No. 06-55390

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

AMC ENTERTAINMENT, INC., et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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MISCELLANEOUS:

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STATEMENT OF JURISDICTION

Appellants' jurisdictional statement is correct.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in entering a remedial decree that requires Appellants to modify some of their stadium-style movie theaters to correct violations of Title III of the Americans With Disabilities Act (ADA) and a federal regulation implementing the statute.

STATEMENT OF THE CASE

1. The only issue before this Court is whether the district court abused its discretion in entering a remedial order that requires Appellants to modify some of their stadium-style movie theaters to correct ADA violations in those facilities. The district court found that many of Appellants' theaters violate an ADA regulation by failing to provide wheelchair seating in the "stadium" sections of their auditoriums. AMC is not challenging that liability ruling here, recognizing that it is unassailable so long as *Oregon Paralyzed Vets. of Am.* v. *Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), cert. denied, 542 U.S. 937 (2004), remains binding precedent in this Circuit.

2. Unlike traditional movie theaters, where seats are located on a sloped floor, most of the seating in stadium-style theaters is in a stadium section on a series of elevated risers. ER 40; SER 326.[1] Some stadium-style theaters, including most auditoriums at issue in this case, also contain a small traditional-style area in which seats are on a sloped floor close to the screen, lower in elevation than the stadium section. SER 326-327; ER 67-68, 70.

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[1] This brief uses the following abbreviations: "ER" for Appellants' Excerpts of Record; "SER" for the United States' Supplemental Excerpts of Record; "Br." for Appellants' opening brief; "NATO Br." for the amicus brief of the National Association of Theater Owners; "TAB Br." for the amicus brief of the Texas Association of Business & Chambers of Commerce; and "RJN" for Appellants' Request for Judicial Notice.

In many of Appellants' theaters, the stadium section is accessible only by stairs, and the wheelchair spaces are located only in the traditional-style portion of the auditorium close to the screen. ER 67-68, 70. Placement of wheelchair seating close to the screen in a stadium-style theater can create significant difficulties for wheelchair users. The locations close to the screen often make the movie image appear blurry and distorted and can cause physical discomfort for wheelchair users who must crane their necks in awkward positions to see the entire screen. See pp. 16-18, *infra*; *Regal Cinemas*, 339 F.3d at 1128.

3. On January 29, 1999, the United States filed suit against AMC Entertainment, Inc. and American Multi-Cinema, Inc. (collectively AMC), alleging that they had engaged in a pattern or practice of disability-based discrimination in violation of Title III of the ADA, 42 U.S.C. 12181-12189, and the Title III regulations, including a Department of Justice regulation known as "Standard 4.33.3." ER 3, 6-7, 10-12. The complaint alleged that many of AMC's stadium-style theaters violated Standard 4.33.3 because wheelchair spaces in those auditoriums failed to provide "lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A, § 4.33.3. See ER 5-7. In addition, the complaint alleged that many of AMC's theaters failed to provide wheelchair seating that was an "integral part of the seating plan." ER 7 (citing § 4.33.3).

Finally, the complaint alleged that many of AMC's theaters also violated several non-line-of-sight requirements. ER 7-8.[2]

The complaint covered AMC's stadium-style theaters "throughout the United States." ER 5. In the complaint, the United States asked the district court to order AMC to undertake the modifications necessary to bring "all" of its stadium-style theaters "that were constructed or altered after January 26, 1993, into full compliance with the requirements of Title III of the ADA * * * and the Department of Justice's regulations implementing Title III." ER 13.

On November 20, 2002, the district court granted partial summary judgment in favor of the United States on liability issues related to the comparable-lines-of-sight claims. ER 65-113. The court concluded that AMC's stadium-style auditoriums "that place wheelchair seating solely on the sloped-floor portion of the theater fail to provide 'lines of sight comparable to those for members of the general public'" and thus violate Standard 4.33.3. ER 100-101. In reaching that conclusion, the court upheld the Department of Justice's interpretation of the regulation's comparable-lines-of-sight mandate. ER 101-102.

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[2] This appeal pertains only to the comparable-lines-of-sight claim. The "integral" seating requirement and the non-line-of-sight claims are not at issue here.

In its liability ruling, the court held that applying the Department of Justice's interpretation of Standard 4.33.3 to AMC theaters built before mid-1998 would not violate due process. ER 103-104. The court found that AMC "understood – or should have understood – that the meaning of 'lines of sight' in the context of motion picture theaters referred not only to possible obstructions but also to viewing angles." ER 99; accord ER 104.

On January 22, 2003, the district court granted partial summary judgment in favor of the United States on the non-line-of-sight issues raised in the complaint. SER 367-382. The court later entered a consent decree in which AMC agreed to remedy the non-line-of-sight violations. SER 383-399.

The parties then addressed the only remaining issue in the case: the proper remedy for the comparable-lines-of-sight violations that the district court had found in AMC's theaters. The United States moved for summary judgment and proposed a remedial plan. SER 401-403, 417-432. AMC proposed two alternative remedial plans and urged the court to adopt either of them. ER 142-164.

On January 10, 2006, the district court granted summary judgment to the United States and entered the remedial order proposed by the government. ER 318-323, 326-372. The order requires AMC to (1) modify some, but not all, of its existing stadium-style auditoriums (ER 336-362); (2) adhere to certain criteria in

designing future theaters (ER 363-365); (3) pay of a total of $200,000 to individuals with disabilities who suffered injury as a result of AMC's violations (ER 366); and (4) pay civil penalties totaling $100,000 (ER 367). That order resolved all outstanding issues among the parties.

After AMC filed its notice of appeal, the parties jointly requested that the district court modify certain deadlines in the lines-of-sight remedial order to maintain the status quo pending appeal. On July 27, 2006, the district court entered an order modifying the deadlines to permit AMC to postpone modification of its existing theaters until this Court decides this appeal. SER 539-542.

STATEMENT OF FACTS

A. AMC's Stadium-Style Movie Theaters

This lawsuit involves 96 stadium-style theater complexes that AMC operates in 22 different states. See ER 337-338, 348, 355-356, 359, 362. These 96 complexes contain a total of 1,933 stadium-style auditoriums. SER 434-440.

In May 1995, AMC opened the industry's first stadium-style theater complex, the Grand 24. ER 67, 146. In most of the auditoriums at the Grand, wheelchair seating is exclusively in the sloped-floor portion of the theater, outside of the stadium section. ER 70; SER 329. Later in 1995, AMC began opening

similarly designed stadium-style theaters around the country, including in California. ER 70, 337-338; SER 327-330.

Larry Jacobson, AMC's former Senior Vice President for Design, Development & Facilities (ER 343), testified that the viewing experience from the front portion of the typical AMC stadium-style auditorium is "awful." ER 83; SER 347-348. He also acknowledged that the majority of the wheelchair locations at the Grand 24 (and other similarly designed theaters in California and Arizona) are "outside the comfort zone." ER 82; SER 346.

Of the 1,933 stadium-style auditoriums at issue in this case, 1,294 have no wheelchair seating in the stadium section. SER 408 (¶ 10), 434. Over 300 of these auditoriums have wheelchair seating in the first row. SER 62 (¶ 6(c)), 71.

In 2001, AMC switched to a "full stadium" design for all of its new theaters. Under this design, all seats (including wheelchair spaces) are on elevated stadium risers. ER 70-71; SER 331.

B. Department Of Justice's Regulation

Title III of the ADA requires that public accommodations and commercial facilities (including movie theaters) designed and constructed for first occupancy after January 26, 1993, be "readily accessible to and usable by" persons with

disabilities. 42 U.S.C. 12183(a)(1). To implement these requirements, Congress directed the Attorney General to promulgate regulations that are consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board, commonly known as the Access Board. See 42 U.S.C. 12186(b), 12186(c), 12204.

In 1991, the Department of Justice issued final regulations establishing accessibility requirements for new construction. 56 Fed. Reg. 35,546 (July 26, 1991). These regulations incorporated the language of the ADA Accessibility Guidelines (ADAAG) promulgated by the Access Board. See 28 C.F.R. 36.406(a); 28 C.F.R. Pt. 36, App. A. One of the Department's regulations is Standard 4.33.3, which provides that in public assembly areas (including movie theaters)

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

28 C.F.R. Pt. 36, App. A, § 4.33.3.

C. Historical Understanding Of "Lines Of Sight"

In adopting the "lines of sight" language in Standard 4.33.3, the Department used a term of art that had long been understood in the field of theater design to encompass viewing angles. For decades prior to the issuance of the regulation,

prominent treatises and articles on theater design had recognized that extreme vertical and horizontal viewing angles adversely affect the quality of lines of sight by causing physical discomfort and image distortion. ER 74-77; SER 332-335, 339-342; SER 212-216, 220-230, 247, 255-257, 259.

D. Movie Theater Industry's Understanding Of "Lines Of Sight"

1. SMPTE Guidelines

In 1989, the Society of Motion Picture and Television Engineers (SMPTE) issued guidelines that made clear that viewing angles are a key component of spectators' lines of sight:

> Since the normal line of sight is 12 to 15º below the horizontal, seat backs should be tilted to elevate the normal line of sight approximately the same amount. For most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35º, and when the horizontal line of sight measured between a perpendicular to his seat and the centerline of the screen exceeds 15º.

