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

BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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JURISDICTION

Defendants' jurisdictional statements are accurate, but they fail to note that the United States filed a timely notice of cross-appeal on May 30, 2003 (A30, 6192).

ISSUES PRESENTED

1. Whether the district court erred in granting summary judgment for the United States on the proper interpretation of Standard 4.33.3, a Department of

Justice regulation requiring that wheelchair spaces in newly constructed assembly areas "be an integral part of any fixed seating plan" and provide "lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A, § 4.33.3.

2. Whether the district court erred in denying summary judgment to defendants on the United States' claims under Standard 4.33.3.

3. Whether the district court, which found the Department of Justice's interpretation of Standard 4.33.3 "eminently reasonable," erred in holding that the Due Process Clause prohibited application of that regulation to any of defendants' stadium-style movie theaters, unless they were constructed or refurbished after the United States filed its complaint. (*Cross-Appeal*)

4. Whether the district court erred in entering a declaratory judgment requiring defendants to provide wheelchair seating within the "stadium section" of any stadium-style theater constructed or refurbished on or after December 18, 2000.

STATEMENT OF THE CASE

This case focuses on the location of wheelchair spaces in stadium-style movie theaters. Unlike traditional movie theaters, where seats are located on a sloped floor, some or all of the seating in stadium-style theaters is in a "stadium"

section on a series of elevated tiers or risers (A4773). Some stadium-style theaters, including many of defendants' auditoriums, also contain a small traditional-style area in which seats are on a flat or sloped floor close to the movie screen, lower in elevation than the stadium section (Op. 10-12).[1] In many of these 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 (*ibid.*).

On December 18, 2000, the United States filed suit against Hoyts Cinemas Corporation ("Hoyts") and National Amusements, Inc. ("National"), alleging that they had engaged in disability-based discrimination in violation of Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181-12189, and its implementing regulations, including a Department of Justice regulation known as "Standard 4.33.3" (A32-51). The complaints alleged that some of Hoyts' and National's stadium-style theaters violated Standard 4.33.3 because their wheelchair spaces failed to provide "lines of sight comparable to those for

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[1] "Op. __" refers to the page number of the district court's opinion, which is included in the addendum to this brief. "National Br." and "Hoyts Br." refer to the defendants' opening briefs; "NATO Br." is the *amicus* brief that the National Association of Theater Owners filed in this Court. "Doc. __" indicates the document number on the district court docket sheet (reprinted at A6-31).

members of the general public" and were not "an integral part of [the] fixed seating plan." 28 C.F.R. Pt. 36, App. A, § 4.33.3.

Hoyts and National moved for summary judgment, arguing that wheelchair spaces satisfy Standard 4.33.3 so long as they provide unobstructed views of the movie screen and are located "among" some general public seating, no matter where that seating is positioned in the auditorium (Op. 22). The district court denied defendants' motions for summary judgment and *sua sponte* granted summary judgment for the United States on the proper interpretation of Standard 4.33.3 (Op. 32-34, 41-42). The court held that wheelchair seating must be offered in the "stadium section" of defendants' stadium-style theaters in order to comply with the comparable-lines-of-sight and "integral" requirements of Standard 4.33.3 (Op. 41-42).

First, the court upheld as "eminently reasonable" the Department's interpretation of the comparable-lines-of-sight provision to require a comparison of the quality of spectators' viewing angles, including the impact that such angles have on physical discomfort and image distortion (Op. 32-34). The court concluded that the Department had consistently maintained this interpretation and that it was entitled to deference (Op. 39-40). Conversely, the court found defendants' interpretation of the lines-of-sight language "indefensible" because it

conflicted with the statutory goals that Standard 4.33.3 was designed to implement (Op. 40-41). The court noted that the movie theater industry had acknowledged that viewing angles are components of lines of sight and that seats near the front of an auditorium offer the worst viewing angles (Op. 34).

With regard to the "integral" prong of the regulation, the court stated that "[c]ommon sense dictates" that "seating located in a totally separate, and ofttimes sectioned-off, area in the front of the theater cannot be an 'integral' part of that theater[']s 'fixed seating plan'" (Op. 38-39). Although the United States offered statistical data about customers' seating preferences in defendants' theaters, the court declined to consider this evidence. Instead, the court took judicial notice of the "obvious and incontestible fact" that, due to the superiority of stadium seating, "patrons entering a stadium-style theater will choose the seats in the stadium section and will only go to the traditional seats in the front of the theater when this is made necessary because the stadium section is full" (Op. 18). In the court's view, customers' preference for the stadium section would be obvious because, "as anyone who has ever been to the movies knows, patrons typically tend to avoid the front rows of a theater until all the middle and back rows are filled" (*ibid.*).

Nonetheless, the court held that it would apply its interpretation of Standard 4.33.3 only "prospectively" to those stadium-style theaters that defendants

constructed or "refurbish[ed]" on or after the date the United States filed its complaint (Op. 42-47). The court premised this holding on due process grounds, concluding that defendants did not have "fair warning" of what Standard 4.33.3 required (Op. 42-43). In reaching that conclusion, the district court placed particular emphasis on three factors: (1) most of defendants' theaters were built or under construction before July 1998, when the government articulated its interpretation of Standard 4.33.3 in an *amicus* brief; (2) the Fifth Circuit later rejected the position that the government advanced in that *amicus* brief; and (3) the Department of Justice failed to promulgate a new regulation to incorporate the interpretation of Standard 4.33.3 that it advocated in its 1998 *amicus* brief (Op. 43-46).

The court entered a judgment declaring that Standard 4.33.3 "requires that wheelchair-accessible seating must be located within the stadium section" of any of defendants' stadium-style theaters "wherein construction or refurbishment (that is, any change that requires a building permit under local law) occurs on or after the date upon which this lawsuit commenced" (Op. 47). The court did not define "stadium section" but suggested that seats would not be considered part of that section if they were on risers of less than 11 or 12 inches in height (Op. 11 & n.4).

STATEMENT OF FACTS

A. Department of Justice's Regulation

Title III of the ADA requires that public accommodations and commercial facilities 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.

B. 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 on theater design had recognized that vertical and horizontal viewing angles affect the quality of lines of sight (A3019-3023, 3067-3068, 3071-3073, 4771). A 1964 treatise – *Theatres and Auditoriums* – stated that the "[m]aximum tolerable upward sight line angle for motion pictures" is 30º from the horizontal position to the top of the screen, and warned against designs that "produc[e] upward sight lines in the first two or three rows which are uncomfortable and unnatural for viewing stage setting and action" (A3077).[2] *Theater Design*, a treatise published in 1977, explained that "[a] good sight line is one in which there are no impediments to vision and angular displacement (vertical and horizontal) of the eyes and head falls within the criteria for comfort" (A3067). In 1988, the American Institute of Architects published *Architectural Graphic Standards*, which stated that the maximum recommended vertical angle

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[2] The terms "line of sight" and "sight line" are used interchangeably among theater designers (A4407).

for a "sightline from the first row to the top of the screen" in a movie theater is 30º to 35º (A3107). Defendants' experts and architects stated that these treatises are well-known and frequently consulted by theater designers (A2286-2287, 3450, 3479, 4006-4007).

C. Movie Theater Industry's Understanding of "Lines of Sight"

The movie theater industry shared this understanding of "lines of sight" when the regulation was promulgated in 1991 and when construction of the first stadium-style theaters began in the mid-1990s.

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.

(A3556). 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" (A3555). SMPTE readopted

those guidelines in 1994 (A3096-3104), one year before construction began on the first stadium-style theaters (Op. 10).

2. National Association of Theater Owners

The National Association of Theater Owners (NATO) is the principal trade organization for movie theater operators (A3234). Hoyts and National are NATO members (A3221, 3225).

Between 1991 (when the Department promulgated its regulation) and 1997 (after the first stadium-style theaters were built in this country), NATO issued a number of statements, including a formal position paper, on Standard 4.33.3's requirements for wheelchair seating. In those public statements, NATO took the position that:

- "Lines of sight are most commonly measured in degrees"(A3317 n.8; accord A3286), and that "if one was discussing sight lines, one would reference angle" (A3328);
- "Seating in the rear of the auditorium affords the smallest viewing angle and thus is the best for a patron with limited flexibility" (A3266);
- "The seats in the rear portion of the auditorium have the best sight lines to the screen and are the first taken" (A3307; accord A3253, 3277, 3280, 3293, 3304, 3306, 3329);

- "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" (A3307), 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" (A3280); and
- "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" (A3284; accord A3306, 3331). "[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" (A3338; accord A3293, 3340-3341).

NATO submitted some of these comments directly to the Department of Justice and the Access Board in the early 1990s (A3266; A3234, 3253).

NATO later changed its position on the meaning of "lines of sight." 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 (A490). That

revised position is the one NATO is advocating as an *amicus* in this Court (NATO Br. 4, 13-14).

