No. 02-3100

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

CINEMARK USA, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

PROOF REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION

Cinemark argues that the term "lines of sight" in Standard 4.33.3 refers only to lack of obstruction and has nothing to do with viewing angles. Yet Cinemark cites nothing – no treatise, no architectural textbook, no industry standard – that indicates that the phrase "lines of sight" has traditionally been used in the field of theater design to mean only unobstructed view. By contrast, the United States has shown that by the time the Department of Justice promulgated the regulation in 1991, the phrase "lines of sight" was a well-established term-of-art commonly used in the movie theater industry and among architects and designers to include

spectators' viewing angles[1] (US Br. 14-19).[2] And the Department further demonstrated that it has consistently interpreted the "lines of sight" language of Standard 4.33.3 to encompass viewing angles, both before and after the advent of stadium-style theaters in 1995 (US Br. 17-19).

Moreover, the evidence in this case shows that the movie theater industry itself understood – prior to the construction of the first stadium-style theaters – that the regulation's "lines of sight" language referred to viewing angles. In 1994, the National Association of Theatre Owners (NATO), the trade organization of the movie theater industry, published a position paper on Standard 4.33.3 stating that "lines of sight are measured in *degrees*" (R. 80 Tab A Tab 7: NATO, *Position Paper on Wheelchair Seating in Motion Picture Theatre Auditoriums* at 6 (Jan. 27, 1994) (emphasis added), Apx. p. __).[3] This reference to "degrees" can only be

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[1] Cinemark mistakenly asserts (Br. 29-30) that the United States failed to raise this argument in the district court. In fact, the United States argued below that (1) the "lines of sight" language of Standard 4.33.3 had always encompassed a viewing angle requirement; (2) the movie theater industry understood the "lines of sight" provision to require consideration of viewing angles; and (3) architects and theater designers had long used the term "lines of sight" to include viewing angles (see R. 99 Reply Memo. of Law at 2 n.2, 21-22, Apx. pp. __, __-__; R. 94 Memo. in Opp. to Motion to Strike at 8, 12, Apx. pp. __, __; R. 81 Statement of Undisputed Material Facts at 9-10, Apx. pp. __-__; R. 26 Reply Memo. in Support of Motion to Dismiss at 4-5, Apx. pp. __-__).

[2] "US Br. __" refers to the page number of the United States' opening brief in this appeal. "Br. __" refers to the page number of Cinemark's response brief.

[3] Cinemark is a member of NATO (R. 50 Notice of Filing of Petition for Rulemaking at 1, Apx. p. __), and has asserted that it and NATO "are, for all intents and purposes, one entity" and that their interests are virtually

(continued...)

interpreted as a recognition that "lines of sight" include viewing *angles*, which are calculated in degrees.

Yet Cinemark would have the Court ignore all this and simply defer to the Fifth Circuit's holding in *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, cert. denied, 531 U.S. 944 (2000). We addressed the flaws in the *Lara* decision in our opening brief (US Br. 20-27). We will not repeat that discussion except to emphasize that the holding of *Lara* is fundamentally inconsistent with one of the core purposes of the Americans With Disabilities Act – providing wheelchair users "equal enjoyment" of the services of public accommodations. 42 U.S.C. 12182(a). Under *Lara*'s holding, a wheelchair space located anywhere in the movie theater – no matter how close to the screen and no matter how uncomfortable the viewing angle – would comply with the comparable-lines-of-sight provision, so long as the patron in the wheelchair could somehow see the screen without obstruction. The practical effect of the *Lara* holding is to permit a theater owner to relegate wheelchair users to the most uncomfortable and undesirable locations in the auditorium. That is not "equal enjoyment" of movie theaters.[4]

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[3](...continued)
indistinguishable (R. 66 Defendant's Sur-Reply at 4-5 & n.5, Apx. pp. __-__).

