Nos. 03-1646, 03-1787, 03-1808

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

HOYTS CINEMAS CORPORATION;
NATIONAL AMUSEMENTS, INC.,

Defendants-Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT

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INTRODUCTION

The Sixth Circuit recently became the second court of appeals to uphold the Department of Justice's interpretation of the comparable-lines-of-sight requirement of Standard 4.33.3. See *United States v. Cinemark USA, Inc.*, ___ F.3d ___, 2003 WL 22508500 (6th Cir. Nov. 6, 2003) (slip opinion in addendum to this brief). Specifically, the Sixth Circuit held that the regulation requires "that wheelchair patrons have something more than a merely unobstructed view in

seating adjacent to other patrons" (*id.*, slip op. 9); instead, the comparable-lines-of-sight provision "requires that wheelchair users be afforded comparable viewing angles to those provided for the general public." *Id.* at 10. As explained below, the Sixth Circuit reached several conclusions that undercut Hoyts' and National's due process arguments.

ARGUMENT

The United States' opening brief adequately addressed most of the arguments raised in Hoyts' and National's reply briefs. We thus limit our reply to the following points:

1. The Sixth Circuit's recent *Cinemark* decision illustrates that the regulation's plain language, when read in light of well-established design principles, provides adequate notice to movie theater owners. The *Cinemark* court based its interpretation of Standard 4.33.3 primarily on the "plain meaning" of the regulation. *Cinemark*, slip op. 9, 14, 15. The Sixth Circuit also noted that prominent design treatises "support the contention that within the field of theater design, 'lines of sight' are compared on the basis of viewing angles." *Id.* at 10 n.6. Thus, according to the court, "[t]he criteria for evaluating similarity" of sight lines under Standard 4.33.3 "*doubtless* include viewing angle." *Id.* at 9-10 (emphasis added).

2. The Sixth Circuit rejected the argument that the Department of Justice had an obligation to amend its regulation to explicitly incorporate its interpretation of the comparable-lines-of-sight requirement. *Cinemark*, slip op. 17-18. The court explained that under a "long-settled principle of federal administrative law," "[a]n agency's enforcement of a general statutory or regulatory term against a regulated party cannot be defeated on the ground that the agency has failed to promulgate a more specific regulation." *Id.* at 17. *Cinemark*'s reasoning is thus directly contrary to the primary rationale the district court used in the present case in refusing to apply the regulation to most of Hoyts' and National's existing theaters (see US Br. 6).[1]

3. In concluding that the Department of Justice's interpretation was entitled to deference, the Sixth Circuit rejected arguments that the Department's position was inconsistent with views the Department had advocated in earlier cases. *Cinemark*, slip op. 15. The *Cinemark* decision thus undercuts Hoyts' and National's contentions that the Department has changed its interpretation of the regulation. The district court in this case rejected these contentions as well (Op. 40).

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[1] "US Br." refers to the United States' opening brief in this appeal. "Op." refers to the district court's opinion, which is reprinted in the addendum to the opening brief.

4. The Sixth Circuit recognized that the district court in *Cinemark* would have discretion on remand to order reasonable retrofitting of some existing theaters without violating due process. *Id.* at 20-22. The only reservation the Sixth Circuit expressed about retrofitting involved a situation where the defendant, prior to 1998, had built some theaters after receiving a certification of compliance with the Texas accessibility code, which the Department of Justice had certified as consistent with the federal accessibility regulations. *Id.* at 5-7, 18-22. But the Sixth Circuit noted that some reasonable retrofitting of existing theaters could comport with due process even if the defendant had relied on the Department's certification of the Texas code in constructing those auditoriums. *Id.* at 21-22. The Sixth Circuit's concerns about retrofitting are inapplicable in the present case because none of the theaters at issue here is located in the four states – Florida, Maine, Texas and Washington – whose codes have been certified by the Department of Justice. See A4786, 4788 (location of Hoyts' and National's theaters); http://www.ada.gov/certinfo.htm (states whose codes have been certified).

