No. 13-1377

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COLORADO CROSS-DISABILITY COALITION, *et al.*,

Plaintiffs-Appellees

v.

ABERCROMBIE & FITCH CO., *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
DISTRICT COURT NO. 09-CV-02757
(HON. WILEY Y. DANIEL)

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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SUPPORTING PETITION FOR PANEL REHEARING
AND REHEARING EN BANC

QUESTIONS PRESENTED

The United States urges this Court to grant panel rehearing or rehearing en banc on the following questions:

1. Whether the Department of Justice's 1991 Standards for Accessible Design, 28 C.F.R. Pt. 36, App. D (1991 Standards or Standards), require "spaces"

in a newly designed or newly constructed building or facility to be accessible unless specifically exempted.

2. Whether the use defendants make of their raised, inaccessible porches as a distinct branding tool, customer lounge, and display area, violates Title III of the Americans with Disabilities Act (ADA), regardless of whether the design complies with the 1991 Standards.

INTEREST OF THE UNITED STATES

This case presents questions of exceptional importance concerning the proper interpretation of Title III of the ADA, 42 U.S.C. 12181 *et seq.*, which ensures the accessibility of places of public accommodation. Pursuant to 42 U.S.C. 12186(b), the Attorney General has promulgated regulations construing the ADA's broad nondiscrimination mandate. 28 C.F.R. Pt. 36. The United States has a direct interest in the proper interpretation and effective enforcement of these regulations and accordingly filed an amicus brief at the panel stage.

INTRODUCTION

With only minimal briefing, a divided panel of this Court ruled that the 1991 Standards for Accessible Design, 28 C.F.R. Pt. 36, App. D, only requires "spaces" in newly constructed buildings or facilities—such as the ornate raised porches in many of Abercrombie & Fitch's (Abercrombie) Hollister stores—to be accessible to shoppers who cannot use stairs if the precise type of space is specifically

identified in the 1991 design standards. Slip Opinion 34-37 (Op.).[1] Judge McHugh, in dissent (Dissent), took the opposite view: all spaces in a newly constructed facility must be accessible unless specifically exempted. Dissent 11. The dissent's view is correct. As discussed below, the majority fundamentally misunderstood how the 1991 Standards apply to "spaces" in newly constructed buildings or facilities. It also erred in refusing to defer to the Department of Justice's (Department) interpretation.

It is imperative to the effective enforcement of the ADA that this Court overturn the panel's erroneous decision, which is in tension with decisions from the Third and Ninth Circuits. If left undisturbed, the panel's ruling will have far-reaching damaging consequences for the accessibility of public accommodations throughout this Circuit and possibly in others if the Court's rationale is accepted elsewhere. The panel's holding that "spaces" in public accommodations need not be accessible unless specifically addressed in the design standards—and hence defendants' raised porches need not be accessible or located on an accessible route—rips a gaping hole into the statutory scheme. The 1991 Standards do not, and could not possibly, catalog every type of space that must be accessible under

[1] Because the stores at issue were built after January 26, 1993 and before September 15, 2010, they must comply with the 1991 Standards. 28 C.F.R. 36.401(a), 36.406(a)(1).

the ADA and the Department's regulations. Instead, the scheme operates on a presumption that new construction must be accessible.

Yet the panel's ruling permits a wide variety of public spaces in public accommodations, such as general retail space in stores; reception or waiting areas in professional office buildings (such as doctor's offices, banks, and law firms); public areas of private schools; and a host of other spaces, to be rendered virtually off-limits to individuals who cannot climb stairs. The ruling's adverse impact on the accessibility of public spaces will be felt for years to come because the panel's interpretation of the 1991 Standards affects all buildings and facilities built between January 1993 and September 2010.

The panel also erred in rejecting plaintiffs' claim that Abercrombie's use of its raised porches violates the text of the ADA regardless of whether the design of the porches complies with the design standards. Op. 28-32.

It is essential that the Court rehear this case.

ARGUMENT

I

THIS COURT SHOULD REHEAR THIS CASE AND OVERTURN THE PANEL'S DECISION THAT THE 1991 STANDARDS DO NOT REQUIRE "SPACES" IN NEW CONSTRUCTION TO BE ACCESSIBLE UNLESS THE TYPE OF SPACE IS ADDRESSED IN A SPECIFIC DESIGN STANDARD

1. The panel misunderstood the application of the 1991 Standards to "spaces" in buildings or facilities built between 1993 and 2010. Focusing solely and too narrowly on the wording of the Standards' application section, the majority failed to consider the statute, the Department's regulations in 28 C.F.R. Pt. 36 (of which the 1991 Standards are a part), the Department's contemporaneous commentary, or even the rest of the same section of the Standards. These sources overwhelmingly establish that under the 1991 Standards all "spaces" in new construction must be accessible unless specifically exempted.

