UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PARALYZED VETERANS OF AMERICA, FRED COWELL, GEOFFREY HOPKINS, ANDREW L. KRIEGER, and LEE PAGE,	)	
Plaintiffs,	)	Civil Action No. 96-1354 (TFH)
v.	)	
ELLERBE BECKET ARCHITECTS & ENGINEERS, P.C., ELLERBE BECKET, INC., D.C. ARENA ASSOCIATES, INC., D.C. ARENA L.P., CENTRE GROUP LIMITED PARTNERSHIP, ABE POLLIN SPORTS, INC., and ABE POLLIN,	)	
Defendants.	)	

MEMORANDUM OF *AMICUS CURIAE* UNITED STATES IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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I. INTRODUCTION

Plaintiffs Paralyzed Veterans of America ("PVA"), a Congressionally chartered, national organization of veterans who use wheelchairs, and four individual wheelchair users, Fred Cowell, Geoffrey Hopkins, Andrew L. Krieger, and Lee Page, have brought this action against the owners, developers, and architects of the new MCI Center, a multi-purpose indoor arena to be constructed in Washington, D.C. The plaintiffs assert that the current designs for the MCI Center violate title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181 through 12189 (the "ADA" or the "Act"), in that the designs provide wheelchair seating locations from which wheelchair users will not be able to see the court, the ice, or the stage when patrons in front of them stand. This failure to provide lines of sight over standing spectators, contend the plaintiffs, violates both title III of the ADA and the Standards for Accessible Design, 28 C.F.R. Part 36, Appendix A, the ADA's architectural requirements for new construction. The plaintiffs seek an injunction compelling the defendant to bring the facility into compliance with the ADA and the Standards. The plaintiffs' application for a preliminary injunction is opposed by several defendants.[1]

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[1]Although only one defendant, D.C. Arena L.P, has filed a memorandum in opposition to the plaintiffs' application for a preliminary injunction, other defendants -- including Ellerbe Becket Architects & Engineers, P.C., Ellerbe Becket, Inc., and D.C. Arena Associates -- have filed statements joining in the arguments presented by defendant D.C. Arena L.P. Accordingly, in discussing the arguments against the plaintiffs' application, this memorandum refers to the defendants collectively, unless the context requires otherwise.

Also pending before the Court are motions to dismiss of various defendants. Defendants Ellerbe Becket Architects & Engineers, P.C. ("EBAE"), the architects for the MCI Center, and Ellerbe Becket, Inc. ("EB"), the parent company of EBAE (collectively, the "Ellerbe Becket defendants"), have moved to dismiss the counts of the complaint alleged against them, arguing that architects and engineers do not fall within the scope of the ADA's provisions governing the design and construction of new facilities, so that they cannot be held liable under the ADA for designing a facility that does not comply with the ADA's Standards for Accessible Design.[2] Defendant D.C. Arena L.P., the owner and operator of the MCI Center, has also moved to dismiss this action, arguing that because the arena has not yet been built, any injury to the plaintiffs remains speculative, such that the case is not ripe for judicial review, and the plaintiffs have no standing to bring the action.

As set forth below, the United States contends that the plaintiffs are correct in arguing that title III of the ADA and the Standards require that new arenas and stadiums be designed to allow patrons who use wheelchairs to see what is happening on the floor or field, even when other patrons stand up. Accordingly, the Court should grant the plaintiffs' application for a preliminary injunction to bring the MCI Center into compliance

[2]The Ellerbe Becket defendants have also moved to dismiss the claim against them under the District of Columbia's Human Rights Act, D.C. Code §§ 1-2501 *et seq*. The United States does not address any issues relating to the D.C. Human Rights Act.

with the Standards. In addition, the United States urges the Court to deny the defendants' motions to dismiss: the ADA's provisions governing new construction apply to all entities involved in the design and construction of new facilities, including architects and engineers, and there can be little question that the imminent construction of a facility that does not comply with the ADA presents a case or controversy sufficiently ripe for judicial review.

II. STATUTORY AND REGULATORY FRAMEWORK

The Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, is Congress' most comprehensive civil rights legislation since the Civil Rights Act of 1964. Its purposes are "to invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities," 42 U.S.C. § 12101(b)(4), and to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA's coverage is accordingly broad -- prohibiting discrimination on the basis of disability in employment, State and local government programs and services, transportation systems, telecommunications, commercial facilities, and the provision of goods and services offered to the public by private businesses.

This case concerns title III of the ADA, 42 U.S.C. §§ 12181 through 12189, which prohibits discrimination on the basis of disability in both public accommodations and commercial

facilities.[3] Title III's general mandate prohibiting discrimination against individuals with disabilities is set out in section 302(a) of the Act, which 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.

42 U.S.C. § 12182(a). Section 302(b) then construes section 302(a), defining discrimination on the basis of disability to include various acts or omissions. For instance, public accommodations may not deny individuals with disabilities opportunities to participate in and benefit from their services on a basis equal to that offered to other individuals. *See* 42 U.S.C. § 12182(b)(1)(A)(ii). Public accommodations also may not provide individuals with disabilities with goods, services,

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[3]The ADA defines commercial facilities very broadly as all facilities intended for non-residential use whose operations affect commerce (with the exception of certain railroad facilities and equipment, and certain facilities covered by the Fair Housing Act). *See* 42 U.S.C. § 12181(2). The statute defines "public accommodations" to be entities (1) whose operations affect commerce, and (2) that fall into one or more of twelve categories of public accommodations set out in the Act. *See* 42 U.S.C. § 12181(7). The category of public accommodations, while still large, is not as broadly inclusive as "commercial facilities."

Many facilities meet both definitions. The MCI Center, for instance, is clearly a non-residential facility whose operations affect commerce, and thus is a "commercial facility." It also is a "public accommodation," as it falls within at least two of the statute's categories of public accommodation: it is a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment, within the meaning of section 301(7)(C), and it is also an auditorium, convention center, lecture hall, or other place of public gathering, within the meaning of section 301(7)(D). *See* 42 U.S.C. §§ 12181(7)(C), (D).

privileges, or advantages that differ from those provided to other individuals, unless doing so is necessary to the provision of the goods or services in question. *See* 42 U.S.C. § 12182(b)(1)(A)(iii). All of the prohibited activities defined in section 302(b) apply exclusively to public accommodations. Section 303 of the Act adds another category of prohibited activity -- the design and construction of new facilities that are not accessible to and usable by individuals with disabilities -- and extends this prohibition not just to public accommodations, but to all commercial facilities. *See* 42 U.S.C. § 12183.

