.g., *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988) (“Even if the challenger presents no bases for invalidating the rule on substantive grounds, we cannot say with certainty whether petitioner’s comments would have had some effect if they had been considered when the issue was open.”).

252. See, e.g., *Sagebrush Rebellion, Inc.*, 790 F.2d at 764.

253. See, e.g., *Chamber of Commerce v. SEC*, 443 F.3d 890, 904 (D.C. Cir. 2006) (rejecting the harmless error doctrine as applicable and referring to the attempted informal comment opportunity as an “outright dodge” of the APA procedures).

254. *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002).

255. *Id.* at 91–92.

256. *Id.* at 92.

257. *Id.* at 93.

258. *Id.* at 96; see also *Chamber of Commerce*, 443 F.3d at 904 (describing the utter-failure cases as “[involving] the outright dodge of APA procedures”).

259. See *Sugar Cane Growers Coop.*, 289 F.3d at 96. But see *Little Bay Lobster Company, Inc. v. Evans*, 352 F.3d 462, 468 (1st Cir. 2003) (applying the harmless error exception where the challenger articulated “virtually nothing about what it might have said” to the agency to persuade it to change the rule in question, and that “[a]bsent such specifics, there is no reason to think that consultation would have produced a different result.”).

of demonstrating prejudice,²⁶⁰ the court recognized that the application of the harmless error doctrine in the case of informal consultation would “eviscerate[]” Section 553, the rulemaking provision of the APA.²⁶¹ If an agency could prevail on a harmless error claim whenever an objector could not articulate what comments it might have made formally that it did not make in an informal setting, then notice and comment requirements could be skirted; the government would avoid stating the basis and purpose of the rule, which is often a “major focus of judicial review.”²⁶²

The court in *Sugar Cane Growers Coop.* also rejected the argument that the challenging party must show that, but for the agency’s failure to offer notice and comment, a different rule would have been enacted;²⁶³ such a rule would render Section 553 “a dead letter.”²⁶⁴ Requiring challengers to state what comments they might have made if given the opportunity, or to speculate about how these new comments might have impacted the DOJ’s ultimate rule, would greatly impair the success of such challenges. A challenger could only succeed by showing that his or her comment would have been the specific comment to convince a large federal agency to change its course. The very purpose of Section 553, however, is to ensure the public an opportunity to be heard in the rulemaking process, regardless of whether a government agency ultimately decides to listen.²⁶⁵

Thus, the key to the harmless error analysis is whether, despite the technical deficiencies in the notice or comment period, interested parties had an actual opportunity to participate.²⁶⁶

260. *E.g.*, *First Am. Discount Corp. v. Commodity Futures Trading Com’n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (applying harmless error doctrine where plaintiff could not demonstrate that alternate commodity regulation was harmful).

261. *Sugar Cane Growers Coop.*, 289 F.3d at 96.

262. *Id.* at 96–97.

263. *Id.* at 95.

264. *Id.*; *see also* Rochvarg, *supra* note 235, at 20 (“When regulations issued without adequate notice are upheld on the ground that comments would not have changed the agency’s policy, the integrity of the administrative process is questioned . . .”).

265. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) (explaining that notice and hearing procedures “are designed to ensure public participation in rulemaking,” even though an agency “is not required to adopt a rule that conforms in any way to the comments presented to it”).

266. *Id.*; *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (“[A]ctual notice will render the error harmless.”); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (stating that the agency’s failure to notify County that it would add a snail to the Endangered Species Act was harmless where County Commissioner was aware of and participated in “early hearings”).