D. Defendants' Understanding of "Lines of Sight"

1. Hoyts

In March 1991, in response to a complaint about wheelchair seating in one of its theaters, Hoyts filed a letter with the Maine Human Rights Commission asserting that the "[i]ndustry standards regarding sightlines are best described" in the 1989 SMPTE guidelines (A3545) (discussed at pp. 9-10, *supra*). Hoyts attached a copy of the guidelines to its letter (A3545, 3554-3560), and quoted them for the proposition that "physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35 degrees" (A3546). The letter was signed by Raymond J. Gaudet, then Hoyts' director of construction, and Harold L. Blank, a Hoyts vice president (A3548), both of whom were involved in the design or construction of some of the stadium-style theaters at issue in this litigation (A2092, 2138, 3684, 4531-4532, 4535, 4564-4565, 4570-4571, 4610).

Also in 1991, Thomas Bakalars Architects prepared a design manual for Hoyts, which explained that "[s]eating areas should be designed to minimize viewing distortions and discomfort due to exaggerated viewing angles or incorrect

viewing distances from the screen" (A3575). Thomas Bakalars Architects designed some of the theaters at issue in this case (A324).

In 1997, another architectural firm – Arrowstreet – prepared a design manual for Hoyts, which contained a section titled "Lines of Sight," whose first sentence states: "Comfortable viewing angles are essential for good presentation and patron comfort" (A2967). Arrowstreet designed 13 Hoyts complexes at issue in this case (A323-325). During the design process, Arrowstreet performed "sight line studies" to determine the steepness of viewing angles from different locations in the theaters (A4544-4545). An Arrowstreet official testified that one of the "objective factors" determining whether one seat is better or worse than another is whether you "have to crane your neck too much" (A3999-4000). Hoyts' former director of design similarly explained that Hoyts' architects measured vertical angles in an effort to ensure that seats were not "too close to the screen" where patrons would "strain their necks" (A4545).

2. National

National and its architects also were familiar with the SMPTE guidelines and the impact that viewing angles had on the quality of lines of sight. In 1998, National commented on architectural drawings that NATO had circulated to some

of its members (A3365-3375). In its comments, National stated that front-row wheelchair locations were "unacceptable" and noted that, under the SMPTE guidelines, the vertical viewing angle should not exceed 35º to the top of the movie screen (A3370, 3371, 3373). One drawing indicated that a proposed wheelchair space would have a vertical viewing angle of 48º. National advised NATO that this was an "unacceptable angle for comfort level. Must be less than 35º" (A3373).

In February 1997, a design firm – TK Architects – provided National with diagrams labeled "sightlines" showing vertical viewing angles to the top of the movie screen in proposed stadium-style theaters (A3348, 3351, 3354, 3356, 3360). A number of the diagrams also cited the SMPTE guidelines (A3347, 3349, 3352-3353, 3355, 3357-3359). TK Architects designed several of the National theaters at issue in this case (A6098, 6106-6107, 6111-6113).

In 1998 and 1999, Beacon Architectural Associates ("Beacon") prepared "siteline" [*sic*] analyses for some of National's proposed stadium-style theaters, which included diagrams showing vertical viewing angles from the wheelchair spaces to the top of the movie screen, as well as "sightline angle" tables comparing the vertical angles from wheelchair spaces and general public seating (A3364, 3377, 3428-3436, 4475). Robert Stansell, one of Beacon's architects,

explained that when he designed National's theaters, he referred to the SMPTE guidelines on viewing angles (A4408-4409, 4423-4424, 4427-4428). He also testified that he measured the vertical viewing angle for each row in the auditorium, and that his goal was to keep the vertical angles below 35º in order to comply with the SMPTE guidelines (A4423-4424). Stansell designed several of the National complexes at issue in this case (A6101-6105, 6108-6109).

E. Defendants' Stadium-Style Movie Theaters

1. Seating layouts and viewing angles

A substantial number of defendants' auditoriums situate the wheelchair areas in locations that afford lines of sight that are inferior to those provided most other members of the general public. For example, in 157 of defendants' auditoriums, some or all of the required wheelchair spaces are in locations with vertical viewing angles ranging from 36º to 55º,[3] even though a majority – usually a large majority – of the general public seats in those theaters have more

[3] The vertical viewing angles for the general public seating can be determined by the position of those seats in relation to the orange lines on the floor plans for the auditoriums. The government's expert report shows two floor plans for each auditorium (*e.g.*, A5287). The one at the top of the page in the report shows the vertical viewing angles from various locations in the theater. That floor plan contains two orange lines, representing 30º and 35º vertical viewing angles. Seats to the left of both orange lines have vertical viewing angles less than 30º, while seats to the right of both orange lines have vertical angles greater than 35º.

comfortable vertical viewing angles.[4] Those auditoriums are listed in Schedule A[5] in the addendum to this brief.[6]

Although the layouts of defendants' theaters vary, three auditoriums illustrate the viewing angle disparities between wheelchair locations and general public seating in many of Hoyts' and National's stadium-style theaters:

(a) East Farmingdale, New York

The first example is Auditorium 1 at National's theater complex in East Farmingdale, whose floor plan is reproduced at A5287 and in Schedule D in the addendum to this brief. All of the wheelchair seats in this auditorium are on a flat floor in the third row with vertical viewing angles of 48º, which National itself described as an "unacceptable angle for comfort level" (A3373). A wide cross-

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[4] Vertical viewing angles in excess of 35º are considered unacceptable under well-established industry standards and design guidelines. See pp. 8-10, *supra*.

[5] This list includes some auditoriums that Hoyts asserts it no longer owns (Hoyts Br. 3 n.2). However, the record contains nothing that confirms the accuracy of Hoyts' assertion. We therefore base our list on those theaters owned by defendants at the time of the summary judgment motions. On remand, the district court can explore whether ownership of any of the theaters has changed and, if so, whether additional companies should be joined as parties.

[6] This list, which focuses on viewing angles, is relevant only to the comparable-lines-of-sight prong of the regulation. It does not purport to address the integral seating requirement, which is an independent obligation imposed by Standard 4.33.3.

aisle separates the wheelchair spaces from the stadium section (A5287), which contains 74% of the general public seating in the auditorium (A5292). The seats in the stadium section have vertical viewing angles ranging from 6º to less than 30º (A5287).

(b) <u>Bellingham, Massachusetts</u>

Another example is Auditorium 8 at Hoyts' Bellingham complex. The floor plan for this theater is reproduced at A5445 and at Schedule E in the addendum to this brief. Photographs of this auditorium appear at A5444 and A5446. In this theater, the wheelchair locations are separated from the stadium section by a wide cross-aisle. All of the wheelchair spaces are on a flat floor in the second row and have vertical viewing angles of 42º (A5445). Approximately 75% of the general public seats in the auditorium are on elevated risers and have vertical viewing angles ranging from 7º to less than 30º (A5445, 5464).

(c) <u>Westborough, Massachusetts</u>

The final example is Auditorium 5 at Hoyts' Westborough complex (A5524). Photographs of this auditorium are at A5523 and A6060-6061. All the wheelchair spaces are on a flat floor and are separated from the stadium section by

a wall 54 inches high (A5524, 5539).[7] The vertical viewing angle from the wheelchair spaces is 41º (A5524), whereas the seats in the stadium section have vertical angles ranging from 3º to less than 30º (A5524). More than 75% of the general public seating is in the stadium section (A5524, 5539).

2. Customer complaints

Hoyts and National have marketed stadium-style seating as "one of the greatest advances in moviegoing in years," which "optimizes sight lines to the screen," and ensures "that everyone has the best seat in the house" (A3381, 3385, 3625). Hoyts has told customers that with stadium-style seating, "[g]one are the days of craning your neck to see the screen" (A3625).

But that is not the reality for wheelchair users who attend many of defendants' theaters. Suzanne Deck, who uses a wheelchair, described her experience in watching a movie from the traditional-style area of a National stadium-style theater:

> It's the most horrible movie experience I've had. You're just so close to the front of the screen. The screen is so large and so big that the image is all blurred and fuzzy and grainy, and you have to constantly move your head from side to side to get the whole screen or view in. It's just the most horrible experience I've had. Your neck is craned back. And I just refuse to go.

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[7] The height of the wall is noted in the chart at A5539 in the column labeled "Riser Hts" under the subheading "Platform."

(A3942-3943). Since 1997, defendants have received similar complaints from other customers (A3387-3397, 3401, 3646-3668, 3675-3678).