5. In essence, defendants are arguing that *all* of their existing theaters should be exempt from liability under Standard 4.33.3 because a court may have difficulty determining whether *some* of those auditoriums comply with the

Department of Justice's interpretation of the regulation. That reasoning is fundamentally flawed. Outside of the First Amendment context, a regulation will not be deemed impermissibly vague "simply because potential uncertainty exists" whether the regulation's language would cover certain "marginal fact situations." *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), cert. denied, 498 U.S. 845 (1990). Because defendants cannot credibly claim ignorance that certain of their theaters – such as East Farmingdale and Westborough – provide people in wheelchairs with materially inferior lines of sight (see US Br. 16-18, 35-36), it follows that defendants had fair warning that at least some of their theaters violated the regulation. The district court's blanket "prospective-only" order must therefore be reversed.

6. National repeatedly asserts that the United States is seeking "reconstruction" of hundreds of theaters (National Reply Br. 37-38, 43-44), thus creating the inaccurate impression that the government is trying to have the existing auditoriums gutted or torn down. In fact, the government's trial counsel advised the district court that "the United States is not in this case and is not in other cases suggesting that these multimillion dollar stadium cinemas should be dynamited and construction begin anew" (A63). See also *Cinemark*, slip op. 21 n.10 (giving same assurance to Sixth Circuit). The United States recognizes that,

because of cost and structural limitations, a court may have discretion to order a remedy in an existing auditorium that improves the lines of sight for wheelchair users but nonetheless places wheelchair seating in locations that would not be acceptable under Standard 4.33.3 if the building were being constructed from scratch. See *id.* at 21-22 & n.10. We reiterate our willingness to work with defendants on remand to devise reasonable remedies for existing facilities, and assure this Court that we will not seek the sweeping reconstruction of auditoriums that National suggests in its brief.

7. In its opening brief, the United States explained that both defendants had previously endorsed the SMPTE guidelines on viewing angles and that National's architect referred to those guidelines in designing many of the theaters at issue in this appeal (US Br. 12-15). In response, defendants have submitted evidence, which is not in the district court record, that a SMPTE committee withdrew the guidelines earlier this year (Hoyts Reply Br. 9; National Reply Br. 18). Defendants' evidence does not indicate why the guidelines were withdrawn, but, in any event, the withdrawal is irrelevant to this appeal. The United States is not arguing that Standard 4.33.3 incorporates the SMPTE guidelines themselves.[2]

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[2] Contrary to defendants' suggestions, the United States neither endorsed a 35º vertical angle as the legal standard under Standard 4.33.3 nor asserted that vertical viewing angles are the only relevant factors in determining compliance

Rather, we cited those guidelines to show that, *at the time defendants built their theaters*, they were aware that the term "lines of sight" encompassed viewing angles, were familiar with common methods of gauging the quality of viewing angles, and knew (based on design standards that they themselves had endorsed) that viewing angles for wheelchair users in some of their theaters were plainly inferior to those offered to most audience members. The withdrawal of those guidelines earlier this year has no bearing on what defendants understood when they built theaters *prior to 2003*. At any rate, the SMPTE guidelines are primarily a compilation of long-established design principles that are set forth in various treatises, including those that defendants' own experts and architects acknowledged are well-known and frequently consulted by theater designers (US Br. 8-9; A3019-3024).

Hoyts also incorrectly asserts that industry guidelines are irrelevant in determining whether a defendant had fair warning of a regulation's requirements

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with the lines-of-sight provision. For example, we previously noted that image distortion also affects the quality of lines of sight (US Br. 4, 8-9, 31-32, 34, 43). In our opening brief, we identified 157 theaters in which some or all of the wheelchair spaces have vertical angles of 36º to 55º (US Br. 15-16). We highlighted those theaters because Hoyts and National previously took the position that vertical viewing angles should not exceed 35º, thus undercutting defendants' assertions that they were unaware that wheelchair users in those auditoriums had inferior lines of sight as compared to most audience members. The United States did not suggest that those are the only theaters that violate the regulation.

(Hoyts Reply Br. 34-35). This Court has repeatedly recognized, in a variety of contexts, that a regulation should be read in light of relevant industry or professional standards in deciding whether it provides adequate notice. See *F.A. Gray, Inc. v. Occupational Safety & Health Review Comm'n*, 785 F.2d 23, 24-25 (1st Cir. 1986) (referring to "industry custom and practice" to assess whether employer had fair notice of what safety regulation required); *Doyle v. Secretary of Health & Human Servs.*, 848 F.2d 296, 301 (1st Cir. 1988) ("adequate medical care" will have a "reasonably clear meaning" in light of generally accepted standards in the medical profession); *In re Bithoney*, 486 F.2d 319, 324 (1st Cir. 1973) (rule prohibiting "conduct unbecoming a member of the bar" provided adequate notice in light of standards commonly accepted in the legal profession).