SER 234; ER 76; see also SER 335-337. The guidelines also warned about "viewing angle distortion," explaining that "as the viewer's line of sight to the screen deviates from the perpendicular * * * all shapes [on the screen] become distorted." SER 233; see also SER 335-337. SMPTE readopted these guidelines in March 1994. SER 237-245, 339; ER 77.

High-level AMC officials – including the Senior Vice President for Design, Development & Facilities and the Senior Vice-President for Design, Construction & Purchasing – were familiar with and consulted these SMPTE guidelines in designing stadium-style theaters. ER 77; SER 337-338. One of these AMC officials gave a speech in 1993 in which he discussed in detail the technical specifications in the SMPTE guidelines. ER 82; SER 306-308, 316-318, 343-345.

2. National Association Of Theater Owners

The National Association of Theater Owners (NATO) is the principal trade organization for movie theater operators in the United States. NATO Br. 1; ER 78. AMC was a NATO member until approximately 2000. ER 79; SER 51-54.

From 1991 (when the Department promulgated its regulation) through 1995 (the year AMC opened its first stadium-style theater), NATO issued a number of statements, including a formal position paper, on Standard 4.33.3's requirements for wheelchair seating. In these public statements, NATO took the position that:

- "Lines of sight are most commonly measured in degrees" (ER 80; SER 292 n.8; accord ER 79; SER 265, 272), and that "if one was discussing sight lines, one would reference angle" (ER 80; SER 302).

➤ "Seating in the rear of the auditorium affords the smallest viewing angle and thus is the best for a patron with limited flexibility" (ER 79; SER 266).

➤ "The seats in the rear portion of the auditorium have the best sight lines to the screen and are the first taken" (SER 282; accord SER 263, 269, 281, 303; ER 79-80).

➤ "In the typical motion picture theater * * *, the seats in the front of [the auditorium] are the least desirable and are the last to be taken" (SER 282), and "most wheelchair patrons would take the position that wheelchair seating located in the front row center of a motion picture theatre auditorium is undesirable" (SER 269; ER 80).

➤ "In motion picture theatres, unlike other auditoriums, the most desirable seats, and in fact the seats first chosen during most performances, are those in the rear third of the theatre" (ER 80; SER 271; accord SER 303). "[I]n a typical showing it is common for the middle and rear of the auditorium to fill before the very front of the auditorium. * * * [W]e in the motion picture theatre industry are well aware of these facts and, indeed, take them for granted" (SER 304; accord SER 274).

NATO submitted some of these comments directly to the Department of Justice in the early and mid-1990s. See SER 264-267, 278-301.

NATO later changed its position on the meaning of "lines of sight" and the requirements of Standard 4.33.3. ER 81. Starting in the late 1990s – after some NATO members had been sued over placement of wheelchair seating in stadium-style theaters – NATO began asserting that it had always understood "lines of sight" to mean only unobstructed view and that Standard 4.33.3 did not require consideration of viewing angles. SER 305, 363, 365-366.

E. AMC's Understanding Of The Comparable "Lines Of Sight" Requirement

In January 1995 – four months before AMC opened its first stadium-style theater – AMC filed a pleading in federal court asserting that, in the context of Standard 4.33.3, "[l]ines of sight for a patron in an auditorium are measured with reference to the horizontal and vertical angles of view the eye must encompass in seeing the screen." SER 321; ER 81. In that pleading, AMC stated that "[i]t is self evident" that "sight lines are steepest in the front [of the theater] and flatten out in moving to the rear." SER 322; ER 81.

In July 1995, Phillip Pennington, AMC's Vice President for Operations Services (SER 455) and the company's "final arbiter" of ADA-related design issues (SER 353), received a letter of complaint from the father of a child with a

disability about the wheelchair seating in one of AMC's newly opened stadium-style theaters. SER 197-199. That customer complained that the location of the wheelchair seating, just "two rows away from the front of the screen," made "it impossible to see the movie." SER 198. Pennington forwarded the letter to AMC's counsel with a note explaining that "[t]his complaint seems to squarely address the 'comparable sightlines' issue with respect to stadium seating." SER 197.

On November 5, 1996, the Department of Justice notified AMC's Chief Executive Officer that it was launching an investigation of AMC's stadium-style theaters in response to complaints that AMC had violated the ADA by placing wheelchair seating near the front of the auditoriums in some theater complexes. SER 356-358. The Department's investigation of AMC was prompted by complaints about stadium-style theaters in Woodland Hills and Norwalk, California. SER 356.

The next day, Douglas Seibert, the director of design and construction in AMC's South Division (SER 49-50), sent a memorandum to high-level AMC officials, warning them that AMC needed to place wheelchair seating in the stadium sections of the theaters it was building in Florida. SER 208-209. In that memorandum, Seibert emphasized:

> [T]he following is apparent to me:
>
> • All Florida projects need some accessible seating in the stadium area. The "300 seat" rule AMC has been using[3] is irrelevant because we do not offer "comparable lines of site [*sic*]" * * *.
>
> • The accessible seating that we currently offer in stadium houses is an insult to the disabled. How often do you sit in the first, or even fourth row?
>
> * * * * *
>
> • AMC may be very vulnerable to lawsuits at the stadium houses we have in Florida * * *.

SER 208-209; ER 74. The AMC officials to whom Seibert sent the memorandum included (1) AMC Vice President Pennington, (2) William Timper, AMC's Vice President for Architecture, Planning and Development and "the principal contact between AMC and its architects with respect to the design of AMC's theaters" (SER 43); and (3) Sam Giordano, AMC's Senior Vice-President for Design, Construction & Purchasing. SER 208-209; see SER 338; ER 77.

In his memorandum, Seibert explained that the Florida Accessibility Advisory Council had told AMC that its wheelchair areas in stadium-style theaters were "terrible" and that the views offered from those locations were "certainly not 'comparable lines of sight' as required by law." SER 208. He further noted that

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[3] At that time, AMC did not place wheelchair spaces in the stadium section if the auditorium had fewer than 300 seats. See SER 48.

the Florida Board of Building Codes and Standards, from which AMC had sought accessibility waivers for some of its stadium-style auditoriums, "pointed out that what we call accessible seating was 'a joke . . . ridiculous . . . unacceptable . . . .'" SER 208 (ellipses in original). Seibert also emphasized that the Florida Board had warned AMC not to seek future waivers of accessibility requirements "unless we made some attempt to make the Stadium seating areas accessible." SER 208.

Despite Seibert's warning, AMC kept opening stadium-style theaters that excluded wheelchair users from the stadium sections and relegated them to undesirable areas close to the screens. Between November 6, 1996 (when Seibert wrote his memorandum) and 2001 (when AMC switched to a "full stadium" design for all its theaters), AMC opened 1,388 stadium-style auditoriums. See SER 72-74, 76-79, 81, 83-85, 87, 90, 92-95, 97-98, 100-104, 106, 108-109, 111-113, 115-117, 119, 121, 123-128, 130-131, 133-147, 149-154. Of those auditoriums, 1,100 (more than 79%) excluded wheelchair users altogether from the stadium sections. See SER 72-74, 77-79, 81, 83-85, 87, 90, 92-95, 97-98, 100-104, 106, 108-109, 111-113, 115-117, 119, 121, 123-128, 130-131, 133-142, 144-147, 149-151, 153-154. In several auditoriums that it opened after November 6, 1996, AMC placed wheelchair spaces in the first row. See SER 72, 81, 97-98, 108, 111, 113, 124-126, 128, 144, 147, 150.

After this litigation began, AMC switched positions and began advocating an interpretation of "lines of sight" diametrically opposed to the one it had used in the mid-1990s. In a pleading filed in this case in September 2002, for example, AMC asserted that the regulation's phrase "lines of sight comparable" has "consistently referred to *obstruction*, not viewing angle." SER 45.

F. Customer Complaints About AMC's Theaters

Almost immediately after the opening of AMC's first stadium-style theater complex (the Grand 24) in May 1995, customers began complaining to AMC that the wheelchair seating in the stadium-style auditoriums was too close to the screens. The first of these complaint letters was written on May 19, 1995 (SER 195), the day the Grand 24 opened. ER 337. AMC received many more such complaints between mid-1995 and mid-1998. See SER 198-206, 175 (¶ 4), 177-178 (¶¶ 17-18), 180-182 (¶¶ 4, 10).

On May 31, 1995 (12 days after the Grand 24 opened for business), an AMC official sent a memorandum to Phillip Singleton, AMC's Executive Vice President and Chief Operating Officer, noting that there had been "[m]any [h]andicapped [c]omplaints" about the auditoriums at that complex. SER 191-192; see also SER 190. In the summer of 1995, AMC Vice President William Timper visited the Grand 24 to investigate the complaints. After his visit, he noted in a memorandum

that the "rows on the sloped floor [where the wheelchair seating is located] are the last to fill up, everytime." ER 71; SER 193-194.