The Act directs the Attorney General to issue regulations to carry out the provisions of title III (other than certain provisions dealing with transportation issues, which are entrusted to the Secretary of Transportation, *see* 42 U.S.C. § 12186(a)). 42 U.S.C. § 12186(b). Section 303 specifically requires that the regulations include, or incorporate by reference, architectural accessibility standards. 42 U.S.C. § 12183(a)). The statute provides that these architectural standards must meet or exceed those developed by another federal agency, the Architectural and Transportation Barriers Compliance Board (also known as, and referred to herein as the "Access Board"); the architectural standards promulgated by the Attorney

General must be "consistent with the minimum guidelines and requirements issued by" the Access Board. 42 U.S.C. § 12186(c).[4]

As required by the statute, the Attorney General timely issued a title III implementing regulation on July 26, 1991. *See* 28 C.F.R. Part 36. The regulation includes architectural standards for newly constructed public accommodations and commercial facilities, entitled the Standards for Accessible Design. *See* 28 C.F.R. Part 36, Appendix A ("the Standards"). Among other things, the Standards set several requirements for wheelchair seating locations in stadiums, arenas, and other "assembly areas." *See* Standards §§ 4.1.3(19), 4.33.[5]

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[4]The Access Board is composed of twenty-two members, eleven of whom are members of the public appointed by the President, and eleven of whom are representatives of federal agencies. 29 U.S.C. § 792(a)(1). The Attorney General, as head of the Department of Justice, is one of the eleven federal members of the Board. 29 U.S.C. § 792(a)(1)(B).

[5]An "assembly area" is defined by the Standards to be any

> room or space accommodating a group of individuals for recreational, educational, political, social, or amusement purposes, or for the consumption of food and drink.

Standards § 3.5 (definition of assembly area). The Standards require that assembly areas with fixed seating provide a certain number of wheelchair seating locations (tied to the total number of fixed seats in the assembly area), and that these wheelchair seating locations comply with various requirements governing their size, floor surface, placement, companion seating, and so on. *See* Standards § 4.1.3(19).

III. ARGUMENT

A. Title III of the ADA and the title III regulation require the MCI Center to be readily accessible to and usable by individuals with disabilities.

Section 303 of the ADA requires that newly constructed facilities be "readily accessible to and usable by individuals with disabilities . . . in accordance with standards set forth . . . in regulations issued under this subchapter." 42 U.S.C. § 12183(a). The standards referred to -- the Attorney General's Standards for Accessible Design -- specifically address the placement of wheelchair seating locations in newly constructed stadiums, arenas, and other assembly areas with fixed seating, requiring that

> [w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. . . .

28 C.F.R Part 36, Appendix A, § 4.33.3 (emphasis added).

The Department of Justice interprets the language in the Standards requiring "lines of sight comparable to those for members of the general public" to mean that wheelchair locations in newly constructed arenas must provide a line of sight over standing spectators in facilities where spectators may be expected to stand during the events. The Department has published or provided its view in various ways, but the first published statement of the Department's position came in the 1994 supplement to the Department's Title III Technical Assistance Manual, in which the Department publishes informal, non-binding

guidance on questions arising on all aspects of title III. The 1994 supplement to the TA Manual states that

> [i]n addition to requiring companion seating and dispersion of wheelchair locations, ADAAG 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. This can be accomplished in many ways, including placing wheelchair locations at the front of a seating section, or by providing sufficient additional elevation for wheelchair locations placed at the rear of seating sections to allow those spectators to see over the spectators who stand in front of them.

U.S. Department of Justice, Americans with Disabilities Act Title III Technical Assistance Manual, 1994 Supplement § III-7.5180 at 13 (Supp. 1994) (copy attached as Exhibit A).

The Department has expressed the same position in other interpretive documents,[6] and has pursued its view of the statute and the regulation in its enforcement efforts. Most notably, the Department has recently concluded a lengthy investigation of

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[6]The Department most recently addressed this issue in a four-page document entitled "Accessible Stadiums," which was first distributed publicly in May 1996. Among other things, this document explains the Department's view that

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

Accessible Stadiums at 2. The document includes a diagram depicting comparable lines of sight for wheelchair users. A copy is attached as Exhibit B.

several newly constructed Olympic venues in and around Atlanta, Georgia. The investigation included the new 85,000 seat Olympic Stadium, which will be used as the main venue for the 1996 Summer Olympic Games, and then converted to a 45,000 seat baseball stadium. The central objective of the Department's investigation of these facilities was to insure that all of the wheelchair seating locations in the facilities in question would provide a line of sight over standing spectators. The Department's efforts were successful: in both the Olympic and baseball stadiums, as well as three other new Olympic venues, wheelchair users will have "comparable" lines of sight allowing them to see over standing spectators.[7]

B. The Department of Justice's interpretation of title III of the ADA and the title III regulation is reasonable.

The Department's reading of section 4.33.3 of the Standards makes perfect sense: if other spectators can see over standing spectators (by standing up themselves), then spectators using wheelchairs must also be able to see over standing spectators, or they will not have a "comparable" line of sight. Put differently, the developers, architects, and engineers who design

[7]The wheelchair seating locations at two other newly constructed Olympic venues -- outdoor stadiums at Clark Atlanta University and Morris Brown College -- will also have lines of sight over standing spectators. In addition, a fourth Olympic venue, the newly constructed aquatic center (on the campus of the Georgia Institute of Technology) will have wheelchair locations with lines of sight over standing spectators in its permanent seating sections. When temporary seating is added for the Summer Games, half of the wheelchair locations in that seating will also provide lines of sight over standing spectators.

new stadiums can no longer rely on the assumption that when patrons stand, all patrons will still be able to see, by standing up themselves. Rather, they must replace that assumption with a design feature that does not require wheelchair users to stand in order to see. Just as the ADA does not allow a new facility to be designed and constructed with an entrance that requires wheelchair users to stand, walk, or climb stairs, so does the ADA forbid an arena to be designed and constructed so that wheelchair users must be able to walk or stand in order to see what is happening on the court or the ice or the stage.[8]

The Department's reading of the "comparable" lines of sight language of the Standards is buttressed by the language and purpose of the statute itself. The new construction provision requires that new facilities be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a). The legislative history of the Act explains that this provision is intended to assure "both ready access to the facility and usability of its features and equipment and of the goods, services, and programs available therein." S. Rep. No. 116, 101st Cong., 1st Sess. 69 (1989). The central purpose of a sports arena like the MCI Center is to provide a facility in which large numbers of people can gather and view an athletic or other event. At many of those events -- basketball games, hockey matches, music concerts, and others -- spectators will stand for

[8]For the sake of convenience, the various playing and performing surfaces that will be employed at the MCI Center are referred to hereafter as the arena "floor."

all or significant portions of the event, including the most interesting and exciting portions of the event. Having a line of sight over standing spectators will be critical to enjoyment of events at the facility. To allow a stadium design which relegates wheelchair users to looking at the backs of the people in front of them during those periods is to allow a stadium design which significantly diminishes the ability of wheelchair users to participate in and enjoy the event. It is precisely the kind of discrimination that the ADA is intended to prevent.