[4] Cinemark (Br. 7) and its *amicus* NATO (NATO Br. 8, 10-11) incorrectly suggest that safety concerns and design limitations require placement of wheelchair seating close to the screen in a stadium-style theater. In fact, as we pointed out in our opening brief (US Br. 5-6), Cinemark and other theater owners have designed stadium-style theaters that place wheelchair seating farther back from the screen in elevated positions that ensure comfortable viewing angles, as well as access to

(continued...)

This Court should reject Cinemark's untenable position and remand for further proceedings to allow the United States an opportunity to prove at trial that many of Cinemark's stadium-style theaters do not, in fact, provide comparable viewing angles for wheelchair users. In moving for summary judgment, Cinemark did not argue that the viewing angles for wheelchair users in its stadium-style theaters were comparable; rather, Cinemark simply contended that viewing angles were irrelevant to the "lines of sight" question. Consequently, the parties have not yet had an opportunity to litigate the factual issue of whether the viewing angles are actually comparable in Cinemark's theaters.

ARGUMENT

1. Cinemark Had Adequate Notice Of The Viewing Angle Requirement

Cinemark contends (Br. 29-33) that when it built its theaters it lacked notice that Standard 4.33.3 required consideration of spectators' viewing angles. In fact, the language of Standard 4.33.3 itself provided adequate notice. By 1991, the phrase "lines of sight" was a well-established term-of-art commonly used in the movie theater industry and among architects and designers to include spectators' viewing angles (US Br. 14-19). And, as we explained above, the national trade association of movie theater owners indicated in 1994 – prior to the construction of

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[4](...continued)
emergency exits. And contrary to NATO's assertion (NATO Br. 11), the correction of viewing angle problems in existing auditoriums would not require demolition and rebuilding of stadium-style theaters.

the first stadium-style theaters in the United States – that it understood the "lines of sight" language to encompass viewing angles. See pp. 2-3, *supra*.

Despite all this, Cinemark suggests (Br. 32) that the regulation fails to provide adequate notice because it does not contain the phrase "viewing angle." But neither does it include the word "obstruction," which Cinemark contends is covered by Standard 4.33.3. Instead of expressly referring to either "viewing angle" or "obstruction," Standard 4.33.3 uses the broader term "lines of sight," which encompasses both concepts.

Cinemark's notice argument is further undermined by the fact that the individuals who usually implement Standard 4.33.3 on behalf of theater owners are architects and theater designers. Because of their specialized training, these architects and designers should be aware of the technical meaning of the term "lines of sight" in the field of theater design. As this Court has recognized, "[w]hen the persons affected by the regulations are a select group with specialized understanding of the subject being regulated the degree of definiteness required to satisfy due process concerns is measured by the common understanding and commercial knowledge of the group." *Fleming v. Department of Agric.*, 713 F.2d 179, 184 (6th Cir. 1983); see also *Ohio Cast Prods., Inc. v. Occupational Safety & Health Review Comm'n*, 246 F.3d 791, 798-799 (6th Cir. 2001) ("While an employer is entitled to fair warning of conduct which an occupational health and safety standard prohibits or requires, this determination is made with reference to

what an employer familiar with the industry could reasonably be expected to know.").

In any event, Cinemark cannot plausibly argue that it lacked notice after July 1998 that the comparable-lines-of-sight requirement encompassed viewing angles. In July 1998, the Department of Justice filed an *amicus* brief in *Lara* – where Cinemark was the defendant – explaining that viewing angles are a component of the regulation's lines-of-sight requirement (US Br. 18). The United States' lawsuit against Cinemark covers several theaters built after July 1998 (see US Br. 18-19 n.7) and seeks injunctive relief governing future construction of cinemas (R. 1 Complaint at 15, Apx. p. __). Therefore, Cinemark's arguments about lack of notice are irrelevant to those theaters.

2. The Treatises And Other Publications Cited In The United States' Opening Brief Are Properly Before This Court

In our opening brief, we cited treatises, an architectural reference book, and industry guidelines published in a periodical to illustrate the common usage of the term "lines of sight" in the field of theater design (US Br. 14-17). Cinemark urges this Court to disregard those publications on the ground that they were not introduced as evidence in the district court in accordance with the Federal Rules of Evidence (Br. 30-31 n.7). Cinemark's argument is meritless.