B. Duplicate Notice and Comment Not Required

The situation that “exemplifies proper application of the harmless error rule,” occurs when an agency complies with the APA once, but does not duplicate the notice and comment period when the identical issue arises again.²⁶⁷ Such a situation may be seen in *Sagebrush Rebellion, Inc. v. Hodel*, in which the Ninth Circuit held that “a second notice and hearing” of proposed administrative action was not required subsequent to a properly noticed proposal of the same action to be taken by Congress more than a year before.²⁶⁸ *Sagebrush Rebellion* concerned the Secretary of the Interior’s proposal that Congress create a wildlife conservation area by withdrawing certain land from public land and mining laws.²⁶⁹ Hearings were held and interested parties testified and submitted written comments, but when Congress failed to act on the bill for more than one year, the Secretary implemented an administrative withdrawal to create the conservation area.²⁷⁰ The plaintiffs, who had opposed the creation of the conservation area, filed suit alleging that the Secretary’s action was invalid because a new round of notice and comment did not take place.²⁷¹ The District Court upheld the Secretary’s action, and the Ninth Circuit Court of Appeals affirmed.²⁷²

The Court of Appeals found that, although the first round of notice and hearings was not in technical compliance with the statutory requirements for the later action by the Secretary, the error was harmless because the hearings nevertheless “afforded the public a full and fair opportunity to be heard.”²⁷³ In refusing to require repeat notice and comment proceedings, the court reasoned that “[t]he same public that would comment on a proposed administrative withdrawal would in all likelihood comment on a congressional withdrawal, since the impact of both actions on all concerned persons would be identical

267. *Riverbend Farms*, 958 F.2d at 1487.

268. *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764–65, 769 (9th Cir. 1986). At issue was compliance with the Federal Land Policy and Management Act, not the APA, though the Court looked to the APA in its analysis. *Id.* at 765. Moreover, the Court in *Riverbend Farms* found the *Sagebrush Rebellion* analysis “dispositive” in the context of the APA. *Riverbend Farms*, 958 F.2d at 1487.

269. *Sagebrush Rebellion, Inc.*, 790 F.2d at 762–763.

270. *Id.* at 763.

271. *Id.*

272. *Id.*

273. *Id.* at 769.

... ”²⁷⁴ To require a second round of “duplicative” notice and comment was simply not necessary.²⁷⁵

*C. DOJ’s Reliance on Earlier Notice and Comment
was Harmless Error*

Like the unnecessary second round of notice in *Sagebrush Rebellion*, the DOJ’s issuance of the 1994 TAM supplement addressing standing spectators without first duplicating the earlier notice and comment should also be found harmless error. The California Speedway and other stadiums and arenas built after 1994 were not at all prejudiced by the DOJ’s technical non-compliance with the APA because the very same question—whether wheelchair users should be assured full lines of sight over standing spectators “in sports arenas or race tracks where the audience frequently stands throughout a large portion of the game or event”²⁷⁶—had been noticed and commented on just a few years earlier.²⁷⁷ Because the “same public” that would have commented on the first notice of the standing spectator rule would likely have commented on a repeat of that question, the procedure need not have been duplicated.²⁷⁸

Unlike the court’s concern in cases like *Sugar Cane Growers Coop.*, in which the court refused to apply the harmless error doctrine

274. *Id.* at 765.

275. *Id.* at 767; *see also* *Shelton v. Marsh*, 902 F.2d 1201, 1206–07 (6th Cir. 1990) (holding that Army Corps of Engineers’ failure to “renotify interested parties that it was issuing a development permit” was “harmless in light of the actual notice” they received through an earlier permit process); *Cal-Almond, Inc. v. United States Dep’t of Agric.*, 14 F.3d 429, 441–42 (9th Cir. 1993) (holding the agency’s failure to follow notice and comment procedure was harmless where it held annual open meetings to receive “comments and testimony from any and all interested parties,” and out of which a proposed assessment rate for almond growers, which was the same as the challenged final rule, was set). *But cf.* *Rochvarg, supra* note 235, at 3 (suggesting a second round of notice and comment is necessary when “the final rule significantly differs from the proposed rule contained in the notice of rulemaking, and thus adoption of the final rule without a second round of notice and comment would undermine public participation and violate the statutory notice requirement of the APA and other statutes.”). The situation in *Sagebrush Rebellion*, and in the DOJ’s adoption of the standing spectators standard, did not involve a modification of the final rule from the version proposed, and thus would not fall within the situation described by *Rochvarg*.
276. *Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities*, 56 Fed. Reg. 2296, 2314 (Architectural and Transp. Barriers Compliance Bd. proposed Jan. 22, 1991) (codified at 36 C.F.R. pt. 1191, app. A § 4.33.3).