The defendants do not argue that wheelchair users at the MCI Center will be able to see what other spectators will be able to see. Instead, the defendants argue that the Department of Justice's views on comparable lines of sight, as expressed in the Technical Assistance Manual, do not have the force of law, are not binding, and are entitled to no deference. The defendants have missed the point. The Department acknowledges that the TA Manual, standing alone, does not have the force of law and is not binding, but only expresses the Department's views on the correct interpretation of title III of the ADA and its title III regulation. We argue below that as the agency directed by Congress to promulgate and enforce architectural standards, our interpretation of the Standards is entitled to deference, but the central issue here is not the nature or validity of the Department's Technical Assistance Manual. The central issue is whether title III of the ADA and the Standards require that patrons using wheelchairs in the MCI Center be able to see the

action on the arena floor. It is the Department's position that, read in light of the statutory language and purpose, the only sensible conclusion is that in stadiums and arenas where spectators can be expected to stand, the "comparable" lines of sight requirement includes lines of sight over those standing spectators.

C. This Court should defer to the Department's interpretation of title III and the title III regulation.

It is well established that the courts "must give substantial deference to an agency's interpretation of its own regulations" unless "plainly erroneous or inconsistent with the regulation." Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2386 (1994) (internal quotes omitted). Moreover, "an agency's interpretation of its own regulations" need not be expressed by formal rulemaking; deference extends as well to statements made in informal interpretive documents like the Department's Technical Assistance Manual. The Supreme Court, for instance, has recently deferred to a Bureau of Prisons interpretation of a statute it was charged with administering, even though the interpretation was contained only in an internal agency document:

> It is true that the Bureau's interpretation appears only in a `Program Statement' -- an internal agency guideline -- rather than in published regulations subject to the rigors of the Administrative Procedure Act, including public notice and comment. But BOP's internal agency guideline, which is akin to an 'interpretive rule' that does not require notice-and-comment, is still entitled to some deference, since it is a permissible construction of the statute.

Reno v. Koray, 115 S. Ct. 2021, 2027 (1995) (quotation marks, brackets, and citations omitted). *See also* Wagner Seed Co., Inc. v. Bush, 946 F.2d 918, 922 (D.C. Cir. 1991), cert. denied, 503 U.S. 970 (1992)(holding that interpretive statements receive Chevron deference even if they do not arise out of rulemaking, and deferring to position taken by EPA in a "decision letter").

The ADA itself provides for the issuance of the Department of Justice's TA Manuals, so that covered entities and individuals with disabilities might better understand their respective duties and rights. The statute directs the Attorney General, in consultation with various other federal officials, to develop and implement a technical assistance plan, "to assist entities covered under [the Act] . . . in understanding the responsibility of such entities . . . under [this Act]." 42 U.S.C. § 12206(a)(1). The statute specifically directs the Attorney General[9] and others with enforcement responsibilities "to ensure the availability and provision of appropriate technical

[9]In discussing the Title III Technical Assistance Manual, the defendants make several references to "a subordinate office" within the Justice Department, seeming to suggest that the Department's Civil Rights Division did not have authority to author or issue the Technical Assistance Manual, or to interpret or enforce the statute. Defendants' suggestion is disingenuous. There is nothing "unofficial" about the TA Manual or its updates; the authority to carry out particular governmental functions is frequently delegated to "subordinate" officials, and the authority to enforce and administer the ADA has been expressly delegated to the Assistant Attorney General for the Civil Rights Division. *See* 28 C.F.R. § 0.50(l). *See also* United States v. Giordano, 416 U.S. 505, 513-14 (1974) (accepting as "unexceptionable" the general proposition that "merely vesting a duty in the Attorney General . . . evinces no intention whatsoever to preclude delegation to other officers in the Department of Justice.")

assistance manuals to individuals or entities with rights or duties under [the Act] . . . ." 42 U.S.C. § 12206(c)(3).[10] Given that Congress explicitly directed the Attorney General to issue this informal guidance, the title III TA Manual should be considered a particularly valuable source for understanding title III and the title III regulation.[11]

Many courts have deferred to the Department's TA Manuals for both titles II and III of the ADA. Indeed, this Court deferred

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[10]The purpose of the Technical Assistance Manual is described in its introduction:

> The purpose of this technical assistance manual is to present the ADA's title III requirements in a format that will be useful to the widest possible audience. The guidance provided in the Department's regulations and accompanying preambles has been carefully reorganized to provide a focused, systematic description of the ADA's requirements. The manual attempts to avoid an overly legalistic style without sacrificing completeness. In order to promote readability and understanding, the text makes liberal use of questions and answers and illustrations.

U.S. Department of Justice, The Americans with Disabilities Act Title III Technical Assistance Manual, Introduction (Nov. 1993). Thus, the TA Manual is not in any sense a regulation. It provides informal guidance about the Department's interpretation of the ADA's statutory and regulatory requirements.

[11]The defendants suggest that the Department of Justice's interpretations of the Standards do not deserve deference because they come from "lawyers in a subordinate office of the Civil Rights Division . . . who have no discernible expertise in designing buildings." Memorandum of D.C. Arena L.P. at 38. Evidently, the defendants are unaware of the level of expertise possessed by the Department. The Civil Rights Division employs five licensed architects to work exclusively on issues of accessible design arising in the course of the Department's ADA enforcement, regulatory, and technical assistance efforts. The Division also employs several other individuals with expertise in a variety of other technical subjects covered by the title III regulation and the Standards, including, for instance, assistive listening systems and devices and other technologies of use to individuals with speech, hearing, or vision impairments.

to the title III TA Manual in a case construing other language of section 4.33.3 of the Standards for Accessible Design, the very section of the Standards at issue here. Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35 (D.D.C. 1994). In Fiedler, the plaintiff sought to have a movie theater in Union Station disperse its wheelchair seating locations throughout the theater. The defendants argued that an "exception" to section 4.33.3 permitted "clustering" of wheelchair locations in the theater. In resolving the dispute, the court relied heavily on the Department of Justice's interpretation of section 4.33.3 in the Technical Assistance Manual. The court noted that

> [t]he United States Department of Justice is charged by statute with the implementation of Title III of the ADA, 42 U.S.C. § 12186(b), and to that end it has promulgated conventional regulations and published literature interpreting the regulations, including a "technical assistance" manual, pursuant to 42 U.S.C. § 12206(c)(3) . . . . Although the parties do not agree as to the force and effect each is to be given, the Court will deem them as regulations and interpretations of regulations, the latter to be given controlling weight as to the former.