Over the next few years, customers repeatedly advised AMC that the location of the wheelchair spaces made watching a movie unpleasant, especially due to the physical discomfort they suffered from having to crane their necks at an extreme angle, as well as the eye strain and blurriness they experienced from being so close to the screen. ER 71-72; SER 198-206; SER 177-178 (¶¶ 17-18), 181-182 (¶ 10). For example, in April 1996, a wheelchair user wrote a letter to Stanley Durwood, AMC's Chief Executive Officer, complaining about her terrible viewing experience at an AMC theater:

> From my vantage point on the far right side of the second row from the screen I was forced to endure two hours of neck wrenching discomfort as I struggled to find a comfortable way to view the entire screen. * * * If not the least desirable location in the theater, the wheelchair area must be a close second. * * * I would also challenge [your design engineers] (and you as well) to take a wheelchair into one of the * * * theaters and sit through an action packed movie. I believe all will agree it is not the enjoyable experience any theater goer, whether able bodied or handicapped, expects and deserves.

SER 442. Another wheelchair user wrote to AMC in February 1997 describing a similar experience and emphasizing that "[s]ome modification needs to be made to

conform to ADA regulations" and to "insure accessibility and comfort" for wheelchair users. SER 205-206.[4]

Several of these customer complaints were directed to AMC Vice President Phillip Pennington. See SER 177-178 (¶¶ 18-19), 181-182 (¶ 10), 197, 200, 204, 455. In response to one of the complaints, Pennington advised a customer in September 1996 that "[r]elocation of the wheelchair spaces is now under study in hopes of providing an alternative in the near future." SER 455.

G. The Department Of Justice's Interpretation Of Its Comparable-Lines-Of-Sight Regulation

As explained, when the Department of Justice promulgated Standard 4.33.3 in 1991, the phrase "lines of sight" was a term of art that was widely understood by architects and designers as encompassing spectators' viewing angles. See pp. 9-10, *supra*. In the early and mid-1990s, the theater industry's own statements indicated that it shared this understanding of the term "lines of sight." See pp. 9-12, *supra*.

In 1998, however, the United States learned that Cinemark USA, Inc. (Cinemark), a major theater chain, was advocating an interpretation of "lines of sight" that conflicted with the long-standing, common usage of that term in the

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[4] The Department of Justice has received numerous complaints from other individuals raising similar objections about the placement of wheelchair seating in AMC's stadium-style theaters. See SER 444-454.

movie theater industry. Cinemark argued, as a litigating position, that the comparable "lines of sight" language in Standard 4.33.3 had nothing to do with viewing angles and simply meant that the view of the screen must be unobstructed.

In response, the Department of Justice filed an *amicus curiae* brief in *Lara* v. *Cinemark USA, Inc.*, No. EP-97-CA-502-H (W.D. Tex.), in which the United States confirmed that "lines of sight" encompassed viewing angles and that, in the context of a stadium-style theater, Standard 4.33.3 required that wheelchair users be provided lines of sight in the stadium section within the range of viewing angles offered to most members of the audience in the stadium seating. SER 5, 13-14. The Department attached a copy of the SMPTE guidelines to its brief and cited them as evidence that the movie theater industry understood that viewing angles affect the quality of spectators' lines of sight in a movie theater. SER 8-9, 12-13, 17-25. The Department's *Lara* brief thus reaffirmed the well-established understanding of "lines of sight" that AMC itself had advocated in January 1995 and that NATO had echoed during the early and mid-1990s. See pp. 10-13, *supra*.

H. Modifications Required In AMC's Existing Stadium-Style Theaters Under The District Court's Remedial Order

The remedial order covers 96 of AMC's existing stadium-style theater complexes (see ER 337-338, 348, 355-356, 359, 362), which contain a total of

1,933 stadium-style auditoriums. See SER 434-440. The order, however, does not require AMC to modify all 96 complexes or all 1,933 of the auditoriums.

In auditoriums in which at least one wheelchair space and companion seat "are already located within the Stadium Section, th[e] Order does not require any accessibility modifications to improve lines of sight so long as such seats otherwise provide an unobstructed view of the screen and no other wheelchair seats in that Auditorium are otherwise located in the front row closest to the screen." ER 336-337. In 762 (or 39%) of the auditoriums at issue in this case, AMC is not required to make any modifications, so long as all the wheelchair spaces in those auditoriums provide unobstructed views of the screen.[5] See SER 434 (last column); SER 409 (¶ 13).

In auditoriums in which modifications are required, the scope of the remedial work is limited. Although 1,294 AMC auditoriums have no wheelchair seating in the stadium section (SER 408 (¶ 10)), the remedial order requires AMC to move wheelchair spaces to the stadium sections in only 339 (or 26%) of those non-compliant auditoriums. See SER 434 (column 5). The order requires that this

[5] The United States has not inspected all 762 auditoriums and thus cannot be sure that all are free of obstructions. Nevertheless, based on available information, including a review of architectural plans that AMC produced in discovery, the United States does not anticipate that any of the 762 auditoriums will require modifications under the remedial decree.

be accomplished by installing a ramp to the first row of the stadium section; AMC is not required to ramp up to higher tiers within the stadium section. ER 337. In another 24 auditoriums, AMC must build a ramp to a "mini-riser" in front of the stadium section. SER 434 (column 6). Thus, the order requires the installation of ramps in only 363 (or 28%) of the 1,294 non-compliant auditoriums. SER 409 (¶ 12(a)). In another 164 auditoriums, the order gives AMC the choice of either removing a mini-riser to create a cross-aisle where wheelchair spaces would be placed, or constructing a ramp to the first mini-riser in front of the stadium section. SER 434 (column 7); SER 409 (¶ 12(b)).

In the remaining auditoriums, the required modifications involve no ramping. In 624 of the auditoriums, AMC is simply required to move wheelchair spaces (and their companion seats) farther back from the screen within the sloped-floor area, a remedy that often entails little more than unbolting companion seats from the front of a cross-aisle and relocating them to the back of the same cross-aisle. SER 409 (¶ 12(c)), 434 (column 8); compare ER 355 with ER 357 (§ 4.3(b)(3)-(4)); ER 360-361 (§ 4.4(c)(3)-(4)). Finally, in 20 auditoriums, AMC is required to perform a handful of miscellaneous fixes, such as adding a missing companion seat or centering wheelchair spaces within a row of traditional seating in the sloped-floor area. SER 434 (column 9); SER 409 (¶ 12(d)).

SUMMARY OF ARGUMENT

The only issue that is properly before this Court is a straightforward one: whether the district court abused its broad equitable discretion in crafting a remedy for violations of federal law in AMC's stadium-style theaters. Clearly, it did not.

The remedial order is designed to correct violations that the district court found in many of AMC's stadium-style theaters. Specifically, the court concluded that many of AMC's stadium-style theaters violate Standard 4.33.3, a Department of Justice regulation implementing Title III of the ADA. Standard 4.33.3 requires that wheelchair areas in movie theaters and other public assembly areas provide "lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A, § 4.33.3. The district court concluded that AMC's stadium-style theaters violate the comparable-lines-of-sight mandate if they place wheelchair seating solely on the sloped-floor portions of the auditoriums outside of the stadium sections. AMC is not challenging that liability ruling here, recognizing that doing so would be futile in light of this Court's decision in *Oregon Paralyzed Vets.* v. *Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003), cert. denied, 542 U.S. 937 (2004).

The district court's remedial order is a reasonable compromise among competing interests. The order requires AMC to take steps in most of its non-

compliant auditoriums to improve the inferior (and oft times physically uncomfortable) viewing experiences that those theaters currently offer wheelchair users. At the same time, the remedial decree ensures that AMC will not be unduly burdened in making those corrections. Although 1,294 of AMC's auditoriums are non-compliant because they provide no wheelchair seating in their stadium sections, the district court ordered AMC to move wheelchair spaces into the stadium sections of only 339 (or 26%) of those auditoriums. In the other auditoriums in which modifications are required, AMC is permitted to take more modest corrective action. Indeed, in over half of the auditoriums in which modifications are mandated, AMC is simply required to move wheelchair spaces (and their companion seats) farther back from the screen within the sloped-floor area – a remedy that often entails simply unbolting some chairs from the floor and moving them back a few feet.

The district court thus opted for a relatively modest remedy that balances both the needs of persons with disabilities and the practical, structural limitations that AMC faces in correcting some of its existing theaters. By choosing this balanced approach, the district court acted well within its broad equitable discretion.

Most of the arguments that AMC attempts to raise in this appeal have been waived and thus are not properly before this Court. In particular, AMC has waived its challenges to the remedial order's coverage of (1) theaters designed before July 1998, (2) theaters outside the Ninth Circuit, (3) theaters within the Fifth Circuit, and (4) theaters in Florida and Texas. AMC waived each of those issues by urging the district court to adopt a remedial plan that would have required AMC to modify theaters in each of those four categories. AMC cannot now switch positions on appeal and attack features of the remedial order that AMC itself proposed below.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING THE REMEDIAL DECREE

At the liability phase of this case, the district court held that AMC's stadium-style movie theaters violated the comparable-lines-of-sight requirement of Standard 4.33.3 if they failed to include any wheelchair spaces in the stadium sections of the auditoriums. ER 100-101. AMC is not challenging that liability ruling here, recognizing that the district court's liability determination is unassailable as long as *Oregon Paralyzed Vets. of Am.* v. *Regal Cinemas, Inc.*, 339

F.3d 1126 (9th Cir. 2003), cert. denied, 542 U.S. 937 (2004),[6] remains binding precedent in this Circuit. See Br. 28 & n.11. Consequently, the only issue before this Court is whether the district court abused its discretion in crafting its remedial order on the line-of-sight issues.