The 1991 Standards define a "Space" as "[a] definable area, e.g., room, toilet room, hall, assembly area, entrance, storage room, alcove, courtyard, or lobby." Standard 3.5. Here, the raised porches are a definable, distinct area. The majority does not dispute that the raised porch is a "space" but denies that all "spaces" must be accessible. Op. 33-35.

The majority's analysis rests on Standard 4.1.1(1):

> All areas of newly designed or newly constructed buildings and facilities *required to be accessible by 4.1.2 and 4.1.3* and altered portions of existing buildings and facilities required to be accessible by 4.1.6 shall comply with these guidelines, 4.1 through 4.35, unless otherwise provided in this section or as modified in a special application section.

Standard 4.1.1(1) (emphasis added). The majority incorrectly read this provision to suggest that Standards 4.1.2 and 4.1.3 are the source of the general accessibility requirement. But as it recognized, 4.1.2 and 4.1.3 require an accessible route to "connect accessible buildings, accessible facilities, accessible elements, and *accessible spaces* that are on the same site" (4.1.2(2)) and to "connect accessible building or facility entrances, with all *accessible spaces* and elements within the building or facility" (4.1.3(1)). Op. 34. The majority observed, "[b]y their plain text, these standards do not require 'spaces' to be accessible; rather, they assume that the mentioned space is already an 'accessible space.'" Op. 34-35.

While that observation is correct, the majority draws the wrong conclusion from it. "Accessible space" refers not to a space expressly made accessible by another standard, as the panel believed (Op. 35-36), but rather to a space not exempted from accessibility requirements that otherwise apply. Standards 4.1.2 and 4.1.3 assume a general requirement of accessibility and then specify how that requirement is met for elements of new construction necessitating additional technical specifications (*e.g.*, parking spaces, elevators, drinking fountains, assembly areas with fixed seating, etc.). Standard 4.1.1(1) references 4.1.2 and

4.1.3 because they articulate the detailed specifications applicable to newly constructed buildings and facilities where such detail is necessary.[2]

Regulations, like statutes, "are to be read as a whole, with 'each part or section . . . construed in connection with every other part or section.'" *American Fed. of Gov't Emps., Local 2782* v. *Federal Labor Relations Auth.*, 803 F.2d 737, 740 (D.C. Cir. 1986) (citation omitted). The existence of specific exceptions in Standard 4.1.1 confirms that the general rule is that all areas, or spaces, of new construction must be accessible.

First, consistent with the ADA, 42 U.S.C. 12183(a)(1), Standard 4.1.1(5)(a) provides that in new construction, a person or entity need not fully satisfy the guidelines "where * * * it is structurally impracticable to do so." Standard

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[2] The phrasing of 4.1.1(1) evolved to emphasize that new construction and altered portions of existing buildings and facilities, but not *existing* buildings or facilities, are subject to the design standards. Standard 4.1.1(1), as originally proposed by the Architectural and Transportation Barriers Compliance Board, provided: "All areas of buildings and facilities shall comply with these guidelines, 4.1 through 4.34, unless otherwise provided in this section or as modified in a special application section." 56 Fed. Reg. 2331 (Jan. 22, 1991). In the final guidelines, the Board explained that it adopted the current version because several commenters requested that the guidelines' application "be clarified with respect to existing buildings." 56 Fed. Reg. 35,414 (July 26, 1991). Accordingly, the Board revised 4.1.1(1) "to clarify that *all areas of newly designed or constructed buildings and facilities*, and altered portions of existing buildings and facilities required to be accessible by 4.1.6, must comply with the guidelines unless otherwise provided in 4.1.1 or a specific application section." *Ibid.* (emphasis added); see *id.* at 35,463. The Department adopted the Board's guidelines. 56 Fed. Reg. 35,602 (July 26, 1991) (Section 36.406).

4.1.1(5)(a). It explicitly emphasizes, however, that "*[a]ny portion of the building or facility which can be made accessible shall comply*" unless structurally impracticable. *Ibid.* (emphasis added); accord 28 C.F.R. 36.401(c)(2). That mandate is not limited to spaces addressed by specific standards. Second, the Standard limits the accessibility requirements for areas used only by employees as work areas. Standard 4.1.1(3). Third, accessibility is not required for "observation galleries used primarily for security purposes," or for "non-occupiable spaces accessed only by ladders, catwalks, crawl spaces, very narrow passageways, or freight (non-passenger) elevators, and frequented only by service personnel for repair purposes." Standard 4.1.1(5)(b)(i)-(ii).[3] As the dissent correctly recognized, "[i]f spaces were never required to comply with the guidelines in the first instance, there would be no reason to exempt certain types of spaces." Dissent 13.

