No. 02-9034

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSAN MEINEKER and SYBIL MCPHERSON,

Plaintiffs-Appellants,

v.

HOYTS CINEMAS CORPORATION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING APPELLANTS AND URGING REVERSAL

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INTRODUCTION

The Department of Justice construes the comparable "lines of sight" provision of 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. In its opening brief, the United States defended this interpretation by explaining that, when the Department promulgated the regulation in 1991, the phrase "lines of sight" was a term-of-art commonly used in the context of theater design to encompass spectators' viewing angles. Hoyts cites *nothing* – no treatise, no architectural textbook, no design guideline – that contradicts the United States' assertion. Instead of responding head-on to the United States' argument concerning the historical usage of the term "lines of

sight," Hoyts implores this Court to disregard the government's contention on this key point.

Indeed, Hoyts ignores the repeated statements by the National Association of Theater Owners (NATO), *of which Hoyts itself is a member* (Doc. 36, Exh. D at 2),[1] which support the Department's interpretation of the regulation's "lines of sight" language. In the early to mid-1990s (prior to the construction of the first stadium-style theaters in this country), NATO repeatedly acknowledged that viewing angles are components of spectators' lines of sight and that lines of sight toward the rear of a theater are generally superior to those near the front (US *Amicus* Br. 16). See *United States v. AMC Entm't, Inc.*, 2002 WL 31649984, *7-*8, slip op. 14-17 (C.D. Cal. Nov. 20, 2002). NATO's statements undercut Hoyts' position by illustrating that the theater industry has long understood that the "lines of sight" language encompasses viewing angles.

ARGUMENT

1. Hoyts argues (Br. 38-42) that the United States is improperly trying to expand the issues on appeal by asserting in its *amicus* brief that the term "lines of sight" has traditionally been used in the context of theater design to encompass viewing angles. Contrary to Hoyts' argument, the historical usage of the term "lines of sight" is directly relevant to the issues on appeal because Hoyts is urging this Court to adopt the rationale of *Lara v. Cinemark USA, Inc.*, 207 F.3d 783 (5th

[1] "Doc. __" indicates the entry number on the district court docket sheet. "Br." means Hoyts' brief and "US *Amicus* Br." refers to the United States' opening *amicus* brief. "JA" is the Joint Appendix.

Cir.), cert. denied, 531 U.S. 944 (2000) (Br. 14, 16-19, 23 n.7), which rejected the Department of Justice's interpretation of its own regulation. *Lara* held that the comparable "lines of sight" provision requires nothing "more than that theaters provide wheelchair-bound patrons with unobstructed views of the screen." 207 F.3d at 789. In reaching that conclusion, the Fifth Circuit suggested that the term "lines of sight" was generally understood, at the time the Department promulgated its regulation, to mean only unobstructed views. *Id.* at 788.

To meet Hoyts' argument, the United States is entitled to show that *Lara*'s reasoning is flawed because, among other reasons, the term "lines of sight" has been widely used in the context of theater design to encompass viewing angles. US *Amicus* Br. 14-21. Hoyts' objection to this argument is an attempt to deny the United States the opportunity to explain *Lara*'s flaws.

Hoyts also incorrectly asserts (Br. 38-42) that the United States is trying to attack the district court's ruling excluding expert reports. While the United States may not agree with every statement in that ruling, the government is not challenging that decision here. Although the district court stated in its decision that there were no specific "industry standards" governing whether lines of sight were "comparable" (JA 169-170), that ruling did not address the distinct issue of whether the term "lines of sight" had traditionally been used in the context of theater design to encompass viewing angles. However, in its subsequent summary judgment ruling, the court correctly recognized that viewing angles were relevant

components of spectators' lines of sight. The United States is *supporting* – not attacking – that aspect of the district court's decision. US *Amicus* Br. 9, 18.

2. Hoyts also argues (Br. 26 n.9, 38, 42-44) that this Court should disregard the publicly available documents that the United States cited in its *amicus* brief to illustrate the common usage of the term "lines of sight" in the context of theater design. The United States' citation of these materials is appropriate.

At the outset, we note that two of the documents to which Hoyts objects are substantively identical to exhibits introduced below, including one submitted by Hoyts. The United States' brief cites the eighth edition of *Architectural Graphic Standards*. The relevant passage from that treatise (US *Amicus* Br. 16) is repeated verbatim in the tenth edition of *Architectural Graphic Standards*, which Hoyts introduced below (Doc. 41, Burstein Affirmation, Exh. A at 916). The same passage also appears in the treatise's ninth edition, which the plaintiffs introduced (Doc. 29, Exh. 4 at 838).