3. Seat-selection surveys

In some of defendants' theaters, excluding wheelchair users from the stadium section effectively isolates them from most audience members, even when the traditional-style area of the auditorium contains a few rows of general public seating. This effect is illustrated by seating surveys conducted at Hoyts' theaters in Westborough, Massachusetts. The surveys showed, for example, that of 330 patrons who attended movies at Westborough auditoriums 5 and 8 on the survey dates, only *one* individual sat in the traditional-style section and *no one* sat in the first three rows of the auditorium in front of the wheelchair row (A4704).[8] In other words, 99.7% of customers sat in the elevated stadium section. Similarly, in Westborough auditoriums 6 and 7, where most of the wheelchair spaces have vertical viewing angles of 44º (A5526, 5528), 522 patrons attended movies on the survey dates but only 4 (or 0.8%) sat in the traditional-style area (A4701). The

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[8] The layout of Auditorium 5 is described at pp. 17-18, *supra*. Auditorium 8 has a similar layout (A5530).

other 99.2% sat in the stadium section, where vertical viewing angles were far more comfortable, ranging from 6º to less than 30º (A5526, 5528).[9]

SUMMARY OF ARGUMENT

This appeal focuses on Standard 4.33.3, a Department of Justice regulation requiring that, in new construction, wheelchair areas in public assembly areas (including movie theaters) be "an integral part of any fixed seating plan" and 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 United States alleges that several of defendants' stadium-style movie theaters violate this regulation.

Defendants moved for summary judgment, arguing that wheelchair spaces necessarily satisfy the regulation as long as they provide an unobstructed view of the movie screen and are located anywhere among some general public seating – no matter where those seats are positioned in the auditorium. The district court correctly held that defendants' interpretation is "indefensible," in part because it conflicts with the underlying statutory goal of providing persons with disabilities

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[9] National misstates the results of some seating surveys (National Br. 51-52 & n.23). National asserts that the surveys indicate that during some movies, several people sat in the traditional-style sections while six rows of the stadium sections remained empty. In fact, the surveys show that in the two auditoriums cited by National, 100 patrons sat in those six rows in one theater and 75 sat in the six rows of the other (A6130, 6138) – not zero as National alleges.

equal enjoyment of the benefits of movie theaters. The court thus properly denied defendants' motions for summary judgment.

The court also correctly granted summary judgment for the United States on the proper interpretation of Standard 4.33.3. The Department of Justice interprets this regulation as requiring that wheelchair users in movie theaters be provided lines of sight within the range of viewing angles offered to most of the patrons of the cinema, and that wheelchair seating in a stadium-style cinema be integrated into the stadium section. The Department's reading of Standard 4.33.3 is consistent not only with the language of the regulation but also with the goals of Title III. This interpretation, which the court found "eminently reasonable," is consistent with the well-established meaning of the term "lines of sight" in the field of theater design and within the movie theater industry. Indeed, it is the understanding that defendants and their own architects and design officials have long held.

The Department also reasonably construes the "integral" seating mandate of Standard 4.33.3 to require that theater operators provide wheelchair seating in the area of the theater where most members of the general public usually choose to sit. In the typical stadium-style theater, a large majority of the general public will sit in the stadium section. Stadium seating is, as the name suggests, the quintessential

part of a "stadium-style" theater. Defendants aggressively market stadium seating as a revolutionary improvement in the moviegoing experience. One would reasonably expect that most members of the general public who attend a stadium-style theater would want to take advantage of this superior viewing experience by sitting in the stadium section. Therefore, excluding wheelchair users from this core area of the theater is likely to isolate them from most audience members. That is especially true in those theaters, including many of defendants' auditoriums, in which the traditional-style section has viewing angles that produce unacceptable levels of physical discomfort and image distortion. Members of the general public who can walk would understandably try to avoid sitting in such an undesirable area of the auditorium. The resulting isolation of wheelchair users contravenes the statutory goals that the regulation was designed to implement.

Although the district court found the Department's interpretation of Standard 4.33.3 "eminently reasonable," it nonetheless held that the Due Process Clause precludes application of the regulation to defendants' theaters unless they were constructed or refurbished on or after the date the United States filed this lawsuit in December 2000. That ruling is erroneous.

The language of Standard 4.33.3, as promulgated in 1991, provided adequate notice that theater designers must seat wheelchair users in locations with

lines of sight within the range of viewing angles offered to most members of the audience. As noted, the regulation uses a term-of-art – "lines of sight" – that has long been recognized among theater designers and within the movie theater industry to encompass viewing angles. At any rate, defendants had *actual notice* that viewing angles affect the quality of lines of sight. Both defendants previously endorsed industry guidelines that recognize that viewing angles are components of spectators' lines of sight. Indeed, defendants specifically took the position, set forth in those guidelines, that extreme vertical viewing angles were unacceptable because they cause viewer discomfort and image distortion. Yet both defendants built stadium-style theaters that relegate wheelchair users to an area of the auditorium that provides viewing angles that are decidedly inferior to those available to the vast majority of the audience. Defendants could not reasonably have believed that those theaters complied with the regulation.

This Court therefore should remand the case to allow the district judge to apply the Department's reasonable interpretation of Standard 4.33.3 to defendants' individual auditoriums, including those constructed prior to the filing of the United States' lawsuit.

STANDARDS OF REVIEW

Issues 1 and 2: The grant or denial of summary judgment is reviewed *de novo*. *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93 (1st Cir. 2001).

Issue 3: In refusing to apply the regulation to defendants' theaters unless they were built or refurbished after the lawsuit was filed, the district court effectively granted partial summary judgment to defendants (although the court did not use that label). Therefore, review is *de novo*. *Ibid.*

Issue 4: The declaratory judgment is subject to "independent review," which occupies a middle ground between the *de novo* and abuse-of-discretion standards. *El Dia, Inc. v. Hernandez Colon*, 963 F.2d 488, 492 (1st Cir. 1992).

ARGUMENT

I

THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO THE UNITED STATES ON THE PROPER INTERPRETATION OF STANDARD 4.33.3

The district court granted summary judgment to the United States on the proper interpretation of Standard 4.33.3. In doing so, the court concluded that the Department of Justice's interpretation of its regulation was reasonable, while defendants' proposed reading of Standard 4.33.3 was "indefensible" (Op. 40-41). That decision is correct and should be upheld. The case should be remanded to

allow the district court to apply the Department's interpretation to the individual auditoriums for which the United States is seeking relief.

A. The Comparable-Lines-Of-Sight Provision Requires That Viewing Angles For Wheelchair Users In Movie Theaters Be Comparable In Quality To Those Provided To Most Members Of The Audience

Standard 4.33.3 requires, in part, that wheelchair locations in public assembly areas (including movie theaters) provide "lines of sight comparable to those for members of the general public." 28 C.F.R. Pt. 36, App. A, § 4.33.3. "Comparable" in this context means "equivalent" or "similar." *Webster's Ninth New Collegiate Dictionary* at 267 (1991).

The Department of Justice has reasonably interpreted Standard 4.33.3 to require, *inter alia*, that a theater operator provide wheelchair users with lines of sight within the range of viewing angles offered to most patrons in the theater. The Department has reasonably concluded that factors in addition to physical obstructions – such as viewing angles and distance from the screen – affect whether individuals' lines of sight are equivalent to those of other audience members. Individuals who use wheelchairs need not be provided the best seats in the house, but neither can they be relegated to locations with viewing angles decidedly inferior to those available to most audience members, as they are in many of defendants' stadium-style theaters.

This interpretation is also consistent with the well-established understanding of the term "lines of sight" among theater designers, within the movie theater industry, and among defendants themselves. The Department's interpretation also is consistent with the ADA's goal of providing persons with disabilities equal enjoyment of movie theaters. At the very least, the Department's interpretation of its own regulation is a reasonable one to which this Court should defer. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulation must be upheld unless it is "plainly erroneous or inconsistent with the regulation").

1. Recent Court Decisions Support the Department's Interpretation

Although courts have reached inconsistent results on the proper interpretation of the comparable-lines-of-sight regulation, the recent trend in the caselaw favors the Department's position. Defendants rely heavily on *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th Cir.), cert. denied, 531 U.S. 944 (2000), which held that the comparable-lines-of-sight provision does not require "anything more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen." *Id.* at 789. Although two district court decisions in 2001 adopted

the *Lara* rationale,[10] three courts that have decided the issue since then have rejected the Fifth Circuit's interpretation and have agreed with the Department of Justice that the comparable-lines-of-sight provision requires consideration of the quality of spectators' viewing angles.

a. Stewmon (9th Cir.)

The Ninth Circuit recently deferred to the Department's interpretation in *Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003). By a 2-1 vote, the court held that theater operators violated Standard 4.33.3 by relegating wheelchair users in their stadium-style auditoriums to a traditional-style area close to the movie screen that had uncomfortable viewing angles that were inferior to those offered in the stadium section where most audience members sat. *Id.* at 1127-1128, 1131-1133. The average vertical viewing angle for the wheelchair spaces in those theaters was 42º, while the average vertical angle from the general public seating was 20º. *Id.* at 1128.

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[10] One decision was reversed on appeal. *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 142 F. Supp. 2d 1293, 1296-1298 (D. Or. 2001), rev'd, *Stewmon v. Regal Cinemas, Inc.*, 339 F.3d 1126 (9th Cir. 2003). The other is on appeal to the Sixth Circuit, which heard oral argument on June 20, 2003. *United States v. Cinemark USA, Inc.*, No. 1:99-CV-705 (N.D. Ohio Nov. 19, 2001), appeal pending, No. 02-3100 (6th Cir.).