A. This Court's Decision In Regal Cinemas

In *Regal Cinemas*, this Court concluded that the stadium-style movie theaters at issue in that case failed to comply with the comparable-lines-of-sight mandate of Standard 4.33.3. See 339 F.3d at 1133 (ordering entry of summary judgment in favor of plaintiffs on their ADA claim). As in the present case, most of the stadium-style auditoriums in *Regal Cinemas* provided wheelchair spaces only in the first few rows near the screen, on a sloped-floor area outside of the elevated stadium section. *Id.* at 1127-1128.

This Court recognized that "locating all of the wheelchair-accessible seating in the first few rows of theaters creates significant disadvantages for wheelchair-bound patrons," because of the disparity between the viewing angles available from the stadium section and those available from the seats in the sloped-floor area close to the screen. 339 F.3d at 1128. The Court noted that this disparity has a greater adverse effect on persons with disabilities than on other customers

[6] AMC refers to this case as *Stewmon* v. *Regal Cinemas*. See Br. 14, 28 n.11.

"because wheelchair-bound patrons cannot slump in their seats and recline their bodies in order to adjust for the unfavorable viewing angle, as can able-bodied patrons sitting in the same part of the theater." *Ibid.* "Thus, not only do the wheelchair seats themselves have, on average, highly unfavorable viewing angles relative to the rest of the theater, but the patrons sitting in them will be less able than other patrons to adjust for those angles by shifting position in their seats." *Ibid.* The Court also highlighted the plaintiffs' testimony that being forced to sit near the front of the theater made the image on the screen appear blurry and caused them to experience nausea, dizziness, and headaches. *Ibid*.

This Court also upheld the Department of Justice's interpretation of the comparable lines-of-sight requirement of Standard 4.33.3. *Regal Cinemas*, 339 F.3d at 1131-1133. The Court recognized that, under the Department's interpretation, wheelchair seating in stadium-style theaters must provide viewing angles "within the range of angles offered to the general public in the stadium-style seats." *Id.* at 1133; accord *id.* at 1130. In accepting the Department's reading of the regulation, this Court rejected the reasoning of the Fifth Circuit in *Lara* v. *Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir. 2000), which had held that the comparable-lines-of-sight mandate of Standard 4.33.3 required only that

wheelchair users have unobstructed views of the screen. See *Regal Cinemas*, 339 F.3d at 1129-1130, 1132-1133 & n.9.

In rejecting *Lara*'s reasoning, this Court relied on the "plain meaning of the regulation both in general and as understood in the movie theater industry." 339 F.3d at 1132. The Court explained that the Society of Motion Picture and Television Engineers (SMPTE) had published guidelines in 1994 indicating that viewing angles affect the quality of spectators' lines of sight in movie theaters and, specifically, that extreme viewing angles produce physical discomfort for viewers. *Id.* at 1128, 1131-1132. The majority also noted that, in 1994, the National Association of Theater Owners (NATO) had taken a similar position on viewing angles. *Id.* at 1132.

This Court further concluded that the Department's interpretation was consistent with the statutory goals that the regulation was designed to implement, in particular the requirement that persons with disabilities have "full and equal enjoyment" of the benefits of public accommodations (42 U.S.C. 12182(a)):

> In the theaters at issue in this case, wheelchair-bound movie theater patrons must sit in seats that are objectively uncomfortable, requiring them to crane their necks and twist their bodies in order to see the screen, while non-disabled patrons have a wide range of comfortable viewing locations from which to choose. We find it simply inconceivable that this arrangement could constitute "full and equal enjoyment" of movie theater services by disabled patrons.

339 F.3d at 1133.

After this Court decided *Regal Cinemas*, two other circuits upheld the Department's interpretation of the comparable-lines-of-sight requirement of Standard 4.33.3. See *United States* v. *Hoyts Cinemas Corp.*, 380 F.3d 558, 566-567 (1st Cir. 2004); *United States* v. *Cinemark USA, Inc.*, 348 F.3d 569, 575-579 (6th Cir. 2003), cert. denied, 542 U.S. 937 (2004). Except for the Fifth Circuit, every court of appeals that has decided the issue – including this Circuit – has accepted the government's interpretation.

B. The District Court Did Not Act Irrationally In Entering The Remedial Order, Which Strikes A Reasonable Compromise By Providing Meaningful Relief To Persons With Disabilities Without Unduly Burdening AMC

"Where the public interest is involved, 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *United States* v. *Alisal Water Corp.*, 431 F.3d 643, 654 (9th Cir. 2005), cert. denied, 126 S. Ct. 1922 (2006). In light of the district court's broad discretion to fashion relief in cases involving the public interest, see *California Dep't of Social Servs.* v. *Thompson*, 321 F.3d 835, 857 (9th Cir. 2003), appellate review of the remedial decree "is correspondingly narrow." *Lamb-Weston, Inc.* v. *McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991). The Court reviews the grant of injunctive relief "for abuse of discretion and application of the correct legal

principles." *Fortyune* v. *American Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004) (upholding injunction against AMC for violating ADA accessibility requirements involving wheelchair companion seating in movie theater). The test for abuse of discretion in this context is whether the district court "acted irrationally in imposing the remedy it did." *Alisal*, 431 F.3d at 656.

In this case, AMC has waived all its arguments that the district court committed legal error in entering the remedial decree. See pp. 36-38, 47-48, 58-59, *infra*. Consequently, the only issue that is properly before this Court is whether the district court abused its broad equitable discretion in fashioning a remedy for the violations at AMC's stadium-style theaters.

The district court in this case did not act irrationally in its choice of a remedy. To the contrary, the court struck a "reasonable compromise" among competing interests. *Alisal*, 431 F.3d at 656. The modifications required by the remedial decree are designed to improve the viewing experience for wheelchair users at AMC's non-compliant theaters, while taking into account the practical difficulty of moving wheelchair spaces into the stadium sections in some of those auditoriums. See ER 337 (decree does not require building a ramp to the stadium section of an auditorium "if the size or configuration" of the auditorium "would

make the construction of a ramp Physically Impracticable"). By adopting this balanced approach, the district court acted well within its broad discretion.

At the outset, it is important to correct misstatements in AMC's brief about the scope of the remedy ordered by the district court. AMC incorrectly asserts, for example, that "[t]he district court ordered AMC to retrofit every stadium-style movie theater it had ever built." Br. 24. AMC also incorrectly claims (Br. 18, 39 n.15) that the remedial order requires retrofitting of all AMC theaters with a "full stadium" design.

In fact, the remedial order does not require AMC to modify all 1,933 of its stadium-style auditoriums. In 762 (or 39%) of those auditoriums, no modifications are required, so long as all the wheelchair spaces provide unobstructed views of the movie screen. See pp. 20-21 & n.5, *supra*. AMC is not required to modify any theaters that have a "full stadium" design, as long as the wheelchair spaces in those auditoriums provide unobstructed views. Indeed, AMC admitted below that the "only modification proposed by the Department for this category [of 'full stadium' theaters] is to correct any obstructed view that might exist." ER 305 n.1; see also ER 361-362 (provisions of decree governing "full stadium" designs); SER 429 (explaining requirements for "full stadium" theaters); SER 440 (no modifications required at 20 theater complexes with "full stadium" designs).

Moreover, contrary to AMC's assertion, the required modifications are not "draconian." Br. 40. Although 1,294 auditoriums lack any wheelchair seating in their stadium sections (SER 408 (¶ 10)), the order requires AMC to move wheelchair spaces into the stadium sections in only 339 (or 26%) of those non-compliant auditoriums. SER 434 (column 5). And even in those 339 auditoriums, AMC need only ramp up to the first row of the stadium sections. ER 337. The remedial order eschews more extensive remedial measures, such as building ramps to higher tiers within the stadium sections or installation of elevators. And in 624 auditoriums (more than half of the total number of auditoriums in which modifications are required), the required changes involve simply moving wheelchair spaces and their companion seats farther back from the screen within the traditional-style area – modifications that often entail little more than unbolting chairs and moving them back a few feet. See p. 22, *supra*.

In light of AMC's exaggeration about the scope of the required modifications, this Court should view with considerable skepticism AMC's unsupported assertion (Br. 23, 39) that the modifications may cost as much as $20 million (Br. 23, 39).[7] AMC did not present evidence below to show the cost of the

[7] The SEC filing that AMC cites (Br. 23) is not in the record and, at any rate, provides no explanation for how AMC arrived at the $20 million figure.

remedies and thus should not be allowed to inject that issue into the case for the first time on appeal. Indeed, AMC previously disclaimed reliance on a cost defense, arguing that if wheelchair locations failed to comply with Standard 4.33.3, they must be relocated regardless of cost. SER 42.

AMC's attacks on the remedial decree ignore the strong public interest in improving the inferior viewing experiences for wheelchair users in AMC's theaters. For many persons with disabilities, the wheelchair locations near the screen provide viewing experiences that are not just inferior but also physically painful. See pp. 16-18, *supra*; *Regal Cinemas*, 339 F.3d at 1128. The upshot is that AMC's violations of Standard 4.33.3 have made many of its stadium-style auditoriums essentially unusable for wheelchair users. See SER 172-174; SER 56-58; SER 155, 160-161, 164-165, 168-169, 186. In light of the seriousness of the problem, the district court appropriately crafted a decree that would improve the viewing experience for wheelchair users at a substantial number of AMC's auditoriums.