In fact, relevant excerpts from three of the five documents to which Cinemark objects were submitted to the district court.[5] These three documents, standing alone, adequately illustrate the common usage of the term-of-art "lines of sight" in the field of theater design.

At any rate, this Court can take judicial notice of these materials for the purpose of determining the common usage of the term "lines of sight" in the context of theater design. Appellate courts routinely cite treatises, books, articles and other publicly-available documents to determine the meaning of words in statutes or regulations, without any suggestion that those reference materials must be introduced into evidence. See, *e.g.*, *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610-612 & n.4 (1987) (consulting books and periodicals on anthropology, sociology and biology, as well as encyclopedias, to determine meaning of "race"); *Dow Chem. Co. v. Sumitomo Chem. Co.*, 257 F.3d 1364, 1373 (Fed. Cir. 2001) ("in determining the ordinary meaning of a technical term, courts are free to consult scientific dictionaries and technical treatises *at any time*") (emphasis added). In an analogous context, this Court concluded that it could consult "secondary sources" –

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[5] The relevant excerpt from *Theaters and Auditoriums* is reprinted in a publication submitted to the district court (US Br. 15 n.4). The 1989 version of the SMPTE guidelines (US Br. 16) is identical in relevant respects to the 1994 edition of the guidelines, which we not only provided to the district court in this case (US Br. 17) but also furnished to Cinemark in 1998 in the *Lara* litigation (R. 90 Exh. E Tab 1: Brief of *Amicus Curiae* at 3-4, Apx. pp. __-__). The pertinent excerpt from *Architectural Graphic Standards* is included in an exhibit submitted to the district court (US Br. 17 n.5). Although it was unnecessary to do so, we authenticated all three of these documents under Fed. R. Evid. 901 (see R. 80 Tab A: Cohen Declaration ¶¶ 6, 9, Apx. pp. __-__).

including a religion encyclopedia and books on Buddhism and Buddhist art – to determine whether an object had religious significance, even where the parties had not introduced those materials into evidence. See *Brooks v. City of Oak Ridge*, 222 F.3d 259, 264-265 & nn.3-5 (6th Cir. 2000), cert. denied, 531 U.S. 1152 (2001). Other courts have refused to strike citations in appellate briefs to treatises, reference works, and other publicly available documents, even though the materials had not been cited or introduced below. See *United States v. Eagleboy*, 200 F.3d 1137, 1140 (8th Cir. 1999); *Charter Oil Co. v. American Employers' Ins. Co.*, 69 F.3d 1160, 1171 (D.C. Cir. 1995); *Chicago Mercantile Exchange v. SEC*, 883 F.2d 537, 541-542 (7th Cir. 1989), cert. denied, 496 U.S. 936 (1990); *United States v. Tucker*, 78 F.3d 1313, 1325 (8th Cir.), cert. denied, 519 U.S. 820 (1996).

3. The Department Of Justice's Interpretation Of Standard 4.33.3 Is Not Subject To The APA's Notice-And-Comment Requirements

Cinemark argues (Br. 46-48) that the Department's interpretation of Standard 4.33.3 to encompass viewing angles represents a substantive change in the regulation that can only be accomplished through the notice-and-comment mechanism of the Administrative Procedure Act (APA). That argument has no merit.[6]

The Department's interpretation of Standard 4.33.3 did not change the regulation or impose any duties that the regulation did not already mandate.

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[6] The district court dismissed Cinemark's counterclaim alleging a violation of the APA's notice-and-comment requirement (see US Br. 3 n.1).