The Ninth Circuit agreed with the Department that "lines of sight" encompass spectators' viewing angles. *Id.* at 1131-1132. In upholding the Department's interpretation, the majority noted the movie theater industry's understanding of "lines of sight." The Ninth Circuit 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 vertical viewing angles produce physical discomfort for viewers. *Id.* at 1128, 1131-1132. The majority also noted that the National Association of Theater Owners (NATO) had taken a position on viewing angles similar to that of the SMPTE guidelines. *Id.* at 1132.

The *Stewmon* majority 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 movie theaters (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.

Stewmon, 339 F.3d at 1133.

b. Meineker v. Hoyts (2d Cir.)

The Second Circuit considered the comparable-lines-of-sight provision in *Meineker v. Hoyts Cinemas Corp.*, 69 Fed. Appx. 19 (2d Cir. 2003) (opinion in the addendum to this brief). That case involved stadium-style auditoriums that Hoyts operates at the Crossgates Mall in Albany, New York – theaters that are also at issue in the present case (A5638-5652). Although the *Meineker* district court rejected the Fifth Circuit's holding in *Lara* that the comparable-lines-of-sight provision required only an unobstructed view, it nonetheless granted summary judgment to Hoyts. The Second Circuit vacated the grant of summary judgment and instructed the district judge on remand to decide whether the Department's interpretation of Standard 4.33.3 is entitled to deference and, if so, whether Hoyts had adequate notice of that interpretation at the time of construction or renovation of its theaters. *Meineker*, 69 Fed. Appx. at 25.

With regard to the notice issue, the Second Circuit observed that Hoyts submitted a letter to the Maine Human Rights Commission in 1991, in which Hoyts: (1) endorsed the SMPTE guidelines as the "[i]ndustry standards regarding sightlines," (2) took the position that "viewing angles are an essential component of spectators' lines of sight," and (3) explained that vertical viewing angles in excess of 35° cause viewer discomfort. *Id.* at 25 nn.7 & 10. The Second Circuit

noted that the 1991 letter was signed by Raymond Gaudet, who had responsibility for the design of the auditoriums at the Crossgates Mall. *Id.* at 25 n.8. The court also observed that Hoyts' 1997 design manual stated that "[c]omfortable viewing angles are essential for good presentation and patron comfort." *Id.* at 25 n.9.

The Second Circuit further instructed the district court to consider the industry's understanding of "lines of sight" at the time of the theaters' construction. The panel explained that "[t]he industry-wide standards should be discernible from a review of" documents such as the SMPTE guidelines and NATO publications. *Id.* at 25 n.10.

c. United States v. AMC

In *United States v. AMC Entertainment, Inc.*, 232 F. Supp. 2d 1092 (C.D. Cal. 2002), the district court upheld the Department's interpretation of the comparable-lines-of-sight requirement after conducting an exhaustive survey of the movie theater industry's understanding of "lines of sight" (*id.* at 1094, 1110-1113) – the type of analysis that the Second Circuit in *Meineker* believed was relevant to whether Hoyts had adequate notice of the regulation's requirements. The *AMC* court found that design treatises had long recognized that viewing angles are important components of spectators' lines of sight, and that the movie theater industry shared this understanding at the time of the construction of the

first stadium-style theaters, as evidenced by NATO's repeated public statements. See *id.* at 1098-1103. The *AMC* court also found widespread agreement among theater designers and within the industry – as reflected in the SMPTE guidelines – that excessive viewing angles cause physical discomfort and image distortion, and that seats between the center and rear of the auditorium generally have lines of sight superior to those near the movie screen. *Id.* at 1099-1102. Based on this evidence, the *AMC* court concluded that the theater operator in that case "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." *Id.* at 1111. The court thus held that applying the Department's interpretation to theaters that were already built would not violate due process. *Id.* at 1114.

2. Theater Designers, the Movie Theater Industry, and Defendants Themselves Have Long Understood That Extreme Viewing Angles Affect the Quality of Spectators' Lines of Sight

The fact section of this brief explains in detail that theater designers, the movie theater industry, and defendants themselves have long understood that viewing angles are significant components of spectators' "lines of sight." Here are the highlights of that discussion, which appears at pp. 8-15, *supra*:

- NATO, the principal trade association for movie theater operators, repeatedly took the position between 1991 (when Standard 4.33.3 was promulgated) and 1997 (after the first stadium-style theaters were constructed) that lines of sight encompassed viewing angles, that seats toward the rear of the auditorium had the best lines of sight and were the most popular, and that seats near the front of the theater were considered undesirable and were the last selected by patrons.
- SMPTE published guidelines in 1989 acknowledging that extreme viewing angles adversely affect the quality of lines of sight by causing physical discomfort and image distortion.
- In 1991, Hoyts endorsed the SMPTE guidelines as the "industry standards regarding sight lines" and specifically took the position that certain vertical viewing angles are uncomfortable for spectators.
- National also endorsed the SMPTE guidelines' limit for vertical viewing angles, and one of defendant's architects consulted the SMPTE guidelines on viewing angles in designing National's stadium-style movie theaters.

Given the historical usage of the term "lines of sight" among theater designers and the theater industry's own statements about "lines of sight," the Department of

Justice reasonably viewed the phrase as a term-of-art that, in the context of theater design, would be widely understood by architects and designers as encompassing spectators' viewing angles.

In 1998, however, the United States learned that Cinemark USA, Inc., 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 field of theater design. 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 to Cinemark's unusual interpretation, the Department of Justice filed an *amicus* brief in *Lara v. Cinemark USA, Inc.*, No. EP-97-CA-502-H (W.D. Tex.), in which we confirmed that "lines of sight" encompassed viewing angles and that Standard 4.33.3 required that wheelchair users be provided lines of sight within the range of viewing angles offered to most members of the audience (A3176-3177, 3180-3182). The Department attached a copy of the SMPTE guidelines to its brief and cited them as evidence that the movie theater industry had developed methods for "measuring the quality of the movie viewing experience" (A3176-3177, 3180-3181). The Department's *Lara* brief thus reaffirmed the well-established

understanding of the term "lines of sight" that had prevailed for years among theater designers and in the movie theater industry.

3. Industry Standards Provide Guidance to Theater Designers in Assessing Whether Lines of Sight Offered to Wheelchair Users are Comparable in Quality to Those Provided to the General Public

As previously noted, the Department of Justice has interpreted the comparable lines-of-sight language to require that wheelchair users be provided lines of sight within the range of viewing angles offered to most patrons in the theater. This is a workable standard that theater designers can apply by referring to well-established design principles and industry standards. Theater designers and the movie theater industry (including defendants themselves) have long recognized that viewing angles are components of "lines of sight" and that extreme viewing angles negatively affect the quality of a patron's lines of sight – and hence a patron's viewing experience – by, for example, causing physical discomfort and image distortion. See pp. 8-15, *supra*.

Industry standards – particularly the SMPTE guidelines which both Hoyts and National previously endorsed – provide well-established methods of gauging the effect that viewing angles have on the quality of lines of sight. These industry standards thus allow theater designers to compare the quality of viewing angles "without embarking on subjective judgments of where each individual prefers to

sit in a movie theater." *Stewmon*, 339 F.3d at 1132 n.7. As the Ninth Circuit recently explained:

> Able-bodied movie theater patrons in a stadium-style theater may choose from a wide range of viewing angles, most of which are objectively comfortable according to SMPTE standards, regardless of what personal viewing preferences individuals may have *within* that comfortable range. As it currently stands in the theaters at issue, however, wheelchair-bound patrons may sit only in the first few rows, where uncontroverted evidence demonstrates that * * * the viewing angle [is] objectively uncomfortable for all viewers * * *.

Ibid. (emphasis in original).

To be sure, some theaters will fall within a gray area in which reasonable theater designers may disagree whether the viewing angles for wheelchair users are comparable in quality to those offered to the general public. But in light of the long-established industry standards, defendants (and their theater designers) could not reasonably have believed that all of their auditoriums fell within such a gray area. Consider, for example, the three auditoriums discussed in detail in the fact section of this brief: East Farmingdale, Bellingham, and Westborough. See pp. 16-18, *supra*. In each of the three auditoriums, wheelchair users are relegated to areas with vertical viewing angles of 48°, 42° and 41°, respectively – a level that both defendants previously recognized was unacceptable under industry standards – while most general public seats in those theaters offer far more comfortable

viewing angles. Thus, under the industry standards that defendants themselves previously endorsed, the viewing angles for wheelchair users in these theaters are plainly inferior to those offered to most audience members.