AMC contends (Br. 40-44) that the district court abused its discretion in imposing retrofitting obligations on AMC that are allegedly more extensive than those required of Cinemark and Regal Cinemas in the settlement agreements that those companies reached in *United States* v. *Cinemark USA, Inc.*, No. 1:99CV-705

(N.D. Ohio), and *United States* v. *Hoyts Cinemas Corp., Regal Entm't Group, and Regal Cinemas, Inc.*, No. 00 CV 12567 (D. Mass.) (*Regal*).[8] AMC cites no authority for the extraordinary proposition that a remedy imposed on a non-settling defendant can be no more burdensome than that embodied in settlement agreements that other parties have negotiated with the government.

AMC's position, if adopted, would create obvious free-rider problems and would discourage settlement. Under AMC's approach, each theater operator would have an incentive to sit back and let its competitors negotiate a settlement with the government, knowing that a court could not order a remedy more extensive than that set forth in the most favorable settlement negotiated by other parties.

AMC had ample opportunity to settle this litigation. The United States engaged in settlement negotiations with AMC on multiple occasions over a seven-year period beginning in June 1998. See SER 1-4, 4B, 25A, 25C, 25F-25U, 206A-206C, 363A-363E, 399A-400, 432E. Having opted not to settle, AMC cannot legitimately complain about the agreements that its competitors negotiated with the government.

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[8] Because AMC refers to this case as *Regal*, we do the same to avoid confusion.

At any rate, AMC fails to demonstrate that the remedial order in this case imposes obligations that are significantly more onerous than those required by the *Regal* consent order.[9] AMC complains that Regal's retrofitting obligations require it to move wheelchair spaces into the stadium sections in "only" 1,030 (or 28%) of its auditoriums. Br. 21, 23, 41. Yet the remedial order in this case requires AMC to move wheelchair spaces into the stadium sections in only 339 auditoriums – 17.5% of AMC's stadium-style auditoriums. Moreover, AMC neglects to mention that the *Regal* consent order requires retrofitting in addition to ramping, including the movement of wheelchair spaces and companion seating back from the screen within the traditional-style area. ER 210 (§ 3.3), 213, 215.

Finally, the district court did not abuse its broad discretion in choosing the United States' proposed remedy over the two alternatives proposed by AMC. The modifications AMC proposed were too meager to meaningfully address the scope of the violations found at its theaters. Although 1,294 auditoriums fail to provide any wheelchair seating in the stadium sections, one of AMC's proposals would have required AMC to install ramps to the stadium sections in only about 65 of

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[9] The *Cinemark* consent order requires retrofits in a relatively small percentage of Cinemark's total theaters, largely because the district court in that case concluded that it had jurisdiction only over theaters within the Sixth Circuit that were built before the United States filed its complaint. See SER 538.

those non-compliant auditoriums. See SER 536B (¶ 10). AMC's alternative proposal would have required adding ramps in only 71 auditoriums. SER 522-533. Moreover, under the latter proposal, AMC's proposed modifications would have resulted in wheelchair seats in 53 auditoriums being relocated so that they would be *closer* to the screen. SER 536C (¶ 16). That proposal also would have left wheelchair seating in the front row in 15 auditoriums. SER 536C (¶ 17). Faced with the choice between AMC's two inadequate proposals and the United States' reasonable alternative, the district court's decision to select the government's proposal cannot be considered an abuse of discretion.

II

ALL REMAINING ARGUMENTS IN AMC'S OPENING BRIEF HAVE BEEN WAIVED AND, IN ANY EVENT, ARE MERITLESS

The remaining arguments that AMC attempts to raise in this appeal have been waived and thus are not properly before this Court. In particular, AMC has waived its challenges to the remedial order's coverage of (1) theaters designed before July 1998, (2) theaters outside the Ninth Circuit, (3) theaters within the Fifth Circuit, and (4) theaters in Florida and Texas. AMC waived each of those issues by urging the district court to adopt a remedial plan that would have required AMC to modify theaters in each of those four categories. AMC cannot now switch

positions on appeal and attack features of the remedial order that AMC itself proposed below. At any rate, even if not waived, AMC's arguments are meritless.

A. AMC Has Waived Its Argument That The District Court Violated Due Process Or Otherwise Abused Its Discretion By Issuing A Remedial Order That Covers AMC Auditoriums Designed Before July 1998

AMC argues (Br. 26-44) that the district court violated the fair notice requirement of the Due Process Clause and otherwise abused its discretion by issuing a remedial order that covers AMC auditoriums designed before July 1998, when the Department of Justice filed its *amicus* brief in the *Lara* litigation. AMC has waived this issue.

AMC urged the district court to adopt remedial plans that would have required retrofitting of theaters designed before July 1998. ER 161. One of AMC's proposals expressly stated that it would require retrofits at theaters "designed in 1995 and 1996 and opened prior to June 1997." SER 469; see SER 469-470, 492-497 (proposing retrofits at 16 theater complexes that opened no later than May 1997). Under AMC's alternative proposal, AMC would have been required to retrofit 44 theater complexes that opened before July 1998. Compare SER 522-531 (proposed retrofits) with SER 518-520 (opening dates). AMC emphasized that, in its view, "either approach would represent a fair and equitable proposed remedy to this longstanding dispute." ER 163; accord ER 311 ("Justice

would be well served were the Court to adopt either of AMC's proposed remedies.").

In light of AMC's remedial proposals, it cannot now argue that the district court violated due process protections or abused its discretion in requiring modifications of pre-July 1998 theaters. A party cannot resurrect on appeal an issue that it conceded below. *Bankamerica Pension Plan* v. *McMath*, 206 F.3d 821, 826 (9th Cir.), cert. denied, 531 U.S. 952 (2000); *United States* v. *Albrektsen*, 151 F.3d 951, 954 (9th Cir. 1998). Although AMC raised a fair-notice argument at the liability stage of the case (ER 103-104), AMC's remedial proposals constitute an abandonment of that issue with regard to pre-July 1998 theaters. See *CDN Inc.* v. *Kapes*, 197 F.3d 1256, 1258 (9th Cir. 1999) ("withdrawal of an objection is tantamount to a waiver of an issue for appeal"); accord *Slaven* v. *American Trading Transp. Co., Inc.*, 146 F.3d 1066, 1069-1070 (9th Cir. 1998).

B. The District Court Did Not Violate The Due Process Clause Or Otherwise Abuse Its Discretion By Issuing A Remedial Order That Covers AMC Auditoriums Designed Before July 1998

Even if not waived, AMC's fair notice argument is meritless. AMC knew what "lines of sight" meant before it built its first stadium-style theater and knew well before July 1998 that its stadium-style theaters did not provide comparable lines of sight for wheelchair users.

1. AMC Had Actual Notice That Its Theaters Violated Standard 4.33.3

The following evidence refutes AMC's contention that it lacked fair notice before July 1998 that its theaters violated Standard 4.33.3:

➤ In January 1995, four months prior to the opening of its first stadium-style theater, AMC filed a pleading in federal court stating that "lines of sight" in a movie theater were measured by reference to horizontal and vertical viewing angles. SER 321. This statement flatly contradicts AMC's claim in this Court (Br. 31) that it was unaware until the district court's 2002 liability ruling that the lines-of-sight regulation required consideration of viewing angles.

➤ In July 1995, AMC Vice President Phillip Pennington, the company's "final arbiter" on ADA-related design issues, wrote that a customer's complaint about wheelchair seating being too close to the screen "seems to squarely address the 'comparable sightlines' issue with respect to stadium seating." SER 197. Pennington's use of the phrase "comparable sightlines" is an unmistakable reference to Standard 4.33.3's comparable-lines-of-sight mandate, and illustrates that AMC's top management was aware by mid-1995 that its compliance with the regulation was being called into question.

➤ In November 1996, AMC's director of design and construction for theaters in the company's southern region sent a memorandum to high-level AMC officials warning them that (1) "[w]e do not offer 'comparable lines of site [*sic*]'" for wheelchair users in stadium-style theaters; (2) "[a]ll Florida projects need some accessible seating in the stadium area"; (3) "[t]he accessible seating that we currently offer in stadium houses is an insult to the disabled"; and (4) "AMC may be very vulnerable to lawsuits at the stadium houses we have in Florida." SER 208-209.

➤ In November 1996, the Florida Accessibility Advisory Council told AMC that the wheelchair areas in its stadium-style theaters were "terrible" and that the views offered from those locations were "certainly not 'comparable lines of sight' as required by law." SER 208.

➤ Also in November 1996, the Florida Board of Building Codes and Standards told AMC that "what [it] call[ed] accessible seating" in its stadium-style theaters "was 'a joke . . . ridiculous . . . unacceptable . . . .'" SER 208.

➤ Between May 1995 and mid-1998, AMC received numerous written complaints from customers describing the terrible viewing experience, including physical discomfort, that wheelchair users had to endure in AMC's theaters because the wheelchair seating was too close to the screen. See pp. 16-18, *supra*.