Hoyts also objects to the United States' citation of the 1989 edition of design guidelines published by the Society of Motion Picture and Television Engineers (SMPTE). Yet the relevant passages from the 1989 version (US *Amicus* Br. 15-16) appear verbatim in the SMPTE guidelines' 1994 edition, which was introduced as an exhibit below (Doc. 31 (attachment); Doc. 40, Exh. 3). Hoyts was familiar with the SMPTE guidelines, as evidenced by its repeated discussion of them in its district court pleadings, as well as its own expert's reference to those guidelines (Doc. 33 at 2, 5-6, 13, 15, 18; Doc. 35 at 1, 8 n.6, 10-13, 14 n.12, 16-

17; Doc. 41 at 4-8; Doc. 34, Exh. F at 2, 4-5; Doc. 36, Exh. A at 4; Doc. 36, Exh. B at 104, 118, 159-161).

At any rate, all the documents to which Hoyts objects are publicly available materials that this Court can consult regardless of whether they were cited by the parties or introduced below. The United States is not citing these documents for the truth of the matters asserted in them, but rather for the limited purpose of illustrating that their authors used the phrase "lines of sight" (or its equivalent) to encompass viewing angles.

This Court may appropriately consult publicly available documents to determine how those involved in theater design have traditionally used the term "lines of sight." Appellate courts routinely consult treatises, periodicals, and other secondary sources to determine the meaning of terms in statutes, regulations, or settlement agreements, even if those reference materials were not introduced into evidence below. See *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610-612 & n.4 (1987) (consulting encyclopedias, books, and periodicals on anthropology, sociology, and biology to determine meaning of "race"); *Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski*, 899 F.2d 151, 161-164 (2d Cir. 1990) (taking judicial notice of scientific literature and industry publications submitted *after oral argument on appeal* in deferring to agency's interpretation of consent order), abrogated on other grounds, *Fidelity Partners, Inc. v. First Trust Co.*, 142 F.3d 560, 565 (2d Cir. 1998); *Great Circle Lines, Ltd. v. Matheson & Co.*, 681 F.2d 121, 126-127 (2d Cir. 1982) (consulting treatise to determine common

understanding of shipping industry terminology); *Dow Chem. Co. v. Sumitomo Chem. Co.*, 257 F.3d 1364, 1373 (Fed. Cir. 2001) ("in determining the ordinary meaning of a technical term, courts are free to consult * * * technical treatises at any time"). Examining such sources to determine the common usage of words is akin to consulting a dictionary.

Contrary to Hoyts' assertion, this Court may consult publicly available documents for this limited purpose, even if the parties disagree about the meaning of "lines of sight." The Supreme Court and this Circuit have consulted secondary sources in analogous circumstances, in order to resolve issues that were not only hotly disputed but also dispositive of the entire case. See *Al-Khazraji*, 481 U.S. at 610-612 & n.4; *Great Circle Lines*, 681 F.2d at 126-127.

Such reliance on publicly available materials is particularly appropriate here because the issue is whether the Department's reading of the term "lines of sight" is a reasonable one – not whether it is the only acceptable interpretation. See US *Amicus* Br. 13-14. Documents illustrating that the term "lines of sight" has often been used in the context of theater design to encompass viewing angles would support the reasonableness of the Department's interpretation, even if Hoyts produced evidence that the term had sometimes been given a different meaning. This Court's decision in *Browning-Ferris*, *supra*, illustrates the point. In that case, the Court took judicial notice of scientific literature for the first time on appeal, to determine whether the Environmental Protection Agency (EPA) had reasonably interpreted an administrative consent order. 899 F.2d at 160. Some of the

literature supported EPA's interpretation, while other documents favored a contrary reading. *Id.* at 161-164. In upholding EPA's position, the Court explained that "[i]t is the existence of the extensive scientific literature" supporting the EPA's interpretation, "rather than the dispositive nature of any of the articles that establishes that there is a sufficient basis for the decision of the EPA." *Id.* at 161.