4. Merely Placing Wheelchair Spaces Among Some General Public Seating Does Not Guarantee That Wheelchair Users Will Have Lines of Sight "Comparable to Those for Members of the General Public"

Defendants argue that if wheelchair spaces provide an unobstructed view and are located *among* some general public seating, they necessarily will provide lines of sight "comparable to those for members of the general public" (Op. 22; National Br. 23, 53; Hoyts Br. 24). Apparently, defendants' position is that if *any* general public seats provide viewing experiences that are as bad as those from the wheelchair spaces, the comparability requirement necessarily has been satisfied (assuming the wheelchair users can somehow see the screen without obstruction). Defendants' argument is untenable.

The fallacy of defendants' argument can be illustrated by examining Auditorium 1 at National's East Farmingdale complex (described at pp. 16-17, *supra*). All of the wheelchair seats are on a flat floor in the third row with vertical viewing angles of 48º, which National itself described as an "unacceptable angle for comfort level" (A3373). A wide cross-aisle separates the wheelchair spaces from the stadium section (A5287), which contains 74% of the general public

seating in the auditorium (A5292). The seats in the stadium section have vertical viewing angles ranging from 6º to less than 30º (A5287).

The viewing angles offered to the wheelchair users in the East Farmingdale auditorium are not comparable in quality to the viewing angles typically available to a member of the general public who wants to attend a movie in the same theater. The chances are relatively small that a member of the general public will be forced to sit in the undesirable seats close to the screen. Because a large majority (74%) of the general public seats are in the stadium section, the chances of finding a seat in that section are great, even if the movie is sold out. The odds of getting a seat in the elevated stadium section improve even further if the movie is not sold out. If fewer than 74% of the general public seats are sold for a particular show, then every person who can climb stairs can sit in the stadium section. Moreover, an ambulatory patron can increase her odds of avoiding the undesirable seats by arriving early at the theater. By contrast, a wheelchair user who wants to see a movie at the East Farmingdale theater can do nothing to avoid the undesirable seats. Since 100% of the wheelchair seats are in a traditional-style section with uncomfortable viewing angles, that wheelchair user will be relegated to the uncomfortable seating locations 100% of the time – regardless of how early he gets in line or how empty the theater is.

That is not "equal enjoyment" of the benefits of movie theaters. 42 U.S.C. 12182(a) (prohibiting disability-based discrimination "in the full and equal enjoyment" of the benefits of public accommodations). Thus, defendants' proposed reading undermines the very statutory goals that the regulation is designed to implement. For that reason, as the district court held, defendants' interpretation is "indefensible" (Op. 40-41).

5. Defendants Have Misstated the Department's Position

Defendants' briefs repeatedly misstate the Department's interpretation of its regulation. Most notably, defendants premise a significant portion of their argument on the assertion that the Department construes Standard 4.33.3 to mandate that wheelchair seats meet an objective four-part test outlined in the expert report of Robert Luchetti, without regard to how the wheelchair locations compare to the general public seating in the auditorium (National Br. 31-34). In fact, the United States repeatedly emphasized in the district court that a wheelchair seat need *not* satisfy Luchetti's four-part test in order to comply with the regulation (A2986-2987, 3003-3004, 3201-3206), and explained that the government was using the information in Luchetti's report simply to compare the quality of lines of sight available to wheelchair users and the general public (*ibid.*). Indeed, the government underscored that there were over 100 auditoriums

that "failed" Luchetti's four-part test as to which the United States was *not* pursuing claims (A3003-3004, 3050-3051).

Defendants base their characterization of the Department's position on a single interrogatory response (A430). Notably, however, the United States amended that response after defendants complained that it was confusing, so as to make clear that the government did not interpret Standard 4.33.3 to impose an absolute four-part test (A3200-3207, 3213-3214). The government served its amended response prior to defendants' motions for summary judgment. Moreover, the comparative principles articulated in the amended response were fully in accord with the comparative interpretation that the Department consistently has given to Standard 4.33.3 in this litigation and in others – a consistency that the district court noted in its decision (Op. 40). On these facts, defendants' claim that the Department interprets Standard 4.33.3 to impose an absolute four-part test – and that they relied on this interpretation in moving for summary judgment (National Br. 31-32 n.16) – is insupportable .

6. The Department Has Consistently Taken the Position That Viewing Angles Affect the Quality of Lines of Sight

Contrary to defendants' arguments, the Department has consistently taken the position that viewing angles are components of "lines of sight." First,

defendants incorrectly assert that the Department took an inconsistent position in technical assistance documents published in 1994 (National Br. 10-11, 28). The excerpts cited by defendants address lines of sight over *standing* spectators, an issue that arises in sports stadiums and arenas, but typically not in movie theaters (A414, 418). The Department's comments on this specific issue did not suggest that obstruction was the only component of "lines of sight" and did not purport to address movie theaters. Defendants emphasize that the Department's manual stated that one way to solve the problem of standing spectators would be to place wheelchair locations "at the front of a seating section" (National Br. 11, quoting A414). But this statement cannot reasonably be interpreted as permitting the placement of wheelchair spaces in the front row of a *movie theater*. The viewing experience from a sports arena or stadium – where spectators (even those at the front of a seating section) usually view the court or field at a *downward* angle – is hardly comparable to watching a movie from the front row at a painful *upward* angle.

In addition, Hoyts asserts that the Department advised Hoyts and others in 1996 that Standard 4.33.3 permitted placement of wheelchair spaces in the front of a stadium-style theater (Hoyts Br. 16, 47, 51). The Department took no such position.

Hoyts bases its assertion largely on a telephone call that allegedly occurred in April 1996 between Todd Andersen (an architect then employed by the Department of Justice) and Robert Carasitti (a consultant for one of Hoyts' architects) (see Hoyts Br. 16, citing A5878-5881). But Andersen was not authorized to issue an official interpretation of the regulation on behalf of the Department, and he did not purport to do so. He testified that callers to the Department's help line were informed, in substance, that the technical assistance they received over the line "was not the official word of the Department of Justice," did "not constitute a legal interpretation," and was "not binding on the Department" (A2701-2703). Andersen emphasized that he never would have told anyone that the Department was approving the placement of wheelchair spaces at the front of stadium-style theaters because he "simply wasn't empowered" to approve anything on behalf of the Department (A2669, 2700). Oral statements by low-level Department employees – particularly where, as here, they are prefaced with a warning that they do not represent an official Department position – cannot reasonably be construed as binding interpretations of the Department's regulation. See *Heckler v. Community Health Servs.*, 467 U.S. 51, 65-66 (1984); *Sidell v. Commissioner of Internal Revenue*, 225 F.3d 103, 110-111 (1st Cir. 2000).

This Court also should be aware of Andersen's possible bias *in favor of Hoyts and National* when he was deposed in 2002. At that time, Andersen was being paid by National to serve as a defense expert in this litigation (A2693-2697). Moreover, Andersen left the Department of Justice in 1998 to work for Rolf Jensen & Associates, the same firm at which Carasitti worked while serving as a consultant for Hoyts' architect (A2630, 2684-2689, 2710, 5856, 5926).

Defendants also contend that the district court should have allowed them to take discovery to determine whether there were internal conflicts within the Department about the meaning of Standard 4.33.3 (Hoyts Br. 51-54; National Br. 61). That argument is meritless. The information sought by defendants is irrelevant to the issues before the Court. In evaluating the reasonableness and consistency of the Department's interpretation of its regulation, what matters is the official position taken publicly by the Department – not internal (or even external) discussions by individual Department employees. See *Sidell*, 225 F.3d at 111; *United States v. Farley*, 11 F.3d 1385, 1390-1391 (7th Cir. 1993). At any rate, the material sought by defendants is protected by the deliberative-process privilege, among others (A299-312), and contrary to Hoyts' argument, these privileges were not waived by the filing of the lawsuit. See *Greater Newburyport Clamshell*

Alliance v. Public Serv. Co. of N.H., 838 F.2d 13, 19 (1st Cir. 1988) (rejecting claim that plaintiff automatically waived attorney-client privilege by filing suit).

7. The Access Board's Positions Do Not Undermine the Department's Interpretation of its Own Regulation

Defendants assert that the Access Board's interpretations of the comparable-lines-of-sight language indicate that the provision was intended to refer only to obstruction, not viewing angles (National Br. 7-9, 53). In fact, the Access Board has recognized that viewing angles are relevant in determining the comparability of lines of sight in stadium-style theaters:

> As stadium-style theaters are currently designed, patrons using wheelchair spaces are often relegated to a few rows of each auditorium, in the traditional sloped floor area near the screen. Due to the size and proximity of the screen, as well as other factors related to stadium-style design, patrons using wheelchair spaces are required to tilt their heads back at *uncomfortable angles* and to constantly move their heads from side to side to view the screen. They are afforded *inferior lines of sight* to the screen.

64 Fed. Reg. 62,278 (Nov. 16, 1999) (emphasis added). The Board's 1998 technical assistance manual also explained, in a section titled "Sight Lines," that "[b]oth the horizontal and vertical viewing angles must be considered in the design of assembly areas" (A3194).