2. The Plain Language Of Standard 4.33.3 Provided Fair Notice To AMC

AMC repeatedly characterizes the district court's remedial order as a "retroactive" application of the Department's interpretation of Standard 4.33.3. Br. 32; accord Br. 25-26, 28, 43. In fact, there are no retroactivity concerns here because the Department's interpretation merely reflects what the language of Standard 4.33.3 has required since its promulgation in 1991, four years before AMC opened its first stadium-style theater.

This Court has recognized that the plain language of the regulation supports the Department's interpretation. In upholding the Department's reading of the regulation, this Court relied on the "*plain meaning* of the regulation both in general and as understood in the movie theater industry." *Regal Cinemas*, 339 F.3d at 1132 (emphasis added). The Sixth Circuit likewise concluded that the "DOJ

interpretation is consistent with the *plain meaning* of the regulation." *Cinemark*, 348 F.3d at 579 (emphasis added); accord *id.* at 575, 578.

Especially when read in light of the movie theater industry's understanding of "lines of sight" (pp. 9-12, *supra*), the plain language of the regulation provided fair notice to AMC that it could not permissibly relegate all wheelchair users to areas with inferior viewing angles. Contrary to AMC's contention (Br. 37-38), it is appropriate to rely on an industry's understanding of terminology used in a regulation in assessing whether that regulation provides adequate notice. See *United States* v. *Elias*, 269 F.3d 1003, 1014-1015 (9th Cir. 2001), cert. denied, 537 U.S. 812 (2002); *United States* v. *Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993), cert. denied, 513 U.S. 1128 (1995); *Stillwater Min. Co.* v. *Federal Mine Safety & Health Review Comm'n*, 142 F.3d 1179, 1182 (9th Cir. 1998).

Moreover, in assessing whether a regulation's language provides fair notice, courts expect "a reasonably prudent" defendant to take the statute's "objectives into account when determining its responsibilities to comply with a regulation promulgated thereunder." *Rock of Ages Corp.* v. *Secretary of Labor*, 170 F.3d 148, 156 (2d Cir. 1999). In the context of Standard 4.33.3, a reasonable theater operator would be aware of the underlying statutory goal of providing persons with disabilities "equal enjoyment" of the benefits of movie theaters (42 U.S.C.

12182(a)), and thus should have realized that the regulation does not allow theaters to relegate all wheelchair users to locations whose viewing angles are plainly inferior to those available to the vast majority of patrons. In light of AMC's own admissions and the repeated complaints of its customers, it is simply "inconceivable" that AMC could have believed during this period that it was providing wheelchair users "full and equal enjoyment" of its movie theaters. *Regal Cinemas*, 339 F.3d at 1133 (quoting 42 U.S.C. 12182(a)).

3. The Department Of Justice's Failure To Amend Its Regulation Did Not Deprive AMC Of Fair Notice

AMC and its amici complain that the Department of Justice failed to amend its regulation to explicitly discuss viewing angles. See Br. 24-25; NATO Br. 13-14; TAB Br. 13-14. At the outset, the complaints about the Department's failure to amend its regulation after July 1998 (NATO Br. 13-14) are irrelevant to the fair notice argument that AMC raises on appeal.[10] AMC has conceded that it is limiting its fair notice argument to theaters designed before July 1998. Br. 28.

[10] The Department is currently in the process of revising all of its Title III accessibility regulations, including the comparable-lines-of-sight requirement, in response to the Access Board's issuance of revised accessibility guidelines in 2004. See 69 Fed. Reg. 58,768, 58,775-58,777 (2004) (advance notice of proposed rulemaking). The Department anticipates issuing a notice of proposed rulemaking in or about January 2007. See 71 Fed. Reg. 22,862 (2006).

What the Department did or did not do after July 1998 could not have affected AMC's decisions prior to that date.

The Department cannot be faulted for failing to amend its regulation prior to July 1998. The movie theater industry gave every indication prior to 1998 that it understood that "lines of sight" encompassed patrons' viewing angles and that areas of a theater close to the movie screen provided lines of sight that were inferior to those available from the seats located in the middle and rear of the theater. That was NATO's stated position during the early and mid-1990s. SMPTE guidelines issued in 1989 and readopted in 1994 also supported that view. See pp. 9-12, *supra*. Most importantly for purposes of this case, AMC filed a pleading in January 1995 taking the position that "lines of sight" required consideration of spectators' horizontal and vertical viewing angles. SER 321.

4. The Department Of Justice Has Been Consistent In Its Interpretation Of The Comparable-Lines-Of-Sight Mandate

AMC and its amici incorrectly accuse the Department of Justice of advocating inconsistent interpretations of Standard 4.33.3's comparable-lines-of-sight mandate. See Br. 34 n.14; TAB Br. 11; NATO Br. 6-7, 15. As the district court found, "[d]espite AMC's repeated protestations to the contrary, the Government has not advocated conflicting interpretations of § 4.33.3." ER 104. This Court has noted that the position the Department took in its amicus brief in

Lara "continues to be DOJ's interpretation" of the regulation. *Regal Cinemas*, 339 F.3d at 1130 n.5. The First and Sixth Circuits also have rejected claims that the Department has taken inconsistent positions on the meaning of the comparable-lines-of-sight requirement. See *Cinemark*, 348 F.3d at 579 ("Nor is [the Department's interpretation] inconsistent with views advocated by DOJ in earlier cases."); *Hoyts*, 380 F.3d at 567 ("The Department's position on angles has been consistent since *Lara*.").

Contrary to NATO's assertion (NATO Br. 6-7), the First Circuit did not find that the Department had taken inconsistent positions on the meaning of the comparable-lines-of-sight requirement. The portion of the First Circuit opinion cited by NATO addresses the government's interpretation of the distinct requirement in Standard 4.33.3 that wheelchair seating be an "integral" part of the fixed seating plan. See *Hoyts*, 380 F.3d at 568-569. The district court in this case did not rely on the "integral" requirement to find liability or craft a remedy, and the "integral" mandate is not at issue in this appeal.

AMC incorrectly asserts that the Department of Justice "itself originally disclaimed that Standard 4.33.3 imposed a viewing angle requirement when it made an important public presentation to the industry in 1997." Br. 35 (citing ER 87). AMC apparently is referring to a presentation that Joseph Russo, a

Department of Justice trial attorney, made at a meeting in March 1997. As the district court explained, however, AMC has distorted Russo's comments by "quot[ing] selectively from the transcript of the meeting." ER 87 n.15; accord ER 108. Russo emphasized at the meeting that he was not taking a position on behalf of the Department of Justice about wheelchair seating or any other requirement of Standard 4.33.3. ER 87 n.15, 108; see SER 355; SER 38 (¶¶ 8, 10). AMC Vice President Phillip Pennington understood this. He stated in a memorandum written shortly after the March 1997 meeting that "[t]here was a brief presentation by Joseph Russo from the D.O.J. who clearly stated that the D.O.J. would not take a formal position on any aspect of compliance in the context of the workshop." SER 36.

5. The Dispersal Exemption Is Irrelevant Here

AMC claims (Br. 24) that the Access Board "rejected a dispersal requirement in the context of theaters under 300 seats which would have imposed a comparable viewing angle requirement." That assertion is incorrect.

The accessibility guidelines that the Access Board issued in 1991 required that "when the seating capacity [of an auditorium] exceeds 300, wheelchair seating spaces must be provided in more than one location." 56 Fed. Reg. 35,440 (1991).

The Department of Justice incorporated this dispersal requirement into Standard 4.33.3.

Although auditoriums of fewer than 300 seats are exempt from this dispersal obligation, all auditoriums – regardless of size – must comply with 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. Consequently, the decision by the Access Board and the Department of Justice to exempt certain auditoriums from the dispersal requirement in no way suggested to theater operators that they could ignore viewing angles (which are components of lines of sight) in designing their stadium-style theaters.

At any rate, AMC stated in January 1995 that "lines of sight" required consideration of viewing angles, refuting any contention that AMC was confused on this point.

C. AMC Has Waived Its Argument That The Remedial Order Should Have Been Limited To The Ninth Circuit Or Should Have Excluded Theaters In The Fifth Circuit

AMC contends (Br. 26, 55-57) that the district court should have limited its remedial order to theaters within the Ninth Circuit or, at a minimum, should have excluded theaters within the Fifth Circuit. AMC has waived this argument. See pp. 37-38, *supra*.

Although AMC argued at the liability stage that the district court should have granted summary judgment in its favor as to theaters within the Fifth Circuit (ER 104-105), AMC abandoned that argument at the remedial stage of the case when it urged the court to adopt plans requiring retrofitting of the company's Fifth Circuit theaters. Indeed, AMC explicitly told the district court that "AMC's proposal requires modifications in its Fifth Circuit theatres." ER 162; accord ER 312 (noting that its proposal "provides for modifications in its Fifth Circuit theatres"). One of AMC's proposals would have required retrofits at 54 theater complexes outside of the Ninth Circuit, including 10 complexes within the Fifth Circuit. SER 492-496, 504-506; see SER 469-475. Under AMC's alternative proposal, AMC would have been required to retrofit 37 theater complexes outside of the Ninth Circuit, including five in the Fifth Circuit. SER 522-533.