Rather, the Department merely reaffirmed the well-established understanding of the term "lines of sight" that had prevailed for years, both before and after the regulation's promulgation. This clarification, which "merely explains 'what the more general terms of the * * * regulation[] already provide,'" is exempt from the APA's notice-and-comment requirements. *Your Home Visiting Nurse Servs., Inc. v. Secretary of HHS*, 132 F.3d 1135, 1139 (6th Cir. 1997) (citation omitted), aff'd, 525 U.S. 449 (1999).

In an attempt to portray the clarification as a substantive change, Cinemark misstates the Department's position on viewing angles. Throughout its brief (*e.g.*, Br. 18, 29), Cinemark asserts that the United States has argued that Standard 4.33.3 imposes a "quantitative" viewing angle requirement. By using the term "quantitative," Cinemark suggests that the Department of Justice interprets Standard 4.33.3 to mandate a specific viewing angle for wheelchair locations. That is not, and has never been, the position of the Department of Justice.

As the United States explained to the district court, "the Department does not argue that title III and Standard 4.33.3 have any specific quantitative viewing angle requirements" (R. 79 Memo. of Law at 33, Apx. p. __). We further emphasized that Standard 4.33.3 does "*not* establish specific minimum or maximum viewing angles [or] distance to the screen," but instead requires that viewing angles "be comparable between patrons who use wheelchairs and most members of the general public" (*id.* at 26, Apx. p. __). Thus, for example, although industry standards typically recommend that no seat have a vertical viewing angle

exceeding 30 or 35 degrees because of viewer discomfort and image distortion (see US Br. 15-17), the Department does *not* adopt that 30- or 35-degree measurement as a maximum for wheelchair spaces. If most members of the audience have seats with vertical viewing angles exceeding 35 degrees, then wheelchair areas also can have viewing angles greater than 35 degrees. The standard, as the language of Standard 4.33.3 states, is whether viewing angles are "comparable."

In support of its APA argument, Cinemark relies on *Caruso v. Blockbuster-Sony Music Entertainment Center*, 193 F.3d 730 (3d Cir. 1999), and *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698 (D. Or. 1997). The holdings of those cases did not address the issue of viewing angles. Rather, those cases involved the Department of Justice's interpretation of Standard 4.33.3 as mandating that wheelchair users in certain types of arenas be able to see over standing spectators. *Caruso* and *Independent Living* concluded that the Department's "standing spectators" interpretation was a substantive change in the regulation that was invalid absent notice-and-comment rulemaking. 193 F.3d at 736-737; 982 F. Supp. at 734-743.

Cinemark neglects to mention, however, that the D.C. Circuit has rejected the position adopted in those two cases. See *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 584-585 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998). The D.C. Circuit properly deferred to the Department's interpretation of Standard 4.33.3 regarding standing spectators and correctly concluded the

interpretation was not a substantive change requiring notice-and-comment rulemaking. *Ibid.*

But even if this Court were to agree with the reasoning of *Caruso* and *Independent Living*, those decisions do not assist Cinemark. First, as we have noted, the holdings of *Caruso* and *Independent Living* did not address whether the comparable-lines-of-sight requirement encompasses viewing angles. Second, *Caruso* and *Independent Living* interpreted the Access Board's 1991 commentary to indicate that the Board did not intend its 1991 guidelines to impose a requirement concerning standing spectators. See *Caruso*, 193 F.3d at 734-736; *Independent Living*, 982 F. Supp. at 738-740. In particular, the courts pointed to the Access Board's statement in the 1991 commentary that "[t]he issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities." 56 Fed. Reg. 35,440 (July 26, 1991). There is no comparable language in the 1991 Access Board commentary that could plausibly be construed as indicating that the Board had decided to wait until a future regulation to cover viewing angles. By 1991, the phrase "lines of sight" had long been used in the context of theater design to include viewing angles. It is thus appropriate to assume that, absent an express indication otherwise, the Access Board understood that the "lines of sight" language would cover viewing angles.