It is true, as defendants point out (Hoyts Br. 17-18), that the Access Board stated in 1999 that it had not decided whether to amend its guidelines to expressly

incorporate certain technical factors that the Department of Justice had used in *settlement negotiations* to assess whether viewing angles were comparable. See 64 Fed. Reg. 62,278. But positions advocated in the give-and-take of settlement discussions are not necessarily identical to the legal requirements that Standard 4.33.3 imposes, and thus the Board's comments about the Department's settlement negotiations shed little light on what the Board believes is mandated by the current version of the regulation. The Access Board's discussion of those negotiations does not detract from the Board's clear position that viewing angles are among the factors that determine whether lines of sight are comparable under the existing guidelines. See p. 43, *supra*.

At any rate, defendants err in assuming that the Access Board's post-1991 interpretation of Standard 4.33.3 could limit the authority of the Department of Justice to construe its own regulation. The Department, not the Access Board, has the sole authority to issue binding regulations to implement the statutory provisions at issue here. 42 U.S.C. 12186(b). Therefore, it is the Department's views – not the Access Board's – to which the courts owe deference in determining the meaning of the Department's regulation. *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 585 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998).

B. The "Integral" Provision of Standard 4.33.3 Prohibits Theater Operators From Excluding Wheelchair Users From the Area of a Stadium-Style Theater Where Most Members of the General Public Usually Choose to Sit

In its complaint, the United States also asserted claims against defendants under the "integral" seating requirement of Standard 4.33.3 (A37, 47), which states that "[w]heelchair areas shall be an integral part of any fixed seating plan." 28 C.F.R. pt. 36, App. A, § 4.33.3.[11] The district court correctly rejected defendants' position that the "integral" requirement is satisfied whenever wheelchair spaces are located anywhere among some general public seating.

The Department construes the "integral" seating mandate of Standard 4.33.3 to require that theater operators provide wheelchair seating in the area of the theater where most members of the general public usually choose to sit. In the typical stadium-style movie theater, a large majority of the patrons can be expected to sit in the stadium section. That is not surprising. The quintessential feature of a "stadium-style" theater is, as the name suggests, the "stadium" seating. Defendants aggressively market stadium seating as "one of the greatest advances in moviegoing in years," which ensures "that everyone has the best seat in the

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[11] With regard to the "integral" claim, the United States will not seek relief on remand for those auditoriums whose construction was completed before July 1998. See p. 54 n.14, *infra*.

house" (A3381, 3385, A3625). Defendants would not be so aggressively touting the superior benefits of the stadium section if they did not expect most customers to prefer it and to choose it over traditional-style seating upon entering the theater. Thus, in the typical stadium-style theater, excluding wheelchairs from the core area of the auditorium and, instead, restricting them to an undesirable section of the theater that most ambulatory patrons choose to avoid, results in *de facto* isolation of wheelchair users from most audience members.

That is especially true in those theaters where the quality of the viewing experience from the traditional-style area is so plainly inferior to that offered in the stadium section. Take, for example, defendants' auditoriums at East Farmingdale, Bellingham and Westborough (described at pp. 16-18, *supra*). In each auditorium, wheelchair users are relegated to non-stadium portions of the theaters with vertical viewing angles above 40º. By contrast, all the seats in the stadium sections of those auditoriums have vertical viewing angles ranging from the single digits to less than 30º. The wheelchair area in each auditorium is separated from the stadium section by either a wall or wide-cross aisle. Although the wheelchair spaces in each auditorium are alongside or behind some general public seats, few ambulatory patrons are likely to choose those seats (if they have any other option) because, *inter alia*, of the physical discomfort and image

distortion they would experience from being so close to the screen. This predictable outcome is confirmed by seating surveys showing that in some theaters – such as some of Hoyts' Westborough auditoriums – over 99% of patrons sat in the stadium section. See pp. 19-20, *supra*.

The Department reasonably interprets the regulation to prohibit such isolation of wheelchair users. The word "integral" in the regulation is synonymous with "integrated." *Webster's Ninth New Collegiate Dictionary* at 628 (1991). A wheelchair location is not truly integrated into the seating plan if it is relegated to a distinct area of the auditorium where relatively few non-disabled patrons sit.

Defendants' interpretation, by contrast, thwarts the statutory goals that the regulation was designed to implement. Title III of the ADA was designed to prevent isolation of persons with disabilities from non-disabled individuals. The statute requires, for example, that "[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual." 42 U.S.C. 12182(b)(1)(B). Title III also generally prohibits providing disabled persons with goods, services, or accommodations that are "separate from" those offered to other people. 42 U.S.C. 12182(b)(1)(A)(iii). Congress further found

that isolation of persons with disabilities was a pervasive problem. 42 U.S.C. 12101(a)(2), 12101(a)(5). In light of Congress's goal of combatting such isolation, the Department of Justice's interpretation of the "integral" portion of the regulation is a reasonable one.[12]

II

THE DISTRICT COURT PROPERLY DENIED DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

National argues that the district court erred in denying its motion for summary judgment as to liability (National Br. 27-40). Defendants moved for summary judgment on the theory that Standard 4.33.3 requires only that wheelchair users have unobstructed views and be located among some general public seating. As explained above, that interpretation of the regulation is "indefensible" (Op. 41). See pp. 24-48, *supra*. Consequently, the district court properly denied defendants' motions for summary judgment.

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[12] Defendants argue that the Access Board's manual contradicts the Department's interpretation of the "integral" seating requirement (Hoyts Br. 32-33; National Br. 35). The manual does not purport to provide an exclusive list of factors relevant to whether wheelchair seating satisfies the "integral" mandate (A3194). At any rate, the Board's post-1991 comments cannot bind the Department of Justice in interpreting its own regulation. See p. 44, *supra*.

III

THE DISTRICT COURT ERRED IN HOLDING THAT STANDARD 4.33.3 COULD ONLY BE APPLIED TO THEATERS CONSTRUCTED OR REFURBISHED AFTER THE UNITED STATES FILED SUIT

(CROSS-APPEAL)

The district court held that the Department's interpretation of its regulation was reasonable and entitled to deference (Op. 39-40). Nonetheless, the court refused to apply the regulation to any of defendants' theaters unless they were constructed or refurbished on or after the date the United States filed suit – *i.e.*, December 18, 2000. The court based this holding on due process grounds, concluding that defendants did not have fair warning of what Standard 4.33.3 required (Op. 42-46). That ruling is erroneous.

A. Theaters Built Before July 1998

The district court's reasoning is flawed in several respects. *First*, the "lines of sight" language of Standard 4.33.3, as promulgated in 1991, provided theater operators adequate notice that they could not permissibly relegate all wheelchair users to an area of the auditorium that would be uncomfortably close to the movie screen and provide a viewing experience decidedly inferior to that offered to the majority of the audience. As explained in detail above, the phrase "lines of sight"

was a term-of-art that theater designers and the movie theater industry had long recognized as encompassing viewing angles. The SMPTE guidelines reflect this. So do NATO's repeated public statements between 1991 and 1997. See pp. 9-12, *supra*. The industry understood, as the SMPTE guidelines make clear, that extreme viewing angles adversely affect the quality of lines of sight. NATO similarly recognized that the rear portion of the auditorium has the best lines of sight and that seats near the screen are undesirable and unpopular. For defendants to now argue that the industry always thought "lines of sight" meant only unobstructed views is revisionist history.

Second, defendants had *actual notice* that viewing angles affected the quality of spectators' lines of sight. In 1991, Hoyts filed a letter with the Maine Human Rights Commission in which it characterized the SMPTE guidelines as the industry standard for sightlines and explained that extreme vertical viewing angles cause physical discomfort. Hoyts' own design manual explained that auditoriums should be designed to minimize discomfort and image distortion caused by extreme viewing angles. See pp. 12-13, *supra*. National also endorsed the SMPTE guidelines' position on vertical viewing angles. One of National's architects acknowledged that he consulted the SMPTE guidelines on viewing angles in designing National's theaters. National's architects also performed

"sightline" analyses for National that measured the vertical viewing angles in proposed stadium-style theaters. See pp. 13-15, *supra*. Given their endorsement of the SMPTE guidelines, Hoyts and National could not reasonably have believed that all of their theaters provided comparable lines of sight for wheelchair users.

Third, the district court's opinion is internally contradictory. The opinion is replete with language suggesting that the violations of Standard 4.33.3 should have been obvious to any reasonable theater designer (Op. 18, 34-35, 37). This language simply cannot be squared with the court's holding that defendants lacked adequate notice that any of their theaters would run afoul of Standard 4.33.3.

Fourth, a regulation's language need not achieve "meticulous specificity" in order to provide sufficient notice. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 156 (2d Cir. 1999). The adequacy of notice is judged from the perspective of "a reasonably prudent person" who is familiar "with the conditions the regulations are meant to address" and the underlying statutory "objectives the regulations are meant to achieve." *Ibid.* 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." *Ibid.* 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 would not allow theaters to relegate all wheelchair users to locations whose viewing angles are decidedly inferior to those available to the vast majority of patrons. As the Supreme Court has explained in the criminal context,

> few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded.

Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952). An even greater degree of ambiguity is tolerated for civil regulations. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982); see also *Doyle v. Secretary of Health & Human Servs.*, 848 F.2d 296, 301 (1st Cir. 1988) (rejecting vagueness challenge to Medicare statute and regulations because, *inter alia*, "'[t]he definition of adequate medical care cannot be boiled down to a precise mathematical formula'") (citation omitted).

The district judge also failed to consider that the individuals who usually implement Standard 4.33.3 on behalf of theater owners are architects and theater designers, whose specialized training should make them familiar with the common

meaning of the term "lines of sight" in the field of theater design. As this Court has explained, language that might be too vague when directed at laypersons will often be acceptable when it regulates "a select group of persons having specialized knowledge," especially if the language includes terms-of-art or other phrases that have "a technical or other special meaning" common to that group. *Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n*, 620 F.2d 900, 907-908 (1st Cir. 1980). That is precisely the situation here. Those who have special training in theater design will understand what "lines of sight" mean and how their quality is assessed.[13]

B. Theaters Constructed After July 1998

Even if one were to assume that the 1991 language failed to provide fair warning, the district court nonetheless erred in choosing the filing of the lawsuit as the event triggering notice to defendants. Defendants plainly had adequate notice in 1998 of both the lines-of-sight and the integral requirements of the regulation.

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[13] For this reason, it is irrelevant that government employees may have had difficulty in their depositions explaining some technical details about lines of sight (see National Br. 37-40). Three of the four witnesses were lawyers, not architects (A548, 1028, 1158-1159, 1457-1458, 1469-1470, 3002-3003). The other individual had little training or experience in movie theater design (A997-999). That does not mean that architects who design theaters for a living will be confused about how to assess the quality of lines of sight (see A1080-1081, 1123, 3003). Defendants' architects and design officials were familiar with these concepts. See pp. 12-15, *supra*.

The Department clearly articulated its interpretation of Standard 4.33.3 in an *amicus* brief that it filed in *Lara* in July 1998. See pp. 33-34, *supra*. The brief made clear that: (1) the line-of-sight provision of Standard 4.33.3 requires that wheelchair users be provided viewing angles within the range of those offered to most of the patrons in the theater, and (2) the "integral" prong of the regulation prohibits theater operators from relegating all wheelchair users in a stadium-style theater to a separate, traditional-style area, if the majority of the general public seats in the auditorium are in the stadium section (A3173-3184).[14] This *amicus* brief was widely publicized within the movie theater industry. As Hoyts explained, "DOJ on numerous occasions between July 1998 and December 2000 publicly discussed its *Lara* brief interpretation of Section 4.33.3" (Doc. 86 at 2-3). The movie theater industry did not need a new round of rulemaking to understand the Department's position. Moreover, in August 1998, the district court in *Lara* adopted an interpretation of the "lines of sight" requirement that was consistent with the Department's. See *Lara v. Cinemark USA, Inc.*, 1998 WL 1048497 (W.D. Tex. Aug. 21, 1998) (opinion in the addendum to this brief). The United

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[14] The United States is *not* arguing that defendants had notice of the meaning of the "integral" requirement prior to the filing of the *Lara amicus* brief. Defendants did, however, have adequate notice regarding the "lines of sight" requirement as of 1991, given the well-established understanding of that term among theater designers and within the movie theater industry.

States then notified defendants in September 1998 that the government was launching an investigation of their stadium-style theaters in response to complaints of alleged violations of Standard 4.33.3 (A3196-3199).

By that point, both defendants had been advised by architects or consultants that they should place wheelchair seating in the stadium sections of their auditoriums. In September 1997, Hoyts' building code consultant advised Hoyts that "it is our recommendation that all new designs of stadium style facilities incorporate mid-level entry to facilitate wheelchair locations in the center of the stadium seating" (A3729). Hoyts rejected the recommendation (A4081-4082). In 1996 and 1997, Hoyts' architects proposed putting wheelchair spaces in the stadium sections of some of the smaller auditoriums at two Hoyts complexes, but Hoyts refused and ordered designers to "eliminate Handicapped seating" from the stadium sections in auditoriums with under 300 seats (A3041-3043, 3688 (notes for 4/22/96), 4106-4107; Op. 45).

National received similar advice. Roncelli, Inc., the construction manager for some of National's stadium-style theaters (A3418), advised National in August 1998 that:

> We feel that handicap seating should be included within the stadium riser seating area for the benefit of the physically challenged patron. The

> availability of equal, optimum site lines [*sic*] to every theater patron should be the goal of any plan.

(A3417).

Yet defendants continued building non-compliant stadium-style theaters. Many of defendants' theater complexes were not completed until after October 1998. See Schedule B in the addendum to this brief.

Contrary to the district court's contention, the Fifth Circuit's *Lara* decision does not undermine the conclusion that defendants had fair warning by 1998. The Fifth Circuit did not issue its decision until April 2000, and thus defendants could not have relied on it in building theaters prior to that date. Indeed, between August 1998 and 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 of the regulation. Even after the Fifth Circuit decision, defendants had no reason to believe that the Department had abandoned its interpretation of Standard 4.33.3. The Department continued pressing its interpretation in other circuits (as it was entitled to do), and thus defendants should have known that they were proceeding at their own risk when they built theaters outside of the Fifth Circuit that did not comply with the Department's reading of Standard 4.33.3. See *United States v. One Parcel of Real*

Prop., 960 F.2d 200, 211 (1st Cir. 1992) (it is "well-settled that the government need not acquiesce, on a nationwide basis, in one circuit's construction of federal law adverse to the government's interpretation of the law").

For these reasons, the district court erred in holding that the Due Process Clause precludes application of Standard 4.33.3 to defendants' theaters unless they were built or refurbished after the filing of the government's complaint.

IV

THE DISTRICT COURT'S DECLARATORY JUDGMENT SHOULD BE VACATED AND REMANDED

The United States agrees with defendants that the district court's declaratory judgment should be vacated and the case remanded for application of the correct interpretation of Standard 4.33.3. Although ambiguous, the district court's opinion could be interpreted as absolutely prohibiting the placement of wheelchair seating on risers of less than 12 inches if other seats in the auditorium are on tiers of greater height, without regard to whether the wheelchair seating affords lines of sight comparable in quality to those offered most members of the general public (see Op. 11; National Br. 24-25; Hoyts Br. 9, 44). Thus applied, the court's ruling arguably would prohibit some designs that comply with Standard 4.33.3.

We emphasize, however, that the district court's declaratory judgment produces the correct outcome when applied to many of defendants' designs, such as those used for National's auditorium at East Farmingdale or Hoyts' theater at Westborough (described at pp. 16-18, *supra*). The district court should be given an opportunity to carefully tailor its ruling to cover these types of auditoriums without prohibiting designs that clearly comply with Standard 4.33.3.[15]

CONCLUSION

The Court should (1) affirm the district court's grant of summary judgment in favor of the United States on the proper interpretation of Standard 4.33.3; (2) affirm the denial of defendants' motions for summary judgment; (3) reverse the district court's holding that Standard 4.33.3 can only be applied to those theaters

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[15] The United States agrees with Hoyts that the duty to remedy the violations of the regulation should not depend on whether the theaters are "refurbish[ed]," which the district court has defined broadly to mean "any change that requires a building permit under local law" (Op. 47). All the theaters at issue in this case were built after January 26, 1993, and thus are subject to the new construction requirements. If the court on remand determines that a particular theater violates the regulation and that there was adequate notice of the regulation's requirements at the time the theater was built, then the defendant would have an obligation to remedy the violation – even if the theater would not otherwise be refurbished. Conversely, if a court were to properly conclude that a defendant otherwise had no obligation to remedy the seating arrangement in a particular theater due to lack of notice, then the subsequent refurbishment of that theater should not, by itself, trigger a duty to retrofit the auditorium, unless the planned renovations qualify as an "alteration" under Title III and 28 C.F.R. 36.402(b)(1).

that were constructed or refurbished on or after December 18, 2000; and (4) vacate the declaratory judgment and remand the case for application of the correct interpretation of Standard 4.33.3.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 12,578 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

____

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Date: October 2, 2003

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2003, two copies of the BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT were served by overnight delivery on the following counsel of record:

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Addendum

Memorandum and Order in *United States v. Hoyts Cinemas Corp.*, No. 00-cv-12568-WGY (D. Mass. Mar. 31, 2003)

Judgment in *United States v. Hoyts Cinemas Corp.*, No. 00-cv-12568-WGY (D. Mass. Mar. 31, 2003)

Meineker v. Hoyts Cinemas Corp., 69 Fed. Appx. 19 (2d Cir. July 1, 2003)

Lara v. Cinemark, 1998 WL 1048497 (W.D. Tex. Aug. 21, 1998)

Schedules A, B, D, and E (there is no Schedule C)

SCHEDULE A
(page 1 of 8)

[see U.S. Brief at 15-16]

Theater complex	*Auditorium #*	*Appendix pages*
HOYTS		
H-01: Branford, CT	1	A5374
	2* +	A5375
	3* +	A5375
	4 +	A5376
	5 +	A5377
	6 +	A5377
	7 +	A5378
	8 +	A5378
	9 +	A5378
	10 +	A5379
	11	A5380
	12	A5380
H-02: Enfield, CT	1	A5385
	9*	A5390
	12	A5385
H-04: Waterbury, CT	1 +	A5417
	2 +	A5418
	4 +	A5420
	9 +	A5425
	11 +	A5418
	12 +	A5417

* = auditoriums in which 100% of wheelchair spaces have vertical angles greater than 35º.