D. The District Court Did Not Abuse Its Discretion In Requiring AMC To Modify Theaters Outside Of The Ninth Circuit

The district court acted well within its discretion in applying the remedial order to AMC theaters outside the Ninth Circuit. "[A] District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction." *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (district court had authority to issue injunction restricting defendant's actions in Mexico); accord *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S.

448, 451-452 (1932) (because district court had jurisdiction over the respondent, the court's decree was binding on that party "throughout the United States"); *United States* v. *Oregon*, 657 F.2d 1009, 1016 n.17 (9th Cir. 1981) ("When a district court has jurisdiction over all parties involved, it may enjoin the commission of acts outside of its district."). This authority includes the power to issue an injunction affecting property in other jurisdictions. *United States* v. *First Nat'l City Bank*, 379 U.S. 378, 384-385 (1965). Consistent with these principles, this Court has rejected arguments that nationwide (and even worldwide) injunctions are geographically overbroad. See *Bresgal* v. *Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987) (refusing to limit injunction to Ninth Circuit); *Lamb-Weston*, 941 F.2d at 973-974 (upholding worldwide injunction based on violation of Oregon law).

E. The District Court Did Not Abuse Its Discretion In Requiring AMC To Modify Some Of Its Theaters Within The Fifth Circuit

If this Court determines that AMC did not waive the issue, it should reject AMC's argument that the district court erred in requiring modifications of some of the company's theaters within the Fifth Circuit.

1. The briefs of AMC and one of the amici create the misleading impression that the United States lost in the Fifth Circuit and then went forum shopping to find

a sympathetic court that would attack the Fifth Circuit's *Lara* decision indirectly. See Br. 21, 50; TAB Br. 11-12. That is not what happened.

The United States, which was not a party in *Lara*, filed suit against AMC in the Central District of California on January 29, 1999 (ER 1), more than a year before the Fifth Circuit issued its decision in *Lara* on April 6, 2000, and more than a month before the *Lara* appeal was docketed in the Fifth Circuit. See docket sheet for No. 99-50204 (5th Cir.) (available on PACER). The district court thus obtained jurisdiction over AMC and equitable authority over its theaters nationwide *before* the Fifth Circuit had jurisdiction over the *Lara* appeal. When the United States filed its complaint in this case in January 1999, the only court that had addressed the comparable-lines-of-sight issue in the context of stadium-style theaters was the district court's decision in *Lara*, which adopted a position consistent with the Department of Justice's interpretation of Standard 4.33.3. See *Lara* v. *Cinemark USA, Inc.*, 1998 WL 1048497 (W.D. Tex. Aug. 21, 1998), rev'd, 207 F.3d 783 (5th Cir. 2000).

California was a logical and appropriate choice of forums for the United States' nationwide suit against AMC. The Department of Justice's investigation of AMC was prompted by complaints about stadium-style theaters in Woodland Hills

and Norwalk, California (SER 356-358), and California is the state with the largest number of AMC stadium-style theater complexes. Br. 4 n.1.

2. Contrary to AMC's contentions (Br. 44-45, 55-57), the remedial order does not violate principles of comity. AMC's comity argument cannot be squared with this Court's decision in *Las Palmas Food Co.* v. *Ramirez & Feraud Chili Co.*, 245 F.2d 874 (9th Cir. 1957) (per curiam), cert. denied, 355 U.S. 927 (1958). In *Las Palmas*, this Court adopted, as its own, the opinion of the district court in *Ramirez & Feraud Chili Co.* v. *Las Palmas Food Co.*, 146 F. Supp. 594 (S.D. Cal. 1956).[11] That court held that it had jurisdiction to issue an injunction prohibiting a defendant from engaging in certain conduct in Mexico, even though that conduct was lawful under Mexican law. *Id.* at 602, 604, 606-607. The court reasoned that the injunction would not violate principles of comity because Mexican law permitted, but did not require, the defendant to engage in the conduct that would be barred under the injunction. *Id.* at 602. Under those circumstances, no risk existed that the injunction would offend the sovereignty of Mexico. *Ibid.* Principles of comity are even less of a barrier to the injunction in the present case, which

[11] A per curiam opinion of this Court adopting the opinion of a district court is binding precedent in this Circuit. See *In re Gardenhire*, 209 F.3d 1145, 1148 (9th Cir. 2000) (referring to *In re Tomlan*, 907 F.2d 114 (9th Cir. 1990) (per curiam), which adopted a lower court opinion as its own, as Circuit "precedent").

involves the relationship between two federal courts that are part of the same sovereign.

As in *Las Palmas*, the injunction in the present case would not require AMC to violate the law of another jurisdiction. Although *Lara* does not mandate all of the modifications required by the district court's injunction, Fifth Circuit law does not prohibit AMC from making those changes to its theaters. ER 105. Under these circumstances, nothing prevented the district court from issuing an injunction that regulates AMC's conduct within the Fifth Circuit. See *First Nat'l City Bank*, 379 U.S. at 384 (noting, in upholding worldwide injunction affecting property in other jurisdictions, that there was no evidence that the injunction would require defendant to violate foreign law); see also *Colby* v. *J.C. Penney Co., Inc.*, 811 F.2d 1119, 1124 (7th Cir. 1987).

Contrary to the argument of the Texas Association of Business (TAB) (see TAB Br. 12), the district court's remedial order does not conflict with *Railway Labor Executives' Ass'n* v. *ICC*, 784 F.2d 959 (9th Cir. 1986). In that case, the Court held that one circuit's approval of an agency's interpretation of a statute does not immunize that interpretation from challenge in other circuits. *Id.* at 964. The Court did not suggest, much less decide, that any geographical limitation exists on

the scope of an injunction that a federal court may issue against a party over which it has jurisdiction.

Moreover, the district court's remedial order does not interfere with pending litigation in another court. "There is a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Sys., Inc.* v. *Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982). But these comity considerations do not exist here. There is not (and was not) any pending litigation against AMC involving the comparable-lines-of-sight issues in the Fifth Circuit. The present case is thus distinguishable from *American Fed'n of Gov't Employees* v. *Weinberger*, 651 F. Supp. 726 (S.D. Ga. 1986) (see Br. 55-56), where the court invoked comity principles to limit the scope of the injunction because judicial proceedings were *pending* in another circuit against the *same defendant* challenging the same program. See 651 F. Supp. 730-731, 739.

Nor does *Virginia Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379 (4th Cir. 2001) (see Br. 56), support AMC's comity argument. To the contrary, the Fourth Circuit's decision supports the nationwide injunction in this case. In *Virginia Soc'y for Human Life*, the district court enjoined the Federal Election Commission (FEC) from enforcing one of its regulations against anyone in the United States.

263 F.3d at 381. The Fourth Circuit found the injunction overbroad, not because it applied throughout the United States but because it enjoined enforcement of the regulation against non-parties to the litigation. *Id.* at 381. Indeed, the Fourth Circuit directed the district judge to enter a modified injunction that would prohibit the FEC from enforcing its regulation against the plaintiff "anywhere in the country," *id.* at 394, explaining that "[n]ationwide injunctions are appropriate if necessary to afford relief to the prevailing party." *Id.* at 393.

3. TAB argues (TAB Br. 5-6, 14) that the district court's remedial order upsets the legitimate expectations of Texas businesses by precluding them from relying on Fifth Circuit precedent in constructing theaters within that circuit. TAB's reliance argument has no relevance to *this* case.

Of the 14 AMC theater complexes within the Fifth Circuit that are the subject of this litigation, 11 opened for business before April 6, 2000, the date the Fifth Circuit issued its *Lara* decision. See ER 337-338, 348, 355-356, 359, 362. Prior to April 2000, the only court decision interpreting Standard 4.33.3 in the context of stadium-style theaters was the *Lara* district court opinion, which was consistent with the Department's interpretation.

Among the three other AMC complexes within the Fifth Circuit, two require no retrofitting so long as all wheelchair seats provide unobstructed views of the

movie screen. See ER 362; SER 440; SER 429, 432F (¶ 58). Because the Fifth Circuit also requires that wheelchair users have unobstructed views, *Lara*, 207 F.3d at 789, the district court's remedial order does not require any retrofitting at those two complexes that would exceed the requirements of Fifth Circuit law.

Of AMC's Fifth Circuit complexes that opened for business after the Fifth Circuit issued its *Lara* decision, only one – the Stonebriar 24 – requires any modifications beyond ensuring that wheelchair users have unobstructed views.[12] See ER 359; SER 439. But even for this one complex, AMC could not *justifiably* have relied on *Lara* because the United States filed its complaint against AMC in January 1999, more than a year before the Fifth Circuit decided *Lara*. Because the United States' complaint made clear that it covered AMC's stadium-style theaters nationwide, AMC knew that it was taking a risk by continuing to construct theaters using a design that the government contended was unlawful under Standard 4.33.3.

This Court need not decide whether other companies that built theaters in the Fifth Circuit at different times and under different conditions might have a legitimate reliance defense. It is clear that AMC does not.

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[12] Because this theater opened for business only four months after *Lara* was decided (see ER 359), it seems likely that AMC designed the facility before the Fifth Circuit issued its opinion.