Cinemark argues, however, that the Access Board's 1999 notice of proposed rulemaking indicates that the 1991 version of Standard 4.33.3 did not encompass viewing angles (Br. 15-16, 28-29). We explained at length in our opening brief

that (1) it is the Department's views – not the Access Board's post-1991 comments – to which courts owe deference in determining the meaning of Standard 4.33.3, *Paralyzed Veterans*, 117 F.3d at 585, and (2) at any rate, the Access Board's 1999 statements (as well as its 1998 technical assistance manual) actually confirm that viewing angles are components of "lines of sight" (US Br. 24-26).

But Cinemark contends (Br. 49 n.18) that the Access Board's proposal to amend its guidelines to discuss viewing angles would be a "meaningless exercise" if they were already covered by Standard 4.33.3. That argument rests on the fallacy that all regulatory amendments are designed to effect substantive changes.

In fact, regulatory amendments are sometimes designed simply to clarify what the regulation has always required. This Court's decision in *Fox v. Bowen*, 835 F.2d 1159 (6th Cir. 1987), illustrates the point. In *Fox*, the Court upheld an agency's interpretation of its own regulation as allowing the agency to reopen, on its own initiative, certain ALJ decisions. The language of the regulation was ambiguous on this point. This Court upheld the agency's interpretation even though the agency had recently proposed amending its existing regulation to make explicit the very interpretation it was urging the Court to accept. See *id.* at 1163 ("we note that the Secretary has proposed to revise his regulations to make it clear that the Social Security Administration may reopen a final decision on its own initiative"); see also 52 Fed. Reg. 14,270, 14,296 (April 27, 1987) (notice of proposed amendment). The Supreme Court also has rejected – even in a criminal prosecution – the type of argument Cinemark makes here. See *Bates v. United*

States, 522 U.S. 23, 32 (1997) ("Congress' 1992 amendment hardly means that [the original criminal statute] did not previously cover the conduct in question."); *O'Gilvie v. United States*, 519 U.S. 79, 89 (1996) ("Congress might simply have thought that the then-current law * * * was unclear, [and] that it wanted to clarify the matter * * *."); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839 (1988) (statutory amendment can be read as merely clarifying what original version of statute always required).

4. The Department Of Justice Has Not Changed Its Position That "Lines Of Sight" Encompass Viewing Angles

Cinemark argues (Br. 17, 33-34) that the Department of Justice has taken inconsistent positions on the question of whether viewing angles are a component of "lines of sight." Cinemark is mistaken. As we pointed out in our opening brief (US Br. 17-19), the Department interpreted the "lines of sight" language of Standard 4.33.3 to encompass viewing angles, both before and after the advent of stadium-style theaters in 1995. Cinemark has not pointed to any evidence that the Department ever stated that viewing angles were irrelevant to "lines of sight" or that the "lines of sight" provision referred only to viewer obstruction.

To support its claim of inconsistency, Cinemark cites an affidavit from its own appellate counsel concerning her version of a March 1998 meeting with a Department of Justice trial attorney to discuss the Department's pending investigation of Cinemark's theaters (Br. 3-4). But even if we accept as accurate her version of the meeting, nothing in the affidavit indicates that the Department of

Justice ever stated that "lines of sight" did not include viewing angles. The affidavit asserts that when Cinemark's counsel asked the Department attorney about viewing-angle requirements for stadium-style theaters, he referred her to Standard 4.33.3 (R. 24 Tab 9: Franze Affidavit ¶ 5, Apx. p. __) – a position consistent with our argument here that the language of the regulation provides adequate notice that viewing angles must be considered in designing theaters. It is true that at the time of the March 1998 meeting, the Department had never issued any public interpretation of Standard 4.33.3 *in the context of stadium-style theaters.* That is understandable, because the Department reasonably believed that the regulation's "lines of sight" language would be understood to encompass viewing angles, given the historical usage of that term in the context of theater design.