Id. at 36 n.4. The court concluded that "[a]s the author of the regulation, the Department of Justice is also the principal arbiter as to its meaning," and adopted the reading of section 4.33.3 advanced by the government. Id. at 38 (citing Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381 (1994)). The Fiedler court also relied upon statements in the TA Manual, including statements in the 1994 supplement to the TA Manual, in addressing other questions raised by the case. *See* id. at 37 n.6 (relying on statement in 1994 supplement to TA Manual as to status of private lessees of government property under title III), and 37

n.7 (title III does not disturb other federal laws which provide equal or greater protections for individuals with disabilities.)

Other courts have also explicitly deferred to the Department's TA Manuals for both titles II and III of the ADA, and more have looked to the Manuals for guidance or support. One of the cases expressly deferring to the title II TA Manual is Ferguson v. City of Phoenix, No. CIV 95-0260 PHX RCB (D. Ariz. Apr. 16, 1996) (attached as Exhibit C). In Ferguson, deaf plaintiffs challenged the adequacy of the city of Phoenix' 911 emergency system, with respect to its ability to handle incoming calls from individuals using telecommunications devices for deaf persons (TDDs). Among other things, they relied upon statements in the Department's title II TA Manual describing features that the Department believes 911 systems must possess. The court first observed that (as with title III) Congress had directed the Attorney General to promulgate regulations necessary to implement title II (which prohibits disability based discrimination by state and local governments -- *see* 42 U.S.C. § 12132), and to publish a technical assistance manual. Slip op. at 9-11. Then, relying on Chevron and Thomas Jefferson, the court held that because the Department's views, as expressed in the TA Manual, were reasonable interpretations of its own regulations, it should defer to them. Id. at 12-15. *See also* Innovative Health Sys. v. City of White Plains, No. 95 CV 9642(BDP) 1996 WL 361137 at *19 n.4 (S.D.N.Y. June 12, 1996) (Department of Justice's title II TA Manual entitled to controlling weight unless plainly erroneous or

inconsistent with the regulations); Orr v. Kindercare, Civ. No. S-95-507 EJG/GGH (E.D. Cal. June 9, 1995), slip op. at 5-6 (attached as Exhibit D) (Attorney General's interpretations of the title III regulations are entitled to substantial deference; moreover, "the government's interpretations of the statute and regulations implemented thereunder, [even though] articulated for the first time in this lawsuit, are at the very least, informative and useful."). *Cf.* Pinnock v. International House of Pancakes, 844 F. Supp. 574 (S.D. Cal. 1993) (rejecting a constitutional challenge to title III of the ADA as void for vagueness in part by considering clarification of statute found in administrative regulations and the title III TA Manual).[12] Many more decisions cite or rely upon the TA Manuals as authority for the courts' statutory and regulatory interpretations of the ADA, without discussion of the level of deference afforded.[13]

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[12]While the defendants are correct in pointing out there are cases in which federal courts have refused to defer to the EEOC's Title I Technical Assistance Manual, *see* Memorandum of D.C. Arena L.P. at 33-34, other federal courts have deferred to the Title I TA Manual. *See* Thompson v. Borg-Warner Protective Services Corp., No. C-94-4015 MHP, 1996 WL 162990 at *4 (N.D. Cal. Mar. 11, 1996) (according "broad deference to interpretations in the EEOC 1995 ADA Manual on Enforcement Guidance as 1995 Guidance, citing Chevron); Le v. Applied Biosystems, 886 F. Supp. 717, 720 n.2 (N.D. Cal. 1995) ("Although not binding on [the] court, [the Title I TA Manual's] interpretation of the ADA is instructive").

[13]*See, e.g.*, Holihan v. Lucky Stores, Inc., No. 95-55409, 1996 WL 346624 at *4 n.3 (9th Cir. June 26, 1996) (Title I); Kornblau v. Dade County, No. 95-4100, 1996 WL 196824 at *3 (11th Cir. June 20, 1996) (Title III); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1123, 1114 (8th Cir. 1995) (Title I); Milton v. Scrivner, Inc., 53 F.3d 1118, 1124 (10th Cir. 1995) (Title I); Adelman v. Dunmire, No. CIV.A. 95-4039, 1996 WL 107853 at *5 n.7 (E.D. Pa. Mar. 12, 1996) (title II); Civic Ass'n. of the Deaf,

D. The defendants' arguments that the Court should not defer to the Department's interpretation lack merit.

1. The Standards for Accessible Design are an integral part of the Department of Justice's title III implementing regulation.

As described above (*see* discussion *supra* at 5-6), the Act directs the Attorney General to issue regulations to implement title III of the ADA, including architectural standards for new construction consistent with minimum guidelines developed by the Access Board. Contrary to the defendants' assertion, the architectural standards included within the Department's title III regulation are not another agency's regulation, but are manifestly part -- indeed, a central, crucial part -- of the Department's own regulation.

Initially, the language of the statute makes clear that the actions of the Attorney General and the Access Board are of different legal effect: while the Access Board is to issue only minimum "guidelines," the Attorney General is to issue "regulations," including architectural standards which must be consistent with the Access Board's "guidelines." *See* 42 U.S.C. § 12186(b) (Attorney General to issue "regulations"); 42 U.S.C. § 12204 (Access Board to issue "minimum guidelines"); 42 U.S.C.

Inc. v. Giuliani, 915 F.Supp. 622, 635 (S.D.N.Y. 1996) (Title II); Dertz v. City of Chicago, 912 F. Supp. 319 (N.D. Ill. 1995) (Title II); Clarkson v. Coughlin, 898 F. Supp. 1019, 1037-38 (S.D.N.Y. 1995) (Title II); Bechtel v. East Penn Sch. Dist., No. Civ. A. 93-4898, 1994 WL 3396 at *2-*3 (E.D. Pa. Jan. 4, 1994); Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (Title II); Noland v. Wheatley, 835 F. Supp. 476 (N.D. Ind. 1993) (Title II).

§ 12186(c) (standards included in regulations issued by Attorney General must be consistent with minimum guidelines issued by Access Board). The "guidelines" issued by the Access Board have no regulatory force or effect in and of themselves; the architectural standards in question are a "regulation," and have regulatory effect, only because they have been included by the Department of Justice in the Department's title III regulation. Indeed, the Board's "guidelines" explicitly recognize that

> [t]hese guidelines are to be applied during the design, construction, and alteration of such buildings and facilities to the extent required by regulations issued by Federal agencies, including the Department of Justice, under the Americans with Disabilities Act of 1990.

Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities, 56 Fed. Reg. 35408, 35459 (1991) (emphasis added).

Moreover, title III vests the Attorney General with considerable discretion to set architectural standards: the only requirement is that they be at least as strict as the "minimum guidelines" to be developed by the Access Board. 42 U.S.C. § 12186(c). Thus, while the Department adopted the Board's guidelines (the ADA Accessibility Guidelines, or "ADAAG") as its Standards for Accessible Design without modification, it was not required to do so, and did so only because, as the Department explained when it issued its final title III regulation,

> [a]s a member of the Board and of its ADA Task Force, the Department participated actively in the public hearings held on the proposed guidelines and in preparation of both the proposed and final versions of ADAAG. Many individuals and groups commented directly to the Department's docket, or at its public hearings, about ADAAG. The comments received on

> ADAAG, whether by the Board or by this Department, were thoroughly analyzed and considered by the Department in the context of whether the proposed ADAAG was consistent with the ADA and suitable for adoption as both guidelines and standards. The Department is convinced that ADAAG as adopted in its final form is appropriate for these purposes. The final guidelines, adopted here as standards, will ensure the high level of access contemplated by Congress, consistent with the ADA's balance between the interests of people with disabilities and the business community.

28 C.F.R. Part 36, Appendix B at 634.

Indeed, in promulgating the title III implementing regulation, the Department did not simply incorporate the Board's ADAAG by reference (as it might have done consistently with the requirements of the Act -- *see* 42 U.S.C. § 12183(a)(1) (architectural standards to be "set forth or incorporated by reference in regulations issued under this subchapter"). To the contrary, the Department carefully integrated the ADAAG into its title III regulation, modifying other parts of the regulation to produce a coherent whole. As explained in the preamble to the final title III regulation, the Department deleted certain parts of subpart D of the rule because they were included in the ADAAG, and retained other parts of subpart D to be faithful to the statute, even though those provisions were partially or wholly repeated in the ADAAG. *See* 28 C.F.R. Part 36, Appendix B at 633. Finally, the ADAAG were re-labeled as the Standards for Accessible Design, to make clear that these were not "guidelines" -- which might be thought to be merely suggestive -- but "standards" with the force of law, and to distinguish the Department of Justice's legally binding regulation from the Board's non-binding ADAAG. *See* 28 C.F.R. Part 36, Appendix A

(the "Standards for Accessible Design"). When it interprets the regulation and the Standards for Accessible Design, the Department is unquestionably construing its own regulation.

2. The Department of Justice did not adopt the Access Board's commentary on the ADAAG.

In contending that the language of the Standards requiring "comparable" lines of sight does not require that wheelchair seating locations provide lines of sight over standing spectators, the defendants make much of the Board's statement, in its commentary to the final ADAAG, that it would return to that issue in future rule-making. What the defendants do not point out, however, is that while the Department adopted the Board's guidelines and incorporated them into its regulation, the Department did not adopt or incorporate the Board's commentary on the final ADAAG. If it had wished to do so, the Department certainly could have adopted the Board's discussion of the ADAAG. The Department, however, wrote and published its own lengthy commentary (some twenty pages) on the new construction requirements of the ADA, the architectural standards, and the interrelationship between the standards and other parts of the regulation and the statute. *See* 28 C.F.R. Part 36, Appendix B at 619-38. In doing so, the Department did not specifically address any of the comments made by the Board the same day, either to endorse or to disavow them. The commentary issued by the Department does not specifically address section 4.33.3 of the

Standards, or the issue of line of sight over standing spectators. Id.

In any case, the defendants cannot credibly argue that they relied on the Board's statement in designing the MCI Center to have wheelchair locations without lines of sight over standing spectators. The Technical Assistance Manual made clear, two years ago, that the Department of Justice believed that lines of sight over standing spectators were required -- resolving any doubts about the Department's position that might have been raised by the Board's statements.[14] The defendants do not claim to have been unaware of the Technical Assistance Manual, or the Department's position. To the contrary, as the plaintiffs demonstrate in their reply memorandum, the defendants were fully aware of the Department's position and simply disregarded it. The defendants now rely on the great momentum of the project, and its high public profile, to steamroll any objections to the design of the arena. They ask this Court to save them from their own calculated refusal to make the facility fully accessible to

[14]It should not be surprising that additional material has been added to the TA Manuals over time. As the Department pursues its enforcement and technical assistance mandates, it becomes clear -- as one might expect with a new statute and new regulation -- that particular issues are not fully understood, and that additional guidance will assist covered entities and individuals with disabilities understand their respective rights and obligations. Thus, the Department publishes supplements to the Technical Assistance Manual, addressing a variety of issues that arise in the course of its enforcement and technical assistance efforts. The supplements, like the TA Manual itself, cover all aspects of the title III regulation, including the Standards for Accessible Design (and the requirements for wheelchair seating locations in stadiums and arenas).

and usable by individuals with disabilities, based on a statement by the Access Board which the defendants knew all along was not the view of the agency responsible for enforcing the statute.

3. Prior industry standards and practices provide no basis on which to reject the Department's position.

Finally, in resisting the plaintiffs' attempts to insure that they and other wheelchair users will be able to participate fully and equally in the events to be held at the MCI Center, the defendants rely in part on what they call a "well-established preexisting meaning" for the principle of "comparable" lines of sight. Memorandum of D.C. Arena L.P. at 36. It is no answer to the plaintiffs' claim, however, to say that stadiums and arenas have not been designed this way in the past -- that there is (or was) a generally understood and accepted industry standard which called for sight lines to be calculated over seated patrons only. Indeed, in adopting the ADA, Congress explicitly recognized that individuals with disabilities

> continually encounter various forms of discrimination, including [among other things] . . . the discriminatory effects of architectural, transportation, and communication barriers, . . . and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. § 12101(a)(5). The defendants complain that requiring lines of sight over standing spectators is a "major change in the law." Memorandum of D.C. Arena L.P. at 37. This is no reason to rule against the plaintiffs. To the contrary -- it is the very purpose of the ADA to change the way new facilities, including sports arenas, are designed and constructed -- to discard

standards and practices which have relegated individuals with disabilities to diminished participation in the day to day life of our society.

The defendants' arguments based on past experience at the USAir Arena fail for similar reasons. *See* Memorandum of D.C. Arena L.P. at 5, 17. Initially, the defendants' suggestion that the MCI Center need have only enough wheelchair seating locations to accommodate the demand experienced at the USAir Arena is tantamount to suggesting that the developers and architects of the MCI Center need not comply with the ADA's new construction requirements. That is, rather than provide the number of wheelchair locations required by the Standards for Accessible Design, the defendants' argument would allow them to provide whatever number of such locations they judged to be adequate, based on "current experience." Id. at 17.