4. Nor does the remedial order's coverage of Fifth Circuit theaters violate equal protection principles. See Br. 51-55. To establish an equal protection claim in this context, AMC must prove that it "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000). "Evidence of different treatment of unlike groups does not support an equal protection claim." *Thornton* v. *City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005). Moreover, to prevail on an equal protection claim, a party "must prove that the decisionmakers in *his* case" intentionally discriminated. *McCleskey* v. *Kemp*, 481 U.S. 279, 292 (1987).

AMC's equal protection claim fails because the decisionmaker in AMC's case – the district judge – did not engage in any differential treatment of theater companies, for the simple reason that AMC was the only theater company before the district court. The judge who entered the decree in this case was not the decisionmaker in other cases involving other theater companies. AMC points to no authority (and we have found none) that would allow a defendant to pursue an equal protection claim on the ground that a remedial decree entered by one district court was allegedly more onerous than a decree entered by a different district court against a different defendant.

AMC's "class of one" claim (see Br. 52-53) also fails for two additional reasons. First, the claim rests on the incorrect assumption that AMC is the only theater company that will be required to retrofit stadium-style theaters within the Fifth Circuit. In fact, Regal Cinemas, a nationwide theater chain that is one of AMC's primary competitors (see SER 456), is required under a consent order to retrofit a number of its theaters within the Fifth Circuit. See ER 216-218, 276, 280-281.

Second, AMC's attempt to compare itself with Cinemark (Br. 14 n.8, 53) is flawed because those two companies are not "similarly situated" (*Olech*, 528 U.S. at 564) with regard to their theaters in the Fifth Circuit. Cinemark was the defendant in the *Lara* case in the Fifth Circuit and thus had already litigated and won a victory as to some of its stadium-style theaters in that circuit. Strong equitable considerations thus justified the United States' decision in its suit against Cinemark not to seek a remedy that would deprive Cinemark of the benefits of the legal victory it had already achieved in the Fifth Circuit. Because AMC was not a party in *Lara*, it does not stand on the same footing as Cinemark with regard to its theaters within the Fifth Circuit.[13]

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[13] AMC also contends (Br. 53-54) that the remedial order's coverage of Fifth Circuit theaters deprives AMC of due process. The only authority AMC cites for

(continued...)

5. Finally, AMC contends (Br. 45-51) that the remedial order "violates the geographically-defined structure of Article III courts" and constitutes "intracircuit nonacquiescence." AMC is wrong on both counts.

The remedial order does not interfere with the Fifth Circuit's authority to establish binding precedent for all federal district courts in Texas, Louisiana, and Mississippi. If a plaintiff were to sue a theater company in a federal district court in one of those states, the Fifth Circuit's *Lara* decision would control the outcome of the litigation.

Nor does the remedial decree involve intra-circuit non-acquiescence. Such non-acquiescence occurs when an agency refuses to follow circuit precedent "in cases originating within [that] circuit." *NLRB* v. *Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987). This case originated in the Central District of California, and thus the district court was bound by this Court's decision in *Regal Cinemas*, not by the contrary decision of the Fifth Circuit in *Lara*. See *Zuniga* v. *United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987) ("District courts are, of course, bound by the law of their own circuit.").

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[13](...continued)
its argument is *Georgia Dep't of Med. Assistance* v. *Bowen*, 846 F.2d 708 (11th Cir. 1998). That decision provides no support for AMC because it does not involve a due process claim and does not even mention the term "due process."

F. AMC Has Waived Its Argument That The Department Of Justice's Certification Of The Florida And Texas Accessibility Codes Precluded The District Court From Ordering Relief For Theaters In Those States

AMC argues (Br. 57-59) that the district court erred in requiring modifications of theaters in Florida and Texas, in light of the Department of Justice's certification of the Florida and Texas accessibility codes as meeting the requirements of the ADA. AMC has waived this argument.

AMC urged the district court to adopt a remedial plan that would have required modifications to theaters in both Florida and Texas, including theaters approved by state and local officials in those states. See SER 469-470, 492-497, 504-506, 522-533; compare RJN 001-081. Moreover, AMC never raised the code certification issue in proposing its own remedy regarding line-of-sight issues (see ER 142-164) or in opposing the United States' proposed remedy (see ER 301-314). Rather, AMC raised the code certification issue only as to non-line-of-sight issues (see ER 114-120, 123-129), which were ultimately settled by entry of a consent decree (SER 383-399) and are not at issue in this appeal. Having urged the court to adopt a plan that would have required modifications at Florida and Texas theaters, AMC cannot permissibly argue on appeal that inclusion of Florida and Texas theaters in the remedial order was inappropriate. See pp. 37-38, *supra*.

G. The District Court Did Not Abuse Its Discretion In Ordering Relief For AMC Theaters In Florida And Texas, Even Though The Department Of

Justice Has Certified The Florida And Texas Accessibility Codes As Meeting ADA Requirements

Title III of the ADA authorizes the Attorney General to certify that a state or local accessibility code "meets or exceeds" the minimum accessibility standards of the ADA. 42 U.S.C. 12188(b)(1)(A)(ii). In an enforcement proceeding under Title III, "such certification by the Attorney General shall be rebuttable evidence that such State law or local ordinance does meet or exceed the minimum requirements" of the ADA. *Ibid*.

The Department of Justice has certified both the Florida and Texas accessibility codes as meeting or exceeding the minimum accessibility requirements of Title III. See Br. 9-10 & n.6. Both states' codes contain comparable-lines-of-sight provisions whose language is virtually identical to that of Standard 4.33.3. See Florida Accessibility Code for Building Construction at 67, § 4.33.3 (Oct. 1997); Texas Accessibility Standards at 65, § 4.33.3 (April 1994).[14]

AMC'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, the Department is speaking only to the

[14] Relevant excerpts of these codes are in the addendum to this brief.

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). The certification says nothing, and guarantees nothing, about how state or local officials will apply that code. 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) (emphasis added), reprinted at 28 C.F.R. pt. 36, App. B, subpt. F at 741 (2006). The Department reiterated this point in its Technical Assistance Manual published in 1993. *Title III Technical Assistance Manual* § III-9.7000 at 76 (Nov. 1993) (SER 31). These Department publications provided adequate notice that state or local inspectors' approval of a particular theater would not signify that the facility complied with the ADA.

AMC had actual notice that the approval of its theater designs by state or local officials in Texas and Florida did not indicate that the theaters complied with the ADA. Several of the local approvals cited by AMC for its Texas theaters explicitly state that "[t]his determination does not address applicability of the Americans with Disabilities Act." RJN 6, 11, 16, 34, 39. Those documents also stated that "THIS REVIEW IN NO WAY WARRANTS COMPLETE COMPLIANCE TO [*sic*] THE TEXAS ACCESSIBILITY STANDARDS." RJN 6, 11, 16, 34, 39.

As for its Florida theaters, all of the approvals cited by AMC are *waivers* of state accessibility requirements. See RJN 45-81. As previously explained, the Department has explicitly advised the public that, even in states with certified codes, waivers of accessibility requirements "will not stand as evidence that the facility has been constructed or altered in accordance with the minimum accessibility requirements of the ADA." 56 Fed. Reg. at 35,592. Moreover, most of the Florida waivers cited by AMC state that "[n]othing in this Final Order shall be construed to relieve the Owner of any duties it may have under the Americans With Disabilities Act of 1990 * * * or the regulations under the Act." RJN 47, 52, 56-57, 61, 69, 73, 77. In addition, AMC Vice President Phillip Pennington sent a letter to other AMC officials in March 1997 advising them that a Department of

Justice attorney had explained that "the existence of a Florida Accessibility waiver would have no bearing on future action by the D.O.J. with respect to ADA compliance." SER 36.

AMC also neglects to mention that with regard to three of the theater complexes in Florida for which AMC obtained waivers – Indian River, West Oaks, and Pleasure Island (RJN 59-62, 71-78) – the Florida Accessibility Advisory Council had informed AMC that the wheelchair seating areas in those theaters were "terrible" and did not provide "'comparable lines of sight' as required by law." SER 208. AMC also fails to acknowledge that the Florida Board of Building Codes and Standards granted the waivers for those three complexes only after criticizing the wheelchair seating as "a joke," "ridiculous," and "unacceptable," and warning AMC not to seek similar waivers in the future unless the company had made an attempt to place wheelchair seating in the stadium sections of the auditoriums. SER 208.[15]

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[15] At any rate, several of the state or local approvals cited by AMC involve theaters that opened before the Department of Justice certified the relevant state accessibility code. AMC obviously did not rely on the Department's certification of the state codes in designing or constructing those theaters. See RJN 1-5, 11 (Texas theaters – the Grand and Deerbrook – which opened in 1995 and May 1996, respectively); RJN 59-62, 71-81 (Florida theaters – Indian River, West Oaks, Pleasure Island, and Lake Squares – which opened in either 1995 or 1997); see ER 337-338, 348, 356 (opening dates of theaters). The Department certified the Texas code in September 1996 (Br. 9) and the Florida code in May 1998

(continued...)

CONCLUSION

This Court should affirm the district court's judgment.

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[15](...continued)
(http://www.usdoj.gov/opa/pr/1998/May/237cr.htm.html).

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I certify that I am not aware of any related cases pending in this Court.

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September 8, 2006

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 12 and contains 13,741 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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