Cinemark's affidavit further asserts that the Department attorney stated in March 1998 that the United States had not taken a position on whether Standard 4.33.3 imposed a "minimum viewing angle" for wheelchair seating or required that wheelchair spaces be a specified distance from the movie screen (R. 24 Tab 9: Franze Affidavit ¶ 5, Apx. p. __; Br. 4).[7] There is no inconsistency between those statements and the United States' position in this litigation. As explained earlier, the United States does not take the position that Standard 4.33.3 imposes a

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[7] Cinemark's brief also cites the affidavit for the proposition that the Department of Justice said that it had not taken a position on whether Standard 4.33.3 "even required particular 'sight lines' in small movie theaters with less than 300 seats" (Br. 4). That statement appears nowhere in the affidavit (R. 24 Tab 9: Franze Affidavit, Apx. pp. __-__), and the record contains no evidence to support the assertion.

particular minimum or maximum viewing angle for wheelchair seating or that it requires such seating to be a specific distance from the screen. Rather, our position is, and always has been, that Standard 4.33.3 requires that viewing angles for wheelchair users simply be "comparable" to those offered to most other members of the audience. See pp. 9-10, *supra*.

5. Local Inspectors' Approval Of Cinemark's Texas Theaters Does Not Preclude The United States From Bringing This ADA Action

Cinemark argues (Br. 40-42) that the United States is estopped from bringing this suit because the Department of Justice certified the Texas Accessibility Standards (TAS) as meeting or exceeding the requirements of the ADA, and because local officials approved construction of Cinemark's theaters in Texas after inspecting them for compliance with the TAS. That argument is meritless. The Texas code contains language virtually identical to that of Standard 4.33.3, including the phrase "lines of sight," and does not indicate that "lines of sight" pertain only to obstruction or that they exclude consideration of viewing angles. See TAS § 4.33.3 (reproduced in addendum to Appellee's brief).

Cinemark's argument reflects a misunderstanding of the certification process. When the Department of Justice certifies that a state or local code meets or exceeds the ADA's minimum requirements for accessibility, the Department is speaking only to the sufficiency of the language used in the state or local code. This certification is "*rebuttable* evidence" in federal enforcement proceedings that the state or local code itself meets the minimum requirements of the ADA. 42

U.S.C. 12188(b)(1)(A)(ii) (emphasis added). The certification says nothing, and guarantees nothing, about how state or local officials will apply that code. See *ibid.* The Department of Justice made this clear in the 1991 preamble to its ADA regulations:

> Certification will not be effective in those situations where a State or local building code official allows a facility to be constructed or altered in a manner that does not follow the technical or scoping provisions of the certified code. Thus, if an official either waives an accessible element or feature or allows a change that does not provide equivalent facilitation, the fact that the Department has certified the code itself will not stand as evidence that the facility has been constructed or altered in accordance with the minimum accessibility requirements of the ADA. The Department's certification of a code is effective only with respect to the standards in the code; it is not to be interpreted to apply to a State or local government's application of the code.

56 Fed. Reg. 35,554, 35,592 (July 26, 1991), reprinted at 28 C.F.R. pt. 36, App. B, subpt. F at 715 (2001). The Department published the same explanation in a technical assistance manual in 1993 (R. 80 Tab A Tab 13: Title III Technical Assistance Manual § III-9.7000 at 76, Apx. p. __). These Department publications provided adequate notice that local inspectors' approval of a particular theater did not necessarily mean that the facility complied with the ADA. Cinemark was well aware of this. The local officials who approved the theaters in Texas repeatedly advised Cinemark that the approvals did not signify that the facilities complied with the ADA (see R. 71 Exh. A Tab 4: Letters of 3/3/97, 6/7/96, 9/3/96, 10/21/97, 11/19/97, 5/11/98, 4/26/99, 8/6/99, 11/3/99, 1/1/00, 6/23/00, Apx. pp. __, __, __, __, __, __, __, __, __, __, __, __, __, __; R. 71 Exh. A Tab 4: Memoranda of 7/16/98 from Texas Department of Licensing and Regulation, Apx. pp. __, __).

