No. 08-16075

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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THE STATE OF ARIZONA,
Plaintiff-Appellant

&

FREDERICK LINDSTROM, BY AND THROUGH HIS PARENT RACHEL LINDSTROM; AND LARRY WANGER
Plaintiffs-Intervenors-Appellants

v.

HARKINS AMUSEMENT ENTERPRISES, INC., *et al.*
Defendants-Appellees

_____

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

_____

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

_____

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STATEMENT OF THE ISSUE

Whether the district court misapplied the auxiliary aids provision of the Americans with Disabilities Act when it ruled that movie theater owners are not required to exhibit closed captioned and video described movies for disabled patrons.

INTEREST OF THE UNITED STATES

The United States has a direct interest in this appeal, which focuses on a movie theater's obligations under Title III of the Americans with Disabilities Act, 42 U.S.C. 12181 *et seq.*, to provide auxiliary aids and services to "ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals." 42 U.S.C. 12182(b)(2)(A)(iii). Specifically, this case concerns whether Title III may require movie theaters to exhibit movies with closed captions and video descriptions for their patrons with sensory disabilities. The Department of Justice is authorized to investigate complaints under Title III of the ADA and to bring suit in particular cases. 42 U.S.C. 12188. Under this authority, the Department has entered into settlement agreements with public accommodations that require them to exhibit movies with closed captions. The district court's holding thus conflicts with the Department's past enforcement efforts, and has the potential to interfere with the Department's future enforcement efforts.

Moreover, pursuant to statutory authorization, the Attorney General has promulgated regulations imposing specific requirements on public accommodations to achieve the Act's general prohibition against discrimination on the basis of disability. One of these regulations, 28 C.F.R. 36.303, requires public

accommodations (including movie theaters) to provide auxiliary aids and services "to ensure effective communication with individuals with disabilities."[1] The district court's holding conflicts with the Department's interpretation of this regulation.

The United States has authority to file briefs as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a) without leave of court. The United States is filing, contemporaneously with this Brief, a Motion Of The United States For Leave To File Its *Amicus Curiae* Brief Supporting Appellants And Urging Reversal Out Of Time because the deadline for filing an *amicus* brief supporting appellants has passed. See Fed. R. App. P. 29(e).

STATEMENT OF FACTS

1. This case concerns closed captions and video descriptions – two auxiliary aids commonly used by individuals with sensory disabilities. Captions are textual descriptions of a film's soundtrack, which include the film's dialogue and descriptions of other sounds. Open captions are similar to subtitles and are visible to everyone in the theater. 73 Fed. Reg. 34,530. A common method of open-

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[1] The Act defines auxiliary aids and services to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments," "taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments," and the "acquisition or modification of equipment or devices." 42 U.S.C. 12103.

captioning is achieved by "burning" the text onto a special print of a selected movie, which the studios make available to the theater owners and operators.[2] 73 Fed. Reg. 34,530. Closed-captioning displays the text only to patrons requesting captions.[3] 73 Fed. Reg. 34,530. Video description provides patrons who are blind or have low vision with an auditory representation of key visual elements of a film, such as actions, settings, facial expressions, costumes, and scene changes, during pauses in the film's soundtrack.[4] 73 Fed. Reg. 34,531.

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[2] Captions can also be superimposed onto the film at theaters. Advances in technology have evolved such that, by using digital technology, captions may now be turned on or off in digital format without the need for a special film print. 73 Fed. Reg. 34,530-34,531.

[3] A common type of closed-captioning used today allows viewers to see captions using a portable, clear panel. 73 Fed. Reg. 34,531. The panel reflects captions that are shown in reverse on an LED display mounted in the back of the theater. *Technical Bulletin: Theatrical Movie Captioning Systems*, U.S. Architectural and Transportation Board (Access Board) (June 2003), available at http://www.access-board.gov/adaag/about/bulletins/captioning.htm. The portable panel permits movie patrons to sit almost anywhere in the theater. *Ibid.* Rear Window Captioning, or RWC, is one technology in use today to achieve this form of closed-captioning. *Ibid.*

[4] Video description delivers narrated descriptions via infrared or FM listening systems so that patrons who are blind or have low vision can hear the descriptions on headsets without disturbing other audience members. 73 Fed. Reg. 34,531. The video descriptions are narrated and recorded onto an audiotape or disk that the movie studios provide to the movie theater. 73 Fed. Reg. 34,531. The descriptions can be synchronized with the film as it is projected. 73 Fed. Reg. 34,531.

Movie producers and distributors, not the movie theater owners or operators, determine what to caption and describe, the type of captioning to use, and the content of the captions and video description script. See, *e.g.*, Motion Picture Access, http://ncam.wgbh.org/mopix. These same producers and distributors assume the costs of captioning and describing movies. *Ibid.* For those with sensory disabilities to benefit from these technologies, movie theater owners and operators must purchase the equipment to display the captions and play the video descriptions in their theaters. 73 Fed. Reg. 34,530-34,531.

2. Harkins Amusement Enterprises, Inc. (Harkins) owns and operates several movie theaters (with a total of 262 screens) throughout Arizona. *Arizona* v. *Harkins Amusement Enters., Inc.*, 548 F. Supp. 2d 723, 725 n.1 (D. Ariz. 2008). None of these theaters exhibits closed captioned or described movies. *Id.* at 726.

The state of Arizona filed suit in state court alleging that Harkins violated the Arizonans with Disabilities Act (AzDA), A.R.S. 41-1492, by not providing auxiliary aids to individuals with sensory disabilities. Two individuals intervened as plaintiffs raising a claim under the ADA. Defendants removed the case to federal court and moved to dismiss the complaints under Rule 12(b) for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Defendants argued that plaintiffs seek impermissibly to alter the "content" of Harkins' goods and services, rather than

simply to ensure "access" to those goods and services. As such, defendants argued, plaintiffs' claim is outside the scope of the ADA.

3. The district court granted the motion. *Harkins Amusement*, 548 F. Supp. 2d at 732. The court noted that a "simple reading" of the ADA did not provide an answer in this case, but reasoned that "[t]he common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated." *Id.* at 727. The district court based its reasoning on cases in which courts (including this Court) rejected plaintiffs' claims that the ADA requires insurance companies to alter the content of their policies. See, *e.g.*, *Weyer* v. *Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000); *McNeil* v. *Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000), cert. denied, 531 U.S. 1191 (2001); *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999), cert. denied, 528 U.S. 1106 (2000). Based on these cases, the district court concluded that "[p]ublic accommodations must ensure that persons with disabilities have access to the services they provide (utilizing auxiliary aids and services if necessary), but are not required to alter or modify the content of those services." *Harkins Amusement*, 548 F. Supp. 2d at 728-729.

In reaching its decision, the district court rejected plaintiffs-intervenors' argument that showing closed captioned or described movies would *not* alter the

content of Harkins' services. The district court explained that "[c]aptioning changes audio elements into a visual format," and "[d]escriptions change visual elements into an audio format." *Harkins Amusement*, 548 F. Supp. 2d at 729. Such captions and descriptions, the district court reasoned, would "alter the form in which [Harkins] normally provides its services." *Ibid.* The district court also concluded that a movie theater was not required to provide captions or video descriptions to achieve a functionally equivalent service for persons with sensory disabilities because "[e]qual access does not mean equal enjoyment." *Ibid.* (quoting *Todd* v. *American Multi-Cinema, Inc.*, 2004 WL 1764686, at *4 (S.D. Tex. Aug. 5, 2004)).[5]

The district court's decision purported to rely on the ADA's legislative history, DOJ regulations, and Access Board Guidelines to support its decision. Specifically, the district court cited the House Report accompanying the passage of

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[5] The district court in *Todd* granted summary judgment to the defendant movie theaters on the ground that plaintiffs failed to show that requiring closed-captioning for every movie at every showing would not constitute an undue burden. 2004 WL 1764686, at *4; see also *Cornilles* v. *Regal Cinemas, Inc.*, 2002 WL 31469787 (D. Or. Mar. 19, 2002) (holding that defendant movie theaters do not need to install closed-captioning technology in all of its auditoriums because the cost is unreasonable as a matter of law); but see *Ball* v. *AMC Entm't, Inc.*, 246 F. Supp. 2d 17 (D.D.C. 2003) (holding that the ADA may require defendant movie theaters to exhibit closed captioned movies; reserving question of whether doing so would constitute an undue burden). This appeal does not present the issue whether exhibiting closed captioned or described movies would constitute an undue burden.

the ADA, which states that open-captioning of feature films playing in movie theaters is not required, see H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 108 (1990); the preamble to DOJ regulations, which contains similar language, see 28 C.F.R. Pt. 36, App. B, Subpt. C ("Movie theaters are not required by § 36.303 to present open-captioned films."); and, the Preamble to the Accessibility Guidelines (ADAAG) established by the Architectural and Transportation Barriers Compliance Board (Access Board), which state that movie theaters are not required to provide captioned films. See *ADA Accessibility Guidelines for Buildings and Facilities*, 69 Fed. Reg. 44,084, 44,138 (July 23, 2004). This appeal followed.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6). *Outdoor Media Group, Inc.* v. *City of Beaumont*, 506 F.3d 895, 899 (9th Cir. 2007). When reviewing a motion to dismiss, this Court may "generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Id.* at 899-900. This Court must accept as true the factual allegations in the complaint and construe the pleadings in the light most favorable to the nonmoving party. *Id.* at 900.

The district court's interpretation of the ADA is a question of law subject to *de novo* review. *Molski* v. *Foley Estates Vineyard and Winery*, 531 F.3d 1043, 1046 (9th Cir. 2008).

ARGUMENT

This appeal is from the dismissal of the complaints on the ground that exhibiting closed captioned and described movies would alter the content of a movie theater's service and are therefore not required by the ADA. This brief argues that closed captions and video descriptions are auxiliary aids that permit individuals with sensory disabilities to enjoy a movie theater's service within the limitations of their disabilities, and that closed captions and descriptions in no way change a movie theater's service of exhibiting movies. The district court misconstrued and misapplied the ADA when it concluded otherwise.

I

AUXILIARY AIDS AND SERVICES ENSURE THAT PERSONS WITH DISABILITIES ARE NOT EXCLUDED FROM A PUBLIC ACCOMMODATION'S GOODS AND SERVICES

Congress enacted the ADA in 1990 to remedy widespread discrimination against individuals with disabilities. Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and

pervasive social problem." 42 U.S.C. 12101(a)(2). Congress found that discrimination against individuals with disabilities "persists in such critical areas as * * * public accommodations * * * [and] recreation." 42 U.S.C. 12101(a)(3). Congress noted that such discrimination includes "outright intentional exclusion" as well as the "failure to make modifications to existing facilities and practices." 42 U.S.C. 12101(a)(5). Congress thus concluded that there was a "compelling need" for a "clear and comprehensive national mandate" to eliminate discrimination against individuals with disabilities, and to integrate them "into the economic and social mainstream of American life." S. Rep. No. 101-116, p. 20 (1989); H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 50 (1990).

Title III of the ADA broadly prohibits a covered public accommodation from discriminating against any person on the basis of that person's disability "in the full and equal enjoyment" of the public accommodation's goods and services. 42 U.S.C. 12182(a). Moreover, Title III specifically prohibits covered public accommodations from affording an unequal or lesser service to individuals with disabilities than is offered to individuals without disabilities. 42 U.S.C. 12182(b)(1)(A)(ii). Discrimination under Section 12182(a) includes failure "to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other

individuals because of the absence of auxiliary aids and services." 42 U.S.C. 12182(b)(2)(A)(iii). Individuals who have been denied access to goods or services because of the absence of auxiliary aids have been "excluded" and "denied the opportunity" to benefit from those goods and services. 42 U.S.C. 12182(b). A public accommodation is not required to provide a person with a disability a requested auxiliary aid or service, however, if doing so "would fundamentally alter the nature" of the goods and services being offered, or "would result in an undue burden." 42 U.S.C. 12182(b)(2)(A)(iii). The ADA defines auxiliary aids and services as "effective methods of making aurally delivered materials available to individuals with hearing impairments," "effective methods of making visually delivered materials available to individuals with visual impairments," and "acqui[ring] or modif[ying] * * * equipment or devices." 42 U.S.C. 12103(1). The ADA specifically identifies a movie theater as a public accommodation. 42 U.S.C. 12181(7)(C).

The Department has issued regulations to carry out the provisions of Title III. 42 U.S.C. 12186(b). The regulations mirror in part the language of the statute, in that they require public accommodations to "take those steps that may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the

absence of auxiliary aids and services," unless "taking those steps would fundamentally alter the nature of the goods [and] services" being offered, "or would result in an undue burden." 28 C.F.R. 36.303(a).

Like the statute, the regulations define auxiliary aids and services to include "effective methods of making aurally delivered materials available to individuals with hearing impairments," and "effective methods of making visually delivered materials available to individuals with visual impairments." 28 C.F.R. 36.303(b). The regulations include specific examples of auxiliary aids and services that may be required by the ADA, including "open and closed captioning," "audio recordings," and the "[a]cquisition or modification of equipment or devices." 28 C.F.R. 36.303(b). Thus, under the regulations, closed captions and audio recordings are two auxiliary aids that may be required of theater owners, unless providing them would work a fundamental alteration of the theaters' service or pose an undue hardship.

The Department of Justice's interpretation of these regulations is entitled to substantial deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); see also *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations."); *Oregon Paralyzed*

Veterans of Am. v. *Regal Cinemas, Inc.*, 339 F.3d 1126, 1131 (9th Cir. 2003) (same), cert. denied, 542 U.S. 937 (2004).

II

THE DISTRICT COURT DID NOT APPLY THE AUXILIARY AIDS PROVISION OF THE ADA

Although the district court here acknowledged the auxiliary aids provision of the statute, *Arizona* v. *Harkins Amusement Enterprises, Inc.*, 548 F. Supp. 2d 723, 728-729 (D. Ariz. 2008), the court did not apply it or the regulation to this case. The district court incorrectly concluded that a movie theater cannot be required to show closed captioned or described movies because doing so would alter the *content* of the theater's services and require the theater to provide a different service. *Id.* at 729. The district court explained that because "theaters offer motion pictures to the public in a specific format which combines audio and visual elements," providing captions and descriptions would require a movie theater to "alter the form in which it normally provides services"; that is, closed captions would "change[] audio elements into a visual format" and descriptions would "change visual elements into an audio format." *Ibid.* The court's analysis was incorrect.

A. Closed Captions And Video Descriptions Are The Means Of Delivering The Theater's Service Of Exhibiting Movies

The service at issue here is screening movies. *Fortyune* v. *American Multi-Cinema, Inc.*, 364 F.3d 1075, 1084 (9th Cir. 2004) (identifying a movie theater's service as "screening films"); *Ball* v. *AMC Entm't, Inc.*, 246 F. Supp. 2d 17, 24 (D.D.C. 2003) (same). The use of auxiliary aids to make that service available to those with sensory disabilities does not change that service.

As the text of the statute and the regulations make clear, auxiliary aids are *the means* by which individuals with sensory disabilities gain access to a public accommodation's goods and services. 42 U.S.C. 12182(b)(2)(A)(iii); 28 C.F.R. 36.303 (explaining that public accommodations are required to provide auxiliary aids and services so that individuals with disabilities are not denied the public accommodation's services); see also *Independent Living Res.* v. *Oregon Arena Corp.*, 982 F. Supp. 698, 734 n.49 (D. Or. 1997) ("[I]t is essential to accurately identify the principal goods or services that are being provided, and to distinguish them from * * * the *means* for perceiving those services (*e.g.*, hearing, seeing, closed captioning, assistive listening devices), * * * which a public accommodation may, in some instances, be required to alter in order to facilitate * * * receipt of the principal goods and services by persons with disabilities.); *Feldman* v. *Pro Football, Inc.*, 579 F. Supp. 2d 697, 709 (D. Md. 2008) (holding

that the ADA requires a sports stadium to make the aural content broadcasted in the stadium accessible to persons who are deaf or hard of hearing because "[w]ithout some form of auxiliary aid or service, [persons who are deaf or hard of hearing] would not have equal access" to the stadium's aural information). Thus, captions and video descriptions are simply the means by which people with sensory disabilities achieve "the full and equal enjoyment," 42 U.S.C. 12182(a), of a movie theater's service – which is screening films.

The district court's reasoning renders the ADA's auxiliary aids requirement meaningless. The district court is correct that captioning and descriptions alter the format by which movies are provided to those with sensory disabilities. *Harkins Amusement*, 548 F. Supp. 2d at 729. But that is precisely the purpose of auxiliary aids (such as captioning, sign language interpretation, audio recordings, Brailled materials, etc.): to change the means of delivering the service so that the service is accessible to people with disabilities. 42 U.S.C. 12182(b)(2)(A); 28 C.F.R. 36.303; *Oregon Arena Corp.*, 982 F. Supp. at 734 n.49. Similarly, sign language interpreters, who convert aurally delivered information into visual components and vice versa, are an auxiliary aid, *or means*, of making aurally delivered information accessible to persons who are deaf or hard of hearing. 28 C.F.R. 36.303(b)(1). And courts have found violations of the Rehabilitation Act and the ADA in cases

where public accommodations or entities failed to provide sign language interpreters. See, *e.g.*, *Rothschild* v. *Grottenthaler*, 907 F.2d 286, 293 (2d Cir. 1990) (finding that Section 504 of the Rehabilitation Act required a school system to provide an enrolled hearing student's deaf parents with a sign language interpreter at "school-initiated conferences incident to the academic and/or disciplinary aspects of their child's education"); see also *United States* v. *Board of Trustees for the Univ. of Alabama*, 908 F.2d 740 (11th Cir. 1990) (holding that the Rehabilitation Act requires universities to pay for sign language interpreters for students with hearing disabilities); *Soto* v. *City of Newark*, 72 F. Supp. 2d 489 (D.N.J. 1999) (finding Municipal Court liable under the ADA for failing to provide sign language interpreters for couple getting married by the Court).

Moreover, the Justice Department has entered into various settlement agreements with public accommodations that require sign language interpretation of their live performances. See, *e.g.*, *Settlement Agreement between the United States of America and Sledge, Inc., D/B/A The 9:30 Club, under the Americans with Disabilities Act in Department of Justice Complaint 202-35-116* (December 1999), available at http://www.usdoj.gov/crt/foia/dcsledge930.php (requiring the place of entertainment to provide sign language interpretation of its performances to "ensure that customers with hearing impairments who use sign language to

communicate are not excluded from or denied the benefits of the services or entertainment offered in the Club"); *Settlement Agreement between the United States of America and the New Orleans Jazz and Heritage Foundation, Inc.* (December 2001), available at http://www.ada.gov/nojazz.htm#anchor262953 (requiring sign language interpretation of musical events and performances at "Jazz Fest"). Although doing so "changes audio elements into a visual format," *Harkins Amusement*, 548 F. Supp. 2d at 729, it does not alter the content of the public accommodation's goods and services; rather, it is a means "to ensure effective communication with individuals with disabilities." 28 C.F.R. 36.303(c). The district court's interpretation of the ADA, however, would open the door for any public accommodation that delivers its service by aural or visual means to avoid providing auxiliary aids to its patrons with sensory disabilities, because those aids would necessarily change aural content to visual content, and vice versa. Such an interpretation is contrary to the language and purposes of the ADA.

In reaching its conclusion, the district court relied upon a series of cases that considered the coverage of insurance policies under the ADA and upheld limitations on coverage for particular disabilities. *Harkins Amusement*, 548 F. Supp. 2d at 727-729; see *Weyer* v. *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) (upholding differences in coverage provided for

physical and mental illnesses, reasoning that the ADA does not regulate the terms of insurance policies);[6] *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) (upholding limitations on coverage for particular illnesses, reasoning that the ADA "does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled"), cert. denied, 528 U.S. 1106 (2000); *McNeil* v. *Time Ins. Co.*, 205 F.3d 179, 186 (5th Cir. 2000) (upholding limitations on coverage for particular illnesses, reasoning that the ADA regulates access to a public accommodation's goods and services, but not the content of those goods and services), cert. denied, 531 U.S. 1191 (2001). Each of these courts reasoned that the ADA does not require a seller to alter the content of its goods and services. *Weyer*, 198 F.3d at 1115; *Doe*, 179 F.3d at 559; *McNeil*, 205 F.3d at 187-188. And in explaining its ruling, each court used the example of a bookstore that would not be required to alter its inventory in order to stock Brailled books. *Weyer*, 198 F.3d at 1115; *Doe*, 179 F.3d at 559; *McNeil*, 205 F.3d at 187.

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[6] In *Weyer*, this Court entered summary judgment for the defendant insurance company on three grounds: (1) that the insurance carrier was not a public accommodation under Title III, (2) that Title III only relates to the availability of goods and services and not the content of the goods, and (3) that the ADA's safe harbor provision for insurance carriers applies to the defendant. *Weyer*, 198 F.3d at 1114. This Court explained that each reason was an independently sufficient basis for rejecting the plaintiff's suit. *Ibid.*

The district court's reliance on these cases is misplaced for three reasons. First, those cases are about altering the *content* of insurance policies; they are not about using auxiliary aids to access the content of a good or service.

Second, the rationale of those cases is that if the ADA required a public accommodation to provide different goods or services, there would be no way to limit its scope. See *McNeil*, 205 F.3d at 187 (explaining that the ADA must have "some practical, common sense boundaries," but reasoning that if the ADA "regulate[d] the content of goods and services, there seem to be no statutory boundaries," thus concluding that there is "no non-arbitrary way to distinguish regulating the content of some goods from regulating the content of all goods").

In contrast, a requirement that auxiliary aids be provided does not threaten to make the statute boundless. The holdings of the insurance cases would have relevance here only if the plaintiffs required auxiliary aids and services to access an insurance company's service. Nothing in those cases, however, suggests that an insurance company could refuse to provide a plaintiff who was blind or had low vision and was unable to read the details of the company's standard coverage policy with an appropriate auxiliary aid (*e.g.*, a reader or Brailled version of the policy) to enable the plaintiff to understand, or "access," the policy. 42 U.S.C. 12182(a); 42 U.S.C. 12182(b)(2)(A)(iii); 28 C.F.R. 36.303. Indeed, this Court

recognized as much when it explained generally that "whatever goods or services the [public accommodation] provides, it cannot discriminate on the basis of disability in providing enjoyment of those goods and services." *Weyer*, 198 F.3d at 1115. Nothing in this Court's reasoning suggests that, if necessary to ensure "enjoyment of those goods and services," auxiliary aids and services would not be required. *Ibid.*

Third, the bookstore example each case relied upon has no application here. The Department's regulations make clear that a public accommodation is not required to "alter its inventory to include accessible or special goods that are designed for, or facilitate use by, individuals with disabilities." 28 C.F.R. 36.307(a). The regulations include "Brailled versions of books" and "closed-captioned video tapes" as examples of such "accessible or special goods." 28 C.F.R. 36.307(c). Thus, a bookstore that does not normally stock Brailled books as part of its regular inventory would not be required to do so under the ADA.[7] But, unlike a retail bookstore, a movie theater does not stock or sell movies as a good – it exhibits them as a service. See 28 C.F.R. 36.104 (differentiating between public accommodations that are places of "exhibition or entertainment," and those that are

[7] A bookstore would, however, be required to order Brailled books for its patrons if (1) it normally makes special requests for unstocked goods, and (2) the accessible good (*i.e.*, Brailled book) could be obtained from the bookstore's customary supplier. 28 C.F.R. 36.307(b).

"sales or rental establishment[s]"); see also *Fortyune*, 364 F.3d at 1084 (identifying a movie theater's service as "screening films"); *Ball* v. *AMC Entm't, Inc.*, 246 F. Supp. 2d 17, 24 (D.D.C. 2003) (explaining that movie theaters are not similarly-situated to bookstores that provide goods because movie theaters provide the service of *screening* first run movies).

Even assuming, *arguendo*, that a movie is a "good" for purposes of 28 C.F.R. 36.307, a movie theater's inventory *already includes captioned and described movies* – as they are provided to the theater by the movie studios. A movie theater, therefore, would not need to alter its inventory in order to show closed captioned or described movies; rather, it would only have to acquire the necessary equipment to exhibit the closed captioned and described movies it currently has in its inventory. 28 C.F.R. 36.303(b)(3) (including "[a]cquisition or modification of equipment or devices" as an example of an auxiliary aid or service under the ADA). The proper analogy, then, is to a bookstore that *has* Brailled books in its current stock, but will not provide them to their patrons who are blind or have low vision. That is clearly prohibited by the ADA. 42 U.S.C. 12182(a); see also *Weyer*, 198 F.3d at 1115.

B. Providing Closed Captions And Video Descriptions Does Not Fundamentally Alter The Nature Of The Theater's Service

Although never specifically holding that providing closed captions or video descriptions would "fundamentally" alter the nature of a theater's service, the district court nonetheless concluded that providing closed captions or video descriptions would impermissibly require a movie theater to alter its goods and services. *Harkins Amusement*, 548 F. Supp. 2d at 728-729; see also *id.* at 728 (explaining that while the ADA "requires public accommodations to ensure persons with disabilities have *access* to the same services that are offered," it "does not require public accommodations to offer *different services*") (emphasis added). The district court seems to have concluded that a public accommodation cannot be required to make *any* alteration in the way a service is delivered. But the statute excuses only *fundamental* alterations. 42 U.S.C. 12182(b)(2). A "fundamental alteration" is a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered. *Americans with Disabilities Act Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, III-4.3600, available at http://www.ada.gov/taman3.html; see, *e.g.*, *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 683 (2001) (concluding that a requested modification was not "inconsistent with the fundamental character" of the service provided); see also *Fortyune*, 364

F.3d at 1084 (explaining that requiring a movie theater to ensure that companion seats are available to the companions of wheelchair-bound patrons would have a "negligible effect – if any – on the nature of the service provided by [a theater]: screening films"). In *PGA Tour*, the Supreme Court did not find a fundamental alteration in a disabled golfer's use of a golf cart while others walked the golf course. As the Court there said, "[t]he ADA admittedly imposes some administrative burdens on the operators of places of public accommodation that could be avoided by strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may indiscriminately preclude access by qualified persons with disabilities." *PGA Tour*, 532 U.S. at 690.

As discussed above, a movie theater exhibits movies. See *Fortyune*, 364 F.3d at 1084; *Ball*, 246 F. Supp. 2d at 24. Exhibiting movies with closed captions and video descriptions would in no way alter – fundamentally or otherwise – the movie theater's service. 42 U.S.C. 12182(b)(2)(A)(iii). For each and every patron in the theater who does not have a sensory disability and who does not request closed captions or video descriptions, the "fundamental character" of the movie's exhibition remains wholly unchanged. *PGA Tour*, 532 U.S. at 683. For those patrons *with* sensory disabilities, the closed captions and video descriptions simply

make the movie's exhibition accessible – as is required by the ADA. 42 U.S.C. 12182(a); 42 U.S.C. 12182(b)(2)(A)(iii).

Finally, the district court erred by not placing the burden on the theater to prove a fundamental alteration.[8] *Lentini* v. *California Ctr. for the Arts, Escondido*, 370 F.3d 837, 845 (9th Cir. 2004); see also *Colorado Cross Disability Coal.* v. *Hermanson Family Ltd.*, 264 F.3d 999, 1003 (10th Cir. 2001) (describing the fundamental alteration component of 42 U.S.C. 12182(b)(2)(A)(iii) as an affirmative defense, and explaining that the public accommodation "bears the burden of persuasion regarding fundamental alteration"); *Johnson* v. *Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997) (same for claims brought under 42 U.S.C. 12182(b)(2)(A)(ii)); see also *Mayberry* v. *Von Valtier*, 843 F. Supp. 1160, 1166 (E.D. Mich. 1994) (shifting burden of proof to defendant in subsection (iii) case).

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[8] Subsection (iii) states that discrimination includes: "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, *unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden*." 42 U.S.C. 12182(b)(2)(A)(iii) (emphasis added).

III

NOTHING IN THE ADA'S LEGISLATIVE HISTORY OR ITS IMPLEMENTING REGULATIONS INDICATES THAT MOVIE THEATERS ARE NOT REQUIRED TO PROVIDE CLOSED CAPTIONED AND DESCRIBED MOVIES

Contrary to the district court's ruling, nothing in the text of the statute or its accompanying regulations suggests that a movie theater could never be required to exhibit closed captioned and described movies for its patrons with sensory disabilities.

A. The ADA's Legislative History Does Not Prohibit Closed-Captioning

The district court erroneously concluded that "[t]he legislative history of the ADA * * * confirms that movie theaters are not required to provide captioning." *Arizona* v. *Harkins Amusement Enters., Inc.*, 548 F. Supp. 2d 723, 730 (D. Ariz. 2008). The district court relied on the following passage from the House Committee Report:

> Open-captioning, for example, of feature films playing in movie theaters, is not required by this legislation. Filmmakers, are, however, encouraged to produce and distribute open-captioned versions of films, and theaters are encouraged to have at least some pre-announced screenings of a captioned version of feature films.

H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 108 (1990).

The district court's reliance on this passage is misplaced for two reasons. First, the passage above addresses only *open*-captioning; it makes no mention of

closed-captioning technology. This omission is understandable, however, given that when Congress passed the ADA there were no systems available for providing closed-captioning in theaters. See *Technical Bulletin: Theatrical Movie