Second, there is every reason to expect that, if it is designed and constructed to be readily accessible to and usable by individuals with disabilities -- including providing wheelchair locations with a line of sight over standing spectators -- the MCI Center will attract far more wheelchair users than have attended events at the USAir Arena, or other older arenas. Those arenas typically do not provide a high level of access or usability, and it is no surprise that few wheelchair users attend events there. In addition to the line of sight question, a variety of other barriers -- lack of accessible public transportation, inaccessible parking, inaccessible

entrances, inaccessible restrooms, inaccessible concession stands, or failure to provide wheelchair seating areas in desirable locations -- may deter wheelchair users from visiting the facility in question.[15] The MCI Center (if it complies with the ADA) will be fully accessible to and usable by individuals

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[15]The legislative history of the ADA makes clear that Congress recognized the magnitude of this problem, and acted to address it:

> Based on testimony presented at the hearings and recent national surveys and reports, it is clear that an overwhelming majority of individuals with disabilities lead isolated lives and do not frequent places of public accommodation.
>
> The National Council on Disability summarized the findings of a recent Lou Harris poll:
>
> > The survey results dealing with social life and leisure experiences paint a sobering picture of an isolated and secluded population of individuals with disabilities. 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. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue * * * The extent of non-participation of individuals with disabilities in social and recreational activities is alarming.
>
> Several witnesses addressed the obvious question "Why don't people with disabilities frequent places of public accommodation and stores as often as other Americans?" Three major reasons were given by witnesses. The first reason is that people with disabilities do not feel that they are welcome and can participate safely in such places. The second reason is fear and self-consciousness about their disability stemming from degrading experiences they or their friends with disabilities have experienced. The third reason is architectural, communication, and transportation barriers.

S. Rep. No. 116, 101st Cong., 1st Sess. 10-11 (1989). *See also* H. R. Rep. No. 485, 101st Cong., 2d Sess. pt. 2, at 34-35 (1990) (same).

with disabilities, will be centrally located and reachable by an accessible public transportation system (the Metro), and attending games there will be considerably easier and more inviting for wheelchair users and their companions.

Indeed, in addition to mandating architectural accessibility, the ADA also aims to change many other factors which have limited the ability of individuals with disabilities to participate in social and leisure activities. By improving access to education and employment opportunities for individuals with disabilities -- and thereby raising their level of disposable income -- the ADA will enable individuals with disabilities to do many things they have not been able to do before, including buying tickets and attending games, concerts, and other events. In all of this, the ADA is forward-looking: the requirements for accessibility applicable to the MCI Center are designed to insure not just that the facility's capacity for wheelchair users will be adequate when it opens in 1997, but also in 2007, 2017, and 2027, when it will still be in operation, and the effects of the ADA in making accessible all aspects of our society will have been more completely realized.

Given the defendants' admission that there are several ways in which to provide wheelchair users at the MCI Center with comparable lines of sight -- ways which will not require the halting of construction -- there is every reason to grant the plaintiffs' request to require the defendants to redesign the MCI

Center's wheelchair seating locations, so that the facility will be in compliance with the ADA when it opens in 1997.[16]

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[16]The defendants offer several possible remedial measures for providing lines of sight over standing spectators, arguing that these measures do not require construction to be halted, and that implementing these measures will be less burdensome than the burdens that would flow from halting construction. Memorandum of D.C. Arena L.P. at 5-6, 16-17, 18. While some of the defendants' proposed remedies would not comply with the requirements of title III and the Standards, others do offer the possibility of bringing the facility into compliance with the ADA.

The remedies suggested by the defendants that offer some promise are: providing additional wheelchair seating locations in the front row of the Lower Bowl, increasing the elevation of the wheelchair seating locations in the upper part of the Lower Bowl, and replacing one or more suites with sections of wheelchair seating locations. It is likely that in order to reach the required number of wheelchair seating locations with comparable lines of sight, a combination of these measures will have to be employed. (Using a combination of these measures also helps to insure that wheelchair seating locations will be available in different locations around the stadium, so that spectators using wheelchairs will have a choice of seating areas and admission prices, as required by section 4.33.3 of the Standards).

At least two other remedies proposed by the defendants are unacceptable, because they rely on operational measures as opposed to design solutions. The focus of the ADA's new construction requirement is that new facilities be designed and constructed to be readily accessible to and usable by individuals with disabilities; compliance with the new construction requirements of the ADA cannot depend on making special, *ad hoc* arrangements or accommodations that allow people with disabilities to gain access to and participate in the daily activities and events that the rest of our society takes for granted. To propose building the MCI Center in a fashion that is not accessible -- with a proviso that the operators of the facility will attempt to cure the accessibility problems operationally every time there is an event at the facility -- is to propose creating exactly the kind of situation that the ADA's new construction provision is intended to prevent.

Thus, this Court should reject the defendants' proposal to implement "measures to ensure that patrons who could block the view of a patron using a wheelchair do not stand up during events." Memorandum of D.C. Arena L.P. at 6. Even if such

E. Architects -- like defendants Ellerbe Becket Architects & Engineers, P.C., and Ellerbe Becket, Inc. -- are covered by the new construction provision of the ADA, and are properly subject to injunctive relief.

As described above, section 302(a) of the statute contains the basic non-discrimination provision, and section 302(b) defines several types of prohibited activity. Section 303 of the Act adds an additional category of prohibited activity -- the design and construction of inaccessible facilities -- and extends its coverage to an additional category of buildings -- commercial facilities. In doing so, section 303 brings within its coverage additional parties: those who design and construct new buildings, such as architects, engineers, contractors, and other building professionals. In contending that the ADA does not reach them, the Ellerbe Becket defendants misconstrue the statute.

Section 302(a) specifies that it applies to private entities that own, operate, or lease places of public accommodation. 42 U.S.C. § 12182(a). This is unsurprising, given that sections 302(a) and 302(b) prohibit various activities related to the

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measures were effective -- which seems very unlikely -- they have a real potential to cause considerable ill will toward the wheelchair users at the back of the section. Similarly, "withholding from sale seats in the two rows located immediately in front of the numerous third-row wheelchair accessible locations" is unacceptable. *See* Memorandum of D.C. Arena L.P. at 5-6. Not selling tickets for those seats does not mean that those seats will be empty; other patrons may well move down from other seats to occupy them, and once again wheelchair users will be forced to rely on others -- their companions, arena personnel (who may or may not be at hand), or the spectators in front of them -- to allow them to see and participate in the event.

operation of public accommodations, and their provision of goods and services (including a requirement to make architectural changes to make public accommodations more accessible to individuals with disabilities) -- the parties that own, operate, or lease those facilities are the parties that control the operation of these entities, and that are able to effect the necessary changes.