This Court's decision in *Beaver Plant Operations, Inc. v. Herman*, 223 F.3d 25 (1st Cir. 2000), is not to the contrary. In *Beaver*, the Court rejected the argument that the employer had fair warning of a safety regulation's requirements simply because the employer's actions violated industry guidelines. But that holding rested on two key factors that do not exist in the present case: (1) the Court believed that the regulation's language could reasonably be interpreted as directly contradicting industry guidelines, see 223 F.3d at 29-31 & n.5, and (2) the record contained "unchallenged testimony of industry experts" that the regulation

"was not understood" in the industry to impose the requirement advocated by the agency. *Id.* at 31. Neither circumstance exists in the present case. The language of Standard 4.33.3 and the Department's interpretation are consistent with the well-established understanding of "lines of sight" that has existed for years among theater designers and within the movie theater industry (US Br. 8-15).

8. Hoyts asserts that it built its theaters in reliance on an alleged telephone conversation in April 1996 between Todd Andersen and Robert Carasitti, a Hoyts' code consultant (Hoyts Reply Br. 23-24, 36-37, 41-42). As previously explained, Hoyts could not reasonably have believed that it could rely on Andersen's alleged advice in light of the fact that callers to the Department help-line are cautioned that any information they might receive does not represent the official position of the Department of Justice (US Br. 41-42).

At any rate, the United States disputes Hoyts' characterization of what Andersen supposedly told Carasitti. Andersen testified that he had no specific recollection of having discussed movie theaters with Carasitti in or around April 1996 (A2710-2712). Carasitti acknowledged that he did not specifically recall what, if anything, Andersen said about the regulation's comparable-lines-of-sight and integral-seating requirements during the alleged conversation (A5939-5940, 5957). The record contains a memorandum that Carasitti claims to have written in

April 1996, purporting to give his account of the alleged conversation with Andersen (A5973; A5876-5877). Notably, however, the memorandum never mentions the comparable-lines-of-sight or integral-seating requirements of Standard 4.33.3, raising doubts whether Carasitti asked Andersen for guidance on those issues. Indeed, the memorandum seems to focus on two other requirements imposed by the Department's regulations – namely, whether the auditoriums had enough wheelchair spaces and whether they satisfied Standard 4.33.3's dispersal requirement (referred to in the memorandum as the "distribution" requirement), which applies only to assembly areas of over 300 seats (A5973). Even if Andersen had advised Carasitti that the auditoriums at issue in the memorandum complied with the dispersal requirement and had a sufficient number of wheelchair spaces, that would not constitute advice about whether the theaters satisfied the comparable-lines-of-sight and integral-seating mandates of Standard 4.33.3.

But even if Hoyts' characterization of the April 1996 telephone call were accurate, Hoyts could not bootstrap it into a blanket approval for all of its stadium-style theaters. The alleged telephone conversation pertained only to auditoriums with over 300 seats at a single Hoyts complex (Brass Mill) in Connecticut (A5973; see A5416-5418 (floor plans for Brass Mill theaters)). Those large auditoriums at Brass Mill employ an infrequently used hybrid design in which: (a) most seats are

in the traditional-style section, rather than on stadium risers, (b) two-thirds of the required wheelchair spaces are at the center of the auditorium, and (c) two-thirds of the wheelchair spaces have vertical viewing angles of only 16º or 17º (A5417-5418, 5427 (number of seats on elevated risers). This unusual design is far different from those used in many other Hoyts theaters – for example, auditorium 8 at Bellingham and auditorium 5 at Westborough, where the vertical viewing angles for all wheelchair spaces exceed 40º (a level that Hoyts previously characterized as physically uncomfortable) and where most general public seats are on elevated tiers with much more comfortable viewing angles. See US Br. 12, 17-18. Thus, even if Hoyts had been told that the large auditoriums at the Brass Mill complex complied with Standard 4.33.3, Hoyts could not reasonably have believed that the regulation also permitted the very different designs at theaters such as Bellingham or Westborough.