2. The ultimate source of the accessibility requirement for all non-exempt spaces in new construction is the text of both the statute and the Department's regulations. See 1991 Standard 1 (guidelines "to be applied during the design, construction, and alteration of such buildings and facilities *to the extent required by regulations issued by Federal agencies, including the Department of Justice*, under the [ADA]") (emphasis added).

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[3] We do not address here all exceptions to the general requirement of accessibility.

"Discrimination" under the ADA includes "a failure to design and construct facilities for first occupancy [after January 26, 1993] that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. 12183(a)(1); see also 42 U.S.C. 12204(b) (requiring issuance of guidelines "to ensure that buildings [and] facilities * * * are accessible * * * to individuals with disabilities"). The Department's regulations implement this statutory mandate. Section 36.401 provides, with certain exceptions not relevant here, that "discrimination for purposes of this part includes a failure to design and construct facilities for first occupancy after January 26, 1993, that are readily accessible to and usable by individuals with disabilities." 28 C.F.R. 36.401(a)(1). The regulations define "Facility" to mean, *inter alia*, "all or any portion of buildings, structures, [or] sites." 28 C.F.R. 36.104. Thus, "facility" encompasses a "space," or "porch," in a retail store.

The Department's contemporaneous guidance on the 1991 final rule emphasizes that all new construction must be accessible: "The rule requires, as does the statute, that covered newly constructed facilities be readily accessible to and usable by individuals with disabilities." 28 C.F.R. Pt. 36, App. C, at 926 (2013); see also *id.* at 924 ("The Act * * * requires that, when a public accommodation or other private entity undertakes the construction or alteration of a facility subject to the Act, *the newly constructed or altered facility must be made*

accessible.") (emphasis added). The commentary emphasizes that "[t]o the extent that a particular type or element of a facility is not specifically addressed by the standards, the language of this section is the safest guide." *Id.* at 926.

The Department's contemporaneous commentary on the design standards themselves reinforces that the standards impose a general accessibility requirement for all areas or spaces in new construction, barring a specific exception. The guidance explains that Standard 4.1.1 "provides that all areas of newly designed or newly constructed buildings and facilities * * * must comply with the guidelines unless otherwise provided in § 4.1.1 or a special application section." 28 C.F.R. Pt. 36, App. C, at 940 (2013); see also *ADA Title III Technical Assistance Manual* III-7.3100 (1993) (1991 standards "appl[y] to all areas in new construction and alterations, except where limited by scoping requirements"), http://www.ada.gov/taman3.html. To the extent Standard 4.1.1(1) is ambiguous, the panel wrongly refused to defer to the Department's longstanding interpretation and the views expressed in its amicus brief (Op. 35-36). See *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998); *Fortyune* v. *City of Lomita*, 766 F.3d 1098, 1104 (9th Cir. 2014); *Colorado Cross Disability Coal.* v. *Hermanson Family Ltd. P'ship I*, 264 F.3d 999, 1004 n.6 (10th Cir. 2001).

3. The panel's conclusion that the 1991 Standards do not require "spaces" in public accommodations to be accessible unless the type of space is specifically

identified, is in tension with decisions of other circuits holding that the Standards' silence regarding particular features does not eliminate defendants' accessibility obligations. In *Caruso* v. *Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730, 737 (1999) (Alito, J.), the Third Circuit held that the 1991 Standards required at least one accessible route to the lawn seating area of a concert facility (E-Centre) unless E-Centre could demonstrate structural impracticability. The court rejected E-Centre's argument that it need not provide lawn access because the Standards require wheelchair seating only when there is fixed seating for the general public. As the court explained, plaintiff was entitled to "an accessible route to the lawn area * * * under the regulations regardless of whether or not the facility is also required to meet the more specific DOJ standards concerning fixed seating plans." *Id.* at 738-739.

In *Fortyune*, the Ninth Circuit very recently ruled that Title II of the ADA required the City of Lomita to provide accessible on-street diagonal parking despite the absence of specific design standards addressing the matter. The court rejected the city's argument that it had no obligation under the ADA absent specific technical guidelines, explaining that "the lack of specific regulations cannot eliminate a statutory obligation," 766 F.3d at 1102, and that nothing in the Department's regulations requiring accessible facilities "suggests that when

technical specifications do not exist for a particular type of facility, public entities have no accessibility obligations," *id.* at 1103.