277. The “overwhelming majority of responses” to this notice “favored including a provision requiring lines of sight over standing spectators in sports arenas and other similar assembly areas.” *Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities*, 57 Fed. Reg. 60,612, 60,618 (Architectural and Transp. Barriers Compliance Bd. proposed 1992).

278. *Sagebrush Rebellion*, 790 F.2d at 765.

where only informal consultation with interested parties has been entertained,²⁷⁹ the standing spectators issue had been presented to the public according to the APA's dictates. The Access Board and the DOJ undertook this first round of notice together in 1991.²⁸⁰ The formal notice was published in the Federal Register, and comments were invited from the public as the APA required.²⁸¹

Because of the prior presentation of the issues, the harmless error doctrine reveals that the DOJ did not need to repeat the notice and comment procedures. Thereby, the harmless error doctrine frees the DOJ from its tenuous argument that the 1994 TAM supplement is perfectly consistent with Standard 4.33.3 and from the unnecessary attempts to fight the close relationship between the Access Board and the DOJ. Even if the DOJ's substantive rulemaking were admitted, under *Sagebrush Rebellion*, there would be no need for the DOJ to undertake a second round of notice and comment to readdress the standing spectators issue before the agency was ready to announce the rule.²⁸² Just as the Secretary in *Sagebrush Rebellion* was not required to duplicate the previous notice and comment procedure, even after more than a year had passed, the DOJ should not have been required to invite the public to comment on the same standing spectators question as it and the Access Board had posed in 1991.²⁸³

CONCLUSION

The *Miller* case has shifted the balance in favor of courts giving deference to the 1994 TAM supplement as the DOJ's reasonable interpretation of Standard 4.33.3. The courts that have given deference to the supplement have held that "lines of sight comparable to those for members of the general public" included lines of sight over standing spectators. Those courts that have refused to grant deference to the

279. *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). *But see Little Bay Lobster Company, Inc., v. Evans*, 352 F.3d 462, 468 (1st Cir. 2003) (applying the harmless error exception where the challenger articulated "virtually nothing about what it might have said" to the agency to persuade it to change the rule in question, and that "[a]bsent such specifics, there is no reason to think that consultation would have produced a different result").

280. *Nondiscrimination on the Basis of Disability by Public Accommodations and In Commercial Facilities*, 56 Fed. Reg. 7452, 7478-79 (Dep't of Justice proposed Feb. 22, 1991) (codified at 28 C.F.R. pt. 36) (proposing to adopt the Access Board's guidelines).

281. *Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities*, 56 Fed. Reg. 2296, 2380 (Architectural and Transp. Barriers Compliance Bd. proposed Jan. 22, 1991) (codified at 36 C.F.R. pt. 1191, app. A § 4.33.3).

282. *See Sagebrush Rebellion*, 790 F.2d at 765.

283. *See id.*

supplement have found that sports arenas and other assembly areas do not have to provide sightlines over standing spectators. Crucial to all of the courts' analyses was whether or not the DOJ adopted the Access Board's comments that referred to addressing the issue of sightlines over standing spectators at a future time. If the DOJ had not adopted the comments, then the 1994 TAM supplement simply interpreted what Standard 4.33.3 meant. Alternatively, if the DOJ had adopted the comments, the supplement represented a substantive change to Standard 4.33.3, in violation of the APA's notice and comment requirements. Yet what all the courts failed to recognize was that deference could be given to the supplement regardless of whether it was interpretive or substantive. Every court to consider the standing spectator issue stopped short of completing the analysis. Had the courts applied the harmless error doctrine, they would have found that it was irrelevant whether the 1994 TAM supplement was an interpretation of Standard 4.33.3, or a substantive change to it. Because there was a notice and comment period prior to the DOJ promulgating Standard 4.33.3, the DOJ did not have to duplicate that effort prior to publishing the supplement. Application of the harmless error doctrine would have resulted in consistency among the courts and a clear view for people who use wheelchairs.