Unlike section 302, section 303 does not separately designate the parties responsible for compliance with its mandate. Because section 303 applies to both public accommodations and commercial facilities, however, it would be quite surprising to find that its obligations were limited to only those parties who have obligations under section 302: "any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). Indeed, such a reading would make meaningless section 303's inclusion of commercial facilities.[17] As noted above, *see* note 3, *supra*, excluding this broad category of facilities would exclude from the ADA's coverage many types of buildings not included within the definition of places of public accommodation. For instance, many office buildings, warehouses, and factories

[17]The defendants have not argued -- and presumably they will not argue -- that the language of section 302 could be read to apply to parties who "own, lease (or lease to), or operate" commercial facilities. Nowhere in section 302 or section 303 -- or anywhere else in the Act -- are the terms "own, lease (or lease to), or operate" applied to "commercial facilities."

are commercial facilities, but are not places of public accommodation.

Construction of the language of section 303 must begin with the statutory language itself, and the structure and purpose of the statute. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990). Section 303(a) provides that:

> as applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) of this title includes
>
> (1) a failure to design and construct facilities for first occupancy later than [January 26, 1993] that are readily accessible to and usable by individuals with disabilities . . .

42 U.S.C. § 12183(a). By including the term "design" in paragraph (1), Congress clearly indicated that those who design new facilities -- architects and engineers -- have obligations under the ADA. The provision certainly could have been drafted differently: Congress could have written this paragraph without using the word "design," addressing itself only to the end result by simply making it illegal to construct inaccessible facilities. By including "design" in the description of the prohibited conduct, however, Congress brought within the Act's coverage not just those parties who are ultimately responsible for the construction of a new facility (the owners of the facility), but also those parties who play a role in the design of a building.

In designing new buildings, those parties must ensure that the building is accessible to persons with disabilities.[18]

Under well-established canons of statutory construction, in addition to examining the text of the statute, the Court must also look to its remedial purposes.[19] By including within the coverage of section 303 those with control over design and construction, Congress chose the path that would best safeguard

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[18]The Ellerbe Becket defendants also argue that they cannot be held responsible for ADA violations at the MCI Center because they are only designing the facility, not designing and constructing it. Memorandum of Ellerbe Becket Defendants at 8-9, n.3. The Ellerbe Becket defendants have again misread the statute. Section 303 is properly read to apply to the entire process of building a facility -- the "design and construction" of a public accommodation or commercial facility. It thus requires all parties involved in that process to conform their involvement, whatever its scope, to the requirements of the ADA. If one parses the language as Ellerbe Becket suggests -- separating "design" from "construct" -- absurd results follow. Under that reading of section 303, so long as a facility were designed to be in compliance with the ADA, the owner and contractor could freely depart from the designs during construction, eliminating accessible features as they wished, and there would be no violation of the ADA, because the building was not designed and constructed in violation of the ADA. It is well-recognized that statutes must not be construed in a manner that yields "odd" or "absurd" results. *See* United States v. X-Citement Video, Inc., 115 S. Ct. 464, 467 (1994).

[19]*See* Peyton v. Rowe, 391 U.S. 54, 65 (1968) (civil rights legislation should be liberally construed in order to effectuate its remedial purpose); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"). The D.C. Circuit has also recognized that "remedial statutes are to be liberally construed to effectuate their purposes." Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 155 n.54 (D.C. Cir. 1984). *See also* Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12, 18 (1st Cir. 1994) (broadly construing the ADA); Kinney v. Yerusalim, 9 F.3d 1067 (3d Cir. 1993) (same), cert. denied sub nom. Hoskins v. Kinney, 114 S. Ct. 1545 (1994); Howe v. Hull, 873 F. Supp. 72 (N.D. Ohio 1994) (same).

its stated purpose, "that, over time, access will be the rule rather than the exception." H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 63 (1990). Indeed, Congress intended strict adherence to section 303. Unlike section 302, where Congress provided a number of statutory cost defenses, in section 303, Congress drew a line in the sand and determined that from January 26, 1993 forward, all new buildings must be fully accessible to individuals with disabilities. *See* id. ("The ADA is geared to the future . . . Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible."). Placing responsibility for compliance not just on owners of buildings, but also on the architects, engineers, and other building professionals on whose judgment and expertise owners rely, best effectuates a fully accessible future. This is particularly true in a case like this one, involving a large, complex, indoor sports and multi-purpose arena, where an owner must rely very heavily on architects and engineers with highly specialized expertise. In such a case, an owner will in many instances simply be unable to judge whether the building professionals to whom he has entrusted his project are complying with the statute, and will not realistically be in a position to identify and prevent ADA violations.

Given the incongruity of limiting section 303 (which plainly covers commercial facilities) to parties who own, operate or lease public accommodations, Congress' use of the term "design" in section 303, and the importance of construing the ADA in a

manner consistent with Congress' stated goals, the most sensible reading of section 303's reference to section 302(a) is that section 303 refers to section 302(a) not to identify the parties that may be held liable under section 303, but rather to indicate that the failure to design and construct accessible facilities constitutes another type of "discrimination on the basis of disability." This interpretation gives full effect to the terms of the provision. *See* Moskal v. United States, 498 U.S. 103, 109-10 (1990) (courts should interpret statutes in a manner that gives effect to every clause and word of the statute) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955) (same)).[20]

F. Plaintiffs have standing to sue, and this action is ripe.

Defendant D.C. Arena L.P. has moved to dismiss the plaintiffs' action on grounds that the plaintiffs do not have standing to sue, and that their action is not ripe. In support of its motion, D.C. Arena L.P. argues that the plaintiffs have alleged no legally cognizable injury, and that any potential

[20]The Department of Justice has also taken this position in its Technical Assistance Manual. *See* THE AMERICANS WITH DISABILITIES ACT Title III Technical Assistance Manual, Covering Public Accommodations and Commercial Facilities, November 1993, III-5.1000 (General). As discussed at some length above, because the Department is the executive agency charged with administering title III of the ADA, its interpretations of the statute and its regulation are entitled to substantial deference.

injury remains speculative, because construction is not complete.[21]

1. Plaintiffs have alleged a real, concrete injury.

For purposes of standing to sue under Article III of the Constitution a cognizable injury consists of "the invasion of a legally protected interest which is concrete and particularized and actual and imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992).[22] Congress can act to confer rights, the invasion of which is sufficient to constitute injury for standing purposes. Warth v. Seldin, 422 U.S. 490, 500 (1975). Given the ADA's protection of individuals with disabilities against disability-based discrimination, there

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[21]To the extent D.C. Arena L.P.'s argues that violation of rights protected by the ADA is not a legally cognizable injury for standing purposes, and that an action alleging imminent construction of a building designed to be in violation of the ADA is not ripe, the Department of Justice has a strong interest in addressing D.C. Arena L.P.'s arguments. As the Supreme Court has often noted, effective enforcement of the nation's civil rights laws depends in large part on the private right of action included in the statute. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) (title VII of the 1964 Civil Rights Act (employment)); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (title VIII of the 1968 Civil Rights Act (fair housing)); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-402 (1968) (title II of the 1964 Civil Rights Act (public accommodations)). Any attempt to limit the ability of private parties to bring actions to enforce the statute is therefore of considerable interest to the Attorney General, as it could have the effect of making her efforts to enforce the statute that much more difficult.