Under Hoyts' logic, the reasonableness of an administrative agency's interpretation of its own regulation would depend on the factual record that private litigants develop in a particular case. Such a result would be untenable. The Department's interpretation either is, or is not, reasonable. The reasonableness of that interpretation does not change from lawsuit to lawsuit depending on the litigating strategies of private parties.[2]

Citation of these documents does not prejudice Hoyts. Two of the documents are substantively identical to exhibits introduced below, including one submitted by Hoyts. See p. 4, *supra*. Four of the documents were introduced as exhibits in *United States v. Hoyts Cinemas Corp.*, No. 00-CV-12567 (D. Mass.),

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[2] Hoyts asserts (Br. 12-13, 38-39, 42) that the district judge invited the United States to intervene in this case. The United States cannot find any record of having received an invitation from the judge to intervene. The only support Hoyts cites for its assertion is the following statement in a minute entry on the docket sheet: "Justice Dept. may move to intervene in this action" (JA 6). It is unclear whether this statement was intended as an invitation or, instead, as a prediction that the Justice Department might intervene. At any rate, the United States has no obligation to intervene in every private lawsuit that might implicate a Department regulation.

and thus Hoyts is familiar with them. See United States' Appendix of Documentary Materials in Opposition to Summary Judgment (items 1, 2, 4, 7), in No. 99-CV-12567. Moreover, all the documents to which Hoyts objects are discussed in *AMC*, *supra*. The United States would be entitled to refer to *AMC*'s discussion of those materials, even if the government's brief did not cite to the documents themselves.

3. Hoyts also contends (Br. 38, 44-46, 50-52) that the Department's interpretation of its regulation is unworthy of deference. Hoyts' contention is meritless.

First, Hoyts asserts (Br. 44-46, 46-49) that the Department's interpretation – requiring that wheelchair users have lines of sight "within the range of viewing angles offered to most patrons in the theater" – fails to give adequate guidance to theater owners. That assertion does not withstand scrutiny. In the context of the type of stadium-style theaters at issue here, theater operators undoubtedly know where most patrons sit: in the elevated "stadium" section, which contains the vast majority of the seats in the auditorium and, as its name suggests, is the quintessential portion and key attraction of a "stadium"-style theater. Moreover, any reasonable theater operator would be aware that the elevated stadium section offers viewing angles that are less steep (and hence more comfortable) than those available in the traditional-style area close to the screen.

The repeated statements by the National Association of Theater Owners (NATO), *of which Hoyts is a member*, contradict Hoyts' suggestion (Br. 25-26,

45) that theater operators are in the dark about where the desirable and undesirable seats are in a theater. Between 1991 (when the Department promulgated its regulation) and 1995 (when the first stadium-style theaters were built), NATO repeatedly took the position that seats near the front of a movie theater are the "least desirable" and "last to be taken," and that seats toward the rear of the theater provide lines of sight that "are the best in the house," have the "smallest viewing angle" and are "most favored" by movie patrons. *AMC*, 2002 WL 31649984, *7-*8, slip op. 15-16. For example, in its 1994 position paper on wheelchair seating, NATO explained that "[i]n 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." *Id.*, slip. op. 16. Hoyts fails to explain how its current position can be squared with these statements by its own membership organization.

Next, Hoyts contends (Br. 45-49) that it lacked notice when it built its theaters that Standard 4.33.3 required consideration of viewing angles. In fact, the language of Standard 4.33.3 provided adequate notice. As previously noted, by 1991, the phrase "lines of sight" was a term-of-art commonly used among theater operators, architects, and designers to include viewing angles. Indeed, the national trade association of movie theater owners indicated on numerous occasions prior to the construction of the first stadium-style theaters that it understood the "lines of sight" language to encompass viewing angles. See p. 2, *supra*. Hoyts' argument is further undermined by the fact that the individuals who

usually implement Standard 4.33.3 on behalf of theater owners are architects and theater designers, whose specialized training should make them aware of the common meaning of the term "lines of sight" in the field of theater design. "When the persons affected by the regulations are a select group with specialized understanding of the subject being regulated the degree of definiteness required to satisfy due process concerns is measured by the common understanding and commercial knowledge of the group." *Fleming v. Department of Agric.*, 713 F.2d 179, 184 (6th Cir. 1983).

Moreover, this Court has emphasized that a regulation's language "need not achieve 'meticulous specificity'" in order to provide sufficient notice. *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." *Id.* at 156. This Court expects "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 (US *Amicus* Br. 11, 23; 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.