+ = auditoriums containing wheelchair spaces with vertical viewing angles ranging from 45º to 55º.

SCHEDULE A

[see U.S. Brief at 15-16]

Theater complex	***Auditorium #***	***Appendix pages***
HOYTS		
H-05: Bellingham, MA	1*	A5431
	2*	A5433
	3*	A5435
	4* +	A5437
	5* +	A5439
	6*	A5441
	7*	A5443
	8*	A5445
	9	A5449
	10	A5453
	11*	A5455
	12*	A5459
	13*	A5461
	14*	A5463
H-07: Marlborough, MA	13	A5507

SCHEDULE A

[see U.S. Br. at 15-16]

Theater complex	***Auditorium #***	***Appendix pages***
HOYTS		
H-08: Westborough, MA	1 +	A5514
	2*	A5518
	3*	A5520
	4*	A5522
	5*	A5524
	6	A5526
	7	A5528
	8	A5530
	9*	A5532
	10*	A5534
	11*	A5536
	12 +	A5538
H-09: BWI, MD	1* +	A5542
	2* +	A5542
	3* +	A5542
	4* +	A5543
	5* +	A5543
	6* +	A5542
	7* +	A5542
	8* +	A5542
	9 +	A5544
	10 +	A5544
	11* +	A5545
	12*	A5546
	13*	A5546
	14* +	A5545

SCHEDULE A
(page 4 of 8)

[see U.S. Brief at 15-16]

Theater complex	*Auditorium #*	*Appendix pages*
HOYTS		
H-10: Bowie, MD	4*	A5552
	5*	A5552
	9	A5553
	10	A5553
H-12: Hunt Valley, MD	3*	A5579
	4*	A5579
	10*	A5582
	11*	A5582
H-14: Pennsauken, NJ	6*	A5605
	9*	A5605
H-18: Guilderland, NY	3*	A5641
	4*	A5641
	5*	A5642
	6* +	A5643
	7*	A5644
	8*	A5644
	9* +	A5645
	12*	A5641
	13*	A5641
	14*	A5647
	15*	A5648
	16*	A5649
	17*	A5649
	18* +	A5645

SCHEDULE A
(page 5 of 8)

[see U.S. Brief at 15-16]

Theater complex	*Auditorium #*	*Appendix pages*
HOYTS		
H-21: Hazelton, PA	1* +	A5671
	2* +	A5671
	3	A5672
	4	A5672
	5* +	A5671
	6	A5673
	7	A5674
	8	A5674
	9	A5673
	10* +	A5671
H-22: Saucon Valley, PA	1*	A5678
	2*	A5678
	3	A5679
	4	A5679
	5*	A5680
	6	A5681
	7	A5682
	8	A5682
	9	A5681
	10*	A5680
H-24: Manassas, VA	4*	A5736
	5*	A5736
H-25: Potomac Yards, VA	4*	A5749
	5*	A5749

SCHEDULE A
(page 6 of 8)

[see U.S. Brief at 15-16]

Theater complex	*Auditorium #*	*Appendix pages*
HOYTS		
H-26: Martinsburg, WV	1* +	A5757
	2* +	A5757
	3	A5758
	4	A5758
	5* +	A5757
	6	A5759
	7	A5760
	8	A5760
	9	A5759
	10* +	A5757
NATIONAL		
N-01: Los Angeles, CA	1*	A4905
	2*	A4906
	3*	A4907
	4*	A4908
	5*	A4909
N-10: Lowell, MA	2*	A5029
	13*	A5053
N-12: Revere, MA	10	A5125
	11	A5127
N-13: Seekonk, MA	9*	A5157
	10*	A5157

SCHEDULE A

[see U.S. Brief at 15-16]

Theater complex	*Auditorium #*	*Appendix pages*
NATIONAL		
N-16: West Springfield, MA	8	A5214
	9	A5215
N-18: Ann Arbor, MI	19	A5241
N-19: Burton, MI	3*	A5251
	4*	A5252
	5*	A5252
	6*	A5251
N-22: Brooklyn, NY	3*	A5272
	4*	A5272
	7*	A5272
	8*	A5272
	11*	A5272
	12*	A5272
N-24: East Farmingdale, NY	1* +	A5287
	3* +	A5287
	5*	A5290
	6*	A5291
	7* +	A5287
	8* +	A5287
	9*	A5291
	10*	A5290
	12*	A5291
N-27: Maumee, OH	9	A5320
	10	A5320

SCHEDULE A
(page 8 of 8)

[see U.S. Brief at 15-16]

Theater complex	*Auditorium #*	*Appendix pages*
NATIONAL		
N-30: Springdale, OH	9	A5349
	10	A5349

SCHEDULE B

THEATER COMPLEXES WHOSE CONSTRUCTION WAS COMPLETED AFTER JULY 1998

Theater complex	*Completion date*	*Appendix pages*
HOYTS		
H-02: Enfield, CT	December 1998	A323, 5384-5392
H-03: Simsbury, CT	December 1999	A323, 5393-5415
H-06: Hyannis, MA	December 2000	A324, 5466-5498
H-10: Bowie, MD	November 1998	A323, 5550-5558
H-11: Germantown, MD	May 2002	A324, 5559-5574
H-12: Hunt Valley, MD	November 1998	A324, 5576-5584
H-14: Pennsauken, NJ	December 1998	A324, 5602-5608
H-15: Binghamton, NY	December 1999	A324, 5609-5618
H-22: Saucon Valley, PA	December 1998	A325, 5677-5685

SCHEDULE B

THEATER COMPLEXES WHOSE CONSTRUCTION WAS COMPLETED AFTER JULY 1998

Theater complex	*Completion date*	*Appendix pages*
HOYTS		
H-23: Providence, RI	August 1999	A325, 5686-5731
H-24: Manassas, VA	May 1999	A325, 5732-5744
H-25: Potomac Yards, VA	November 1998	A325, 5745-5755
NATIONAL		
N-01: Los Angeles, CA	After Dec. 2001	A6095; A4904-4923
N-02: Berlin, CT	June 2000	A6095-6096; A4925-4957
N-03: East Windsor, CT	May 2000	A6097; A4958-4964
N-06: Davenport, IA	December 1998	A6098; A4981-4990
N-07: Jeffersontown, KY	September 1999	A6099; A4992-5007

SCHEDULE B
(page 3 of 4)

THEATER COMPLEXES WHOSE CONSTRUCTION WAS COMPLETED AFTER JULY 1998

Theater complex	*Completion date*	*Appendix pages*
<u>NATIONAL</u>		
N-08: Lawrence East, MA	May 2000	A6100; A5009-5015
N-09: Lawrence West, MA	August 2000	A6099-6100; A5016-5024
N-12: Revere, MA	May 2000	A6102; A5101-5148
N-15: Springfield/ Eastfield, MA	August 1999	A6104; A5169-5209
N-16: West Springfield, MA	After Dec. 2001	A6104; A5210-5220
N-18: Ann Arbor, MI	June 1999	A6107; A5231-5246
N-19: Burton, MI	November 1998	A6106; A5248-5253
N-20: Flint Township, MI	February 2000	A6106; A5254-5257

SCHEDULE B

THEATER COMPLEXES WHOSE CONSTRUCTION WAS COMPLETED AFTER JULY 1998

Theater complex	*Completion date*	*Appendix pages*
NATIONAL		
N-21: Edgewater, NJ	December 2000	A6108; A5258-5268
N-23: College Point, NY	May 1999	A6110; A5275-5285
N-25: Greenburgh, NY	December 1999	A6109; A5294-5301
N-26: Huber Heights, OH	May 1999	A6111; A5303-5312
N-28: Miamisburg, OH	December 2000	A6113; A5323-5330
N-29: Milford, OH	December 2000	A6112; A5332-5341
N-30: Springdale, OH	December 1998	A6113; A5343-5355
N-31: Warwick, RI	May 2000	A6114; A5356-5364
N-32: Warwick Mall, RI	June 2001	A6115; A5365-5371

THERE IS NO

SCHEDULE C

SCHEDULE D

East Farmingdale, NY (National)

Auditorium 1

(A5287).

SCHEDULE E

Bellingham, MA (Hoyts)

Auditorium 8

(A5445).