[22]In making its standing argument, D.C. Arena L.P. argues only that plaintiffs have suffered no legally cognizable injury. *See* Memorandum of D.C. Arena L.P. in Support of Motion to Dismiss at 5-7. No issue has been raised with regard to the other constitutionally-required elements of standing, commonly referred to as "traceability" and "redressability."

simply is no merit in the argument of defendant D.C. Arena L.P. that no such legally protected right is implicated here. The injury alleged by the plaintiffs is entirely sufficient to confer standing upon them.

It can hardly be disputed that the ADA in general protects individuals with disabilities from disability-based discrimination, or that title III of the ADA in particular protects wheelchair users from disability-based discrimination in public accommodations and commercial facilities. As Congress expressly found in passing the ADA,

> 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.

42 U.S.C. § 12101(a)(4) (emphasis added). Thus, a primary purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(2), and Congress specifically included a private right of action in the statute's enforcement scheme.[23]

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[23]For private suits, title III of the ADA adopts the "remedies and procedures" set forth in title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-3(a), which provides:

> [w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a[n] . . . injunction . . . may be instituted by the person aggrieved[.]

42 U.S.C. § 2000a-3(a).

The legal interests protected by the ADA specifically include protection from the discriminatory effects of new buildings that are designed and constructed to be inaccessible to or unusable by such individuals. The statute and regulation protect the right to be able to have access to and make full use of such buildings, on a basis equivalent to that of other members of our society. In the case of new sports arenas, the rights of individuals with disabilities specifically include the right to have a choice of seating options in all parts of the stadium, and to be able to see the action on the floor from whatever location is chosen.

Defendant D.C. Arena L.P. makes several attempts to trivialize the plaintiffs' interest in having the MCI Center designed and constructed according to the requirements of the ADA, repeatedly characterizing their claim as grounded in no more than an "anxiety" or "apprehension" that the facility will not provide them with seating "in positions they consider desirable." Memorandum to Dismiss of D.C. Arena L.P. at 6, 7. Plaintiffs, however, face the very kind of exclusion that the ADA aims to prevent -- relegation to second-class citizenship status by placement in inferior seating locations, or locations that will not allow them to see what is happening. The defendant's attempt to minimize that injury is tantamount to an attack on the statute itself -- a suggestion that the rights the ADA protects are of little significance, and not worthy of recognition. The answer to such an argument is that the Congress took a different view.

2. The plaintiffs' claims are ripe for review.

In addition to being legally cognizable, in order to confer jurisdiction on a federal court, the injury asserted by a plaintiff must be "certainly impending." Lujan, 504 U.S. at 565 n.2; Whitmore v. Arkansas, 495 U.S. 149, 158 (1990). The plaintiffs' claims meet this requirement.

First, Congress has specifically addressed itself to the degree of immediacy that must be shown in order to bring an action to prevent a new facility from being designed and constructed in violation of the ADA. Title III of the ADA specifically authorizes actions to enforce the statute by any person "who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title." 42 U.S.C. § 12188(a)(1). The statute further provides that "[n]othing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions." Id. That is, knowing that the blueprints for the MCI Center call for wheelchair locations which will not comply with the Standards' line of sight requirements, the plaintiffs need not wait for the arena to be built, go to an event, be unable to see, and then file their action.

Moreover, D.C. Arena L.P. itself argues forcefully that construction of the MCI Center is well underway (and provides affidavits to show it), making clear the plaintiffs' claims are

"certainly impending." According to the defendants, the MCI Center is "being built on an unusually fast and demanding schedule." Memorandum of D.C. Arena L.P. at 16. Mr. Stranix, the chief operating officer of D.C. Arena L.P., explains in his affidavit that as of June 25, 1996, 88% of the excavation work has been completed, and 90% of the foundation work has been completed. Stranix Aff. ¶¶ 10, 11, 12. Nearly 7,000 tons of steel have been ordered, and fabrication has begun. Id. ¶ 13.

There is nothing conjectural or speculative about the plaintiffs' case. The current plans for the arena plainly show that the vast majority of all wheelchair seating locations will not provide lines of sight over standing spectators (and the defendants do not dispute this). Defendant D.C. Arena L.P. responds instead that "the seating plan" is not yet finalized. Memorandum of D.C. Arena L.P. in Support of Motion to Dismiss at 4. As is explained by Mr. Stranix, however, what is not final is the selection of a seating supplier, and the selection of seats for the arena. Stranix Aff. ¶ 19. Those choices will have little impact on the issues raised by plaintiffs. The ability of wheelchair users to see what is happening on the floor will depend not on whether the arena uses 18" wide or 20" wide seats, but rather on the placement and elevation of wheelchair locations relative to the placement and elevation of other seating. And those choices have already been made: as Mr. Stranix explains, the pre-cast concrete risers on which both standard seats and wheelchair locations will be placed are a "long lead-time item";

they will be erected along with the facility's structural steel, and as of June 25, all shop drawings for the risers have been completed, and over 300 of them have been finally cast. Stranix Aff. ¶ 14. The plaintiffs' concerns about their inability to see are, quite literally, being set in concrete.

IV. CONCLUSION

For the reasons stated above, the United States respectfully urges this Court to grant the plaintiffs' application for a preliminary injunction, so that the designs for the MCI Center may be brought into compliance with the requirements of title III of the ADA, including the Standards for Accessible Design, and to deny the defendants' motions to dismiss.

Respectfully submitted,

ERIC H. HOLDER, JR.
United States Attorney
District of Columbia

DEVAL L. PATRICK
Assistant Attorney General
Civil Rights Division

JOHN L. WODATCH
District of Columbia Bar
Number 344523
JOAN A. MAGAGNA
District of Columbia Bar
Number 910885
THOMAS M. CONTOIS
North Carolina Bar
Number 17787
U.S. Department of Justice
Civil Rights Division
Disability Rights Section
Post Office Box 66738
Washington, D.C. 20035-6738
(202) 514-6014

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