The panel's contrary decision is likely to eviscerate effective enforcement of the ADA in this Circuit by both the Department and private parties because, under the panel's interpretation, publicly used spaces in public accommodations not addressed in specific design standards need not be accessible. That the raised porches also serve as entrances has obscured the obvious: if the stores placed a significant section of retail space forming a vital part of the shopping experience—complete with merchandise displays, decorations, and furniture on which customers may sit—on raised platforms, in the middle of their stores, inaccessible to wheelchair users, they would violate the design standards, regulations, and the ADA, notwithstanding the absence of a specific standard identifying such a space. The panel's decision says otherwise, and thus this case should be reheard.

II

THE COURT SHOULD REHEAR THIS CASE AND OVERTURN THE PANEL'S DECISION REJECTING PLAINTIFFS' CLAIM UNDER 42 U.S.C. 12182

The panel also erred in rejecting plaintiffs' claim that defendants' use of the raised porches violates the ADA regardless of whether the porches' design complies with the 1991 Standards. Op. 27-32. The majority reasoned that Abercrombie does not "use" the porch at all; rather, in its view, it is the porch's

design (as a two-stepped, elevated structure) that renders it inaccessible. Op. 28. Because it understood plaintiffs to challenge the porch only "*as it was built*" (Op. 28), the majority believed the claim "must be evaluated through the lens of the Design Standards; were it otherwise, an entity's decision to follow the standards and build an 'accessible' facility would have little meaning." Op. 31.

The majority is correct that compliance with the design standards can serve as a safe harbor, but only up to a point. Where the standards articulate precise requirements for avoiding discrimination, compliance precludes reliance on Title III's general non-discrimination mandate. The standards do not, however, purport to describe all the ways that idiosyncratic use of facilities can deny individuals with disabilities their statutorily guaranteed "full and equal enjoyment" of those facilities. See 42 U.S.C. 12182(a).

The panel's rejection of plaintiffs' ADA claim is in tension with the Ninth Circuit's decision in *Fortyune* v. *American Multi-Cinema, Inc.*, 364 F.3d 1075, 1082-1085 (9th Cir. 2004), that a movie theater violated Title III by not ensuring the availability of companion seating. The Ninth Circuit rejected the theater's argument that Fortyune had to establish noncompliance with the design standards, explaining that in cases about a public accommodation's "*use* of [the] design (*e.g.*, the use and availability of a companion seat), the provisions of the [design standards] are not controlling." *Id.* at 1085. The panel's decision here is difficult

to square with *Fortyune* because plaintiffs' ADA claim—like Fortyune's—is predicated on the distinct, special use to which the challenged feature (here, the porch) has been put, and the vivid contrast between the accessibility of that special use to people who can walk and the obvious denial of access to those who cannot.

The majority misunderstood plaintiffs to challenge the porch only "*as it was built*"—that is, only its design. Op. 28. But defendants use the raised porch, with its "look and feel of a Southern California surf shack" (Op. 5-6), "as an entrance, customer lounge, and display area, decorated in a fashion calculated to draw customers into the store and strengthen the Hollister brand and image." Dissent 27. Abercrombie made the porch, unlike the accessible side entrances, appealing and hip. Thus, not only the porch's design, but the use defendants have made of it, denies these shoppers the "full and equal enjoyment" of the store, 42 U.S.C. 12182(a). That use violates the ADA's prohibitions on denying individuals with disabilities participation opportunities, affording unequal or separate benefits, and failing to provide an integrated setting. 42 U.S.C. 12182(b)(1)(A)(i)-(iii) and (B). As the dissent recognized, in excluding shoppers in wheelchairs from the porch and consigning them instead to use "unadorned, inferior side entrances," Abercrombie effectively "relegates persons with disabilities to the status of second-class citizens." Dissent 30 (citation omitted).

CONCLUSION

This Court should grant plaintiffs-appellees' petition for panel rehearing and rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Tenth Circuit Rule 29.1 because it contains 2,996 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

s/ Bonnie I. Robin-Vergeer
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Date: October 23, 2014

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITION FOR PANEL REHEARING AND REHEARING EN BANC, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals, and has been scanned with the most recent version of Trend Micro Office Scan (version 10.6) and is virus-free.

s/ Bonnie I. Robin-Vergeer
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Date: October 23, 2014

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2014, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITION FOR PANEL REHEARING AND REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

In addition, I certify that I will file twelve paper copies of the same with the Clerk of the Court, using Federal Express, to be received within two business days of October 23, 2014.

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