In addition, Hoyts asserts (Br. 38, 50-52) that the Department has taken inconsistent positions on the meaning of Standard 4.33.3. That assertion is baseless. Hoyts attempts to manufacture inconsistency where none exists by pointing to minor wording differences in various pleadings. The statements that wheelchair users' viewing angles must be comparable to those available to "most of the general public" (Br. 50), that they must be "within the range of viewing angles offered to most of the patrons of the cinema" (Br. 51), and that they cannot be "on the extremes of the range offered to the general public" (Br. 50) are just slightly different ways of expressing the same standard. Contrary to Hoyts' assertion (Br. 50-51), the Department advocated the same position in *United States v. Hoyts*, *supra*, explaining that certain theaters evaluated by its expert violated the regulation because they provided lines of sight for wheelchair users that were inferior in quality to those available from "the majority of the other seats in the same auditorium" (Hoyts' Addendum at 35).[3]

4. Contrary to Hoyts' argument (Br. 29 & n.11), the recent decision in *AMC* does not support its position. The *AMC* court agreed with the district judge in this case on two points: (1) the "lines of sight" provision requires more than an

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[3] The document Hoyts cites does not support its assertion that the United States previously adopted a "specific mathematical formula" as the governing standard (see Br. 50-51, citing Hoyts Addendum at 32-33).

unobstructed view of the movie screen and (2) viewing angles are relevant to whether lines of sight are comparable. *AMC*, 2002 WL 31649984, *17, slip op. 36. But unlike the district judge in this case, the *AMC* court concluded that restricting wheelchair spaces to the traditional-style area of a stadium-style theater violated the comparable-lines-of-sight mandate. *Id.* at *1, *15-*19, slip op. 2-3, 31-38. Applying *AMC*'s reasoning to this case would require reversal of the grant of summary judgment.[4]

5. Hoyts proposes an interpretation of the regulation's "integral" seating requirement (Br. 30-33) that ignores – indeed thwarts – the statutory goals that Standard 4.33.3 was designed to implement. Under the logic of Hoyts' position, wheelchair spaces located "among" other seats would comply with the integral seating requirement even if no one ever sat in those seats and even if all ambulatory patrons sat in a separate section of the auditorium. Such a result

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[4] Contrary to Hoyts' assertion (Br. 29 n.11), *AMC* did not hold that wheelchair spaces would violate the regulation only if they were in the front 25% of the theater. Although the district judge in *AMC* made a vague reference to "the front 25%" at oral argument, she emphasized that she was not announcing a definitive interpretation at that time but would later provide a detailed decision setting forth the appropriate standard (Hoyts Addendum at 27). In her subsequent written opinion, the judge did not mention the front 25% of the theater but, instead, concluded that "those AMC designs of stadium-style theaters that place wheelchair seating solely on the sloped-floor portion of the theater" violate the regulation's comparable-lines-of-sight mandate. *AMC*, 2002 WL 31649984, *18, slip op. 36-37. *AMC* reached that conclusion even though some wheelchair spaces were in the third and fourth rows of the traditional-style section, the same rows in which wheelchair spaces are located in 15 of the 18 Hoyts auditoriums at issue here (JA 177, 179-183). At any rate, several of Hoyts' auditoriums would fail to meet even Hoyts' proposed test because they have fewer than 25% of their seats in the traditional-style area (JA 177, 179, 181).

cannot be squared with the statutory goals that Standard 4.33.3 was designed to accomplish. Hoyts had an obligation to take the statutory "objectives into account when determining its responsibilities to comply with" the regulation. *Rock of Ages Corp.*, 170 F.3d at 156. Therefore, the regulation's "integral" mandate must be construed in light of the statutory goal of ensuring that individuals with disabilities are not isolated from non-disabled *persons*. US *Amicus* Br. 26-27; 42 U.S.C. 12182(b)(1)(B), 12182(b)(1)(A)(iii). Simply surrounding wheelchair spaces with seats does not accomplish this goal if few ambulatory persons actually sit in them. Because plaintiffs produced evidence that restricting wheelchair seating to the non-stadium portion of the theater effectively isolates wheelchair users from most other audience members (US *Amicus* Br. 7-8), the district court erred in granting summary judgment for Hoyts on this issue.[5]

[5] Hoyts incorrectly asserts (Br. 31-32) that the Access Board's manual contradicts the Department's interpretation of the "integral" seating requirement. The portion of the manual cited by Hoyts does not purport to provide an exclusive list of factors relevant to whether wheelchair seating satisfies the "integral" mandate. The Access Board did not take the position that wheelchair locations within the "footprint" would necessarily be integrated, regardless of where ambulatory patrons actually sat in the auditorium.

CONCLUSION

This Court should reverse the grant of summary judgment on plaintiffs' claims under Standard 4.33.3.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 3,451 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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I hereby certify that on January 7, 2003, two copies of the foregoing REPLY BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL were served by Federal Express, next-business-day delivery, on each of the following counsel of record:

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I further certify that the same brief was filed in accordance with Fed. R. App. P. 25(a)(2)(B)(i) and 29(e) by sending it to the Clerk of the United States Court of Appeals for the Second Circuit by Federal Express, next-business-day delivery, on January 3, 2003.

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