9. Defendants assert that the "government's own study" indicated in 1994 that there was confusion about what "lines of sight" meant (Hoyts Reply Br. 12-13). In support of that assertion, defendants quote a single paragraph from a lengthy report prepared by North Carolina State University (NCSU) (see A435-

443) – not by the Department of Justice.[3] The quoted excerpt does not support defendants' position. The NCSU report discusses various types of public assembly areas, ranging from sports stadiums, to concert halls, to movie theaters. The passage that defendants quote does not state that the alleged confusion related to movie theaters (as opposed to another type of assembly area) or that anyone was confused about whether viewing angles affected the quality of spectators' lines of sight. To be sure, at the time of the NCSU study, a dispute existed as to whether the "lines of sight" provision meant that wheelchair users in sports arenas needed to be able to see over standing spectators or only over seated patrons. See *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998). That issue has no relevance to movie theaters, where patrons typically remain seated during the show.

In fact, defendants' assertions about industry confusion are belied by comments of the National Association of Theater Owners (NATO), whose members include Hoyts and National. NATO submitted two letters to NCSU in 1993 and 1994 commenting on earlier drafts of the research report from which defendants quote (A3275-3280, 3292-3296). In neither letter did NATO state that

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[3] The Access Board did pay for the study, but the report was not the work of the United States.

theater owners were confused as to whether "lines of sight" encompassed viewing angles or how to assess the relative quality of sight lines in movie theaters. To the contrary, NATO advised NCSU that the best sight lines in movie theaters were toward the rear of the auditorium, that the rear half of the theater was typically preferred by customers, and that most wheelchair users would consider the front row undesirable (A3277, 3280, 3293).

Hoyts also asserts that NATO expressed confusion about Standard 4.33.3 in documents submitted to the Department of Justice (Hoyts Reply Br. 35-36). In fact, the documents cited by Hoyts show that NATO was raising questions about Standard 4.33.3's exemption of certain theaters from the requirement that wheelchair spaces be dispersed (A3265, 3266, 3284-3286) – an issue distinct from the question of whether "lines of sight" encompass viewing angles or how to compare the quality of sight lines. Indeed, the NATO documents cited by Hoyts state that "lines of sight are measured in degrees" (A3286) and that "the most desirable seats, and in fact the seats first chosen during most performances, are those in the rear third of the theatre" (A3284).

10. Defendants contend that the Access Board exempted small theaters from the dispersal requirement of Standard 4.33.3 after concluding that all seats in such auditoriums are comparable in quality (Hoyts Reply Br. 20-21; National

Reply Br. 39-40). That assertion is inaccurate. Defendants cite a comment submitted to the Access Board during the rulemaking process asserting that, in smaller theaters, "each seat is situated to provide a clear line of sight to the screen." 56 Fed. Reg. 35,440 (1991). The Access Board never said it agreed with that comment or believed obstruction was the only relevant factor in assessing lines of sight. See *ibid.* Moreover, the plain language of the Access Board's guideline makes clear that the Board did not believe that all small theaters would necessarily satisfy the comparable lines of sight requirement. Although Standard 4.33.3 exempts small theaters from the requirement to disperse wheelchair spaces, the regulation plainly does not exempt those theaters from the separate, and distinct, requirement that wheelchair users have comparable lines of sight. See 28 C.F.R. Pt. 36, App. A, § 4.33.3, at 637 (2003).

11. Through selective and incomplete quotations, National conveys a misleading impression about the deposition testimony of government witnesses concerning the meaning of "lines of sight" (National Reply Br. 15-16 & n.11). In fact, government witnesses testified, consistently with the Department's interpretation, that viewing angles are components of "lines of sight" (A653, 658,

1076-1078, 1108-1109, 1122-1124, 1293, 1308, 1313, 1488-1490, 1536-1538).[4]

CONCLUSION

This Court should reverse the district court's holding that Standard 4.33.3 can only be applied to those theaters that were constructed or refurbished on or after December 18, 2000.

Respectfully submitted,

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[4] The government's Rule 30(b)(6) witness was permitted to answer questions on this issue but not to divulge privileged internal discussions (A534, 624).

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 3,098 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: November 18, 2003

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2003, two copies of the REPLY BRIEF FOR THE UNITED STATES AS CROSS-APPELLANT were served by Federal Express, next business day delivery, on the following counsel of record:

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