6. The Collateral Estoppel Doctrine Does Not Bar The United States From Litigating The "Lines Of Sight" Issue Against Cinemark

Cinemark argues (Br. 42-46) that collateral estoppel bars the United States from litigating the "lines of sight" issue against Cinemark because the United States addressed the same issue as an *amicus curiae* in the *Lara* litigation. This argument is not only meritless but also a bit puzzling because Cinemark took precisely the opposite position in the *Lara* litigation, advising the district court in that case that:

> While the DOJ has appeared as *amicus*, the filing of an *amicus* brief does not rise to the level of participation in a lawsuit necessary to bind a non-party to the result of a legal proceeding. * * * Without party litigant status, the DOJ retains the ability to bring suit against Defendant based on the identical facts and legal theories as are now presented in the current lawsuit * * *.

(R. 77 Tab A Tab 1: Defendant's Motion to Join at 4, Apx. p. __).

It is well-settled that, absent extraordinary circumstances not present here, *amicus* participation does not trigger collateral estoppel. See *Stryker v. Crane*, 123 U.S. 527, 540 (1887); *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991); *Kerr-McGee Chem. Corp. v. Hartigan*, 816 F.2d 1177, 1181 (7th Cir. 1987). This is not an extraordinary case like *Montana v. United States*, 440 U.S. 147 (1979), in which the government not only filed an *amicus* brief but also "totally financed and controlled" the litigation. *United States v. Mendoza*, 464 U.S. 154, 159 n.5 (1984). See *Montana*, 440 U.S. at 155.

In *Lara*, the United States adhered to the traditional role of an *amicus*. The United States did not, as Cinemark alleges (Br. 43-44), assert any claims against

Cinemark. Nor did the United States exceed the proper bounds of *amicus* participation when it brought the SMPTE guidelines to the district court's attention (see Br. 44). The United States simply cited (and attached to its *amicus* brief) these publicly-available industry guidelines to illustrate that the term "lines of sight" has long been used to refer to viewing angles (see R. 90 Exh. E Tab 1: Brief of *Amicus Curiae* at 3-4, Apx. pp. __-__). In opposing Cinemark's motion to compel discovery from the Department of Justice, the United States emphasized that it was "not a party" and that its role as *amicus* was "limited to providing the court with the Department of Justice's interpretation of its own regulations" (R. 90 Exh. E Tab 4: United States' Response at 2, Apx. p. __). And the United States opposed the motion to amend the scheduling order because Cinemark sought the delay so that it could try to add the Department of Justice as a party – an attempt we successfully opposed (R. 90 Exh. E Tab 3: Response of *Amicus Curiae* at 1, Apx. p. __).

7. It Is Premature To Grant Summary Judgment To Cinemark With Regard To The Theaters In The Fifth Circuit

Cinemark argues (Br. 50) that in light of the *Lara* decision, this Court must affirm the grant of summary judgment with regard to those theaters located within the Fifth Circuit, even if this Court disagrees with the *Lara* holding. Cinemark's request for summary judgment as to those theaters is premature. This Court has the authority to reach an independent decision on the legal issue in this appeal, regardless of the Fifth Circuit's decision in *Lara*. See *Peveler v. United States*, 269 F.3d 693, 699 (6th Cir. 2001) ("We, of course, are not bound by a decision from

another circuit."). However, the law in the Fifth Circuit will become relevant at the remedial stage if the district court finds Cinemark liable on remand. If *Lara* is still the law of the Fifth Circuit at that time, the district court should not order relief regarding the theaters within that Circuit. Cf. *Herman Miller, Inc. v. Palazzetti Imports and Exports, Inc.*, 270 F.3d 298, 327 (6th Cir. 2001) (requiring modification of injunction to exclude those states whose laws would not recognize plaintiff's claim); *Carson v. Here's Johnny Portable Toilets, Inc.*, 810 F.2d 104, 105 (6th Cir. 1987) (upholding nationwide injunction but allowing defendant to seek future modification of injunction to preclude its application in states where the enjoined conduct would otherwise be lawful). But, at the present time, one cannot be sure that *Lara* will still be the law of the Fifth Circuit on the "lines of sight" issue by the time the district court is ready to enter judgment on remand.

CONCLUSION

For the reasons set forth in this reply brief and in the United States' opening brief, this Court should reverse the grant of summary judgment and remand for further proceedings on the United States' claim under Standard 4.33.3.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 5,009 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2002, one copy of the foregoing PROOF REPLY BRIEF FOR THE UNITED STATES was served by Federal Express, next business-day delivery, on the following counsel of record for the Appellee:

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In addition, I certify that on May 8, 2002, one copy of the proof reply brief was served by first-class mail, postage prepaid, on each of the following:

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I further certify that the same proof reply brief was filed in accordance with Fed. R. App. P. 25(a)(2)(B)(i) by sending it to the Clerk of the United States Court of Appeals for the Sixth Circuit by first-class mail, postage prepaid, on May 8, 2002.

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GREGORY B. FRIEL
Attorney

APPELLANT'S APPENDIX DESIGNATIONS

Pursuant to Sixth Circuit Rule 28(d), Appellant United States designates the following items for the Joint Appendix, in addition to those previously designated in Appellant's opening brief.

Description of Entry	**Date Filed in District Court**	**Record Entry Number**
Plaintiff's Reply Memo in Support of its Motion to Dismiss Defendant's Counterclaim	12/21/01	26
Defendant's Notice of Filing of Petition for Rulemaking	4/19/00	50
Defendant's Sur-Reply to Plaintiff's Reply in Support of its Motion to Compel Production of Documents	9/25/00	66
The following exhibits to Appendix by Defendant of Documentary Evidence in Support of Motion for Summary Judgment: Exhibit A, Tab 4: "Accessible Texas" Letters of 3/3/97, 6/7/96, 9/3/96, 10/21/97, 11/19/97, 5/11/98, 4/26/99, 8/6/99, 11/3/99, 1/1/00 Exhibit A, Tab 4: Memoranda of 7/16/98 from Texas Department of Licensing and Regulation	12/11/00	71
The following exhibit to Plaintiff's Appendix in Support of its Opposition to Cinemark's Second Motion for Summary Judgment: Tab A, Tab 1: Defendant's Motion to Join United States Department of Justice as a Party Litigant to this Lawsuit	1/18/01	77
Plaintiff's Memorandum of Law in Support of its Mot. for Partial Summary Judgment	1/18/01	79

Description of Entry	**Date Filed in District Court**	**Record Entry Number**
The following exhibits to Appendix by Plaintiff to Cross Motion for Partial Summary Judgment: Tab A, Declaration of Phyllis M. Cohen in Support of Plaintiff's Cross-Motion for Partial Summary Judgment Tab A, Tab 7: NATO, *Position Paper on Wheelchair Seating in Motion Picture Theater Auditoriums* Tab A, Tab 13: Title III Technical Assistance Manual	1/18/01	80
Plaintiff's Statement of Undisputed Material Facts in Support of its Cross-Motion for Partial Summary Judgment	1/18/01	81
The following exhibits to Defendant's Appendix in Support of its Memorandum of Law in Opposition to Plaintiff's Partial Motion for Summary Judgment: Exhibit E, Tab 1: Brief of *Amicus Curiae* United States Exhibit E, Tab 3: Response of *Amicus Curiae* United States in Opposition to Defendant's Motion to Amend Scheduling Order Exhibit E, Tab 4: United States' Response to Defendant's Expedited Motion to Compel Deposition of United States Department of Justice and Reply to Defendant's Response to United States' Motion for Protective Order	2/20/01	90

Description of Entry	Date Filed in District Court	Record Entry Number
Plaintiff's Memorandum in Opposition to Defendant's Motion to Strike Plaintiff's Cross-Motion for Partial Summary Judgment Evidence	3/13/01	94
Plaintiff's Reply Memorandum of Law in Further Support of its Cross-Motion for Partial Summary Judgment	3/23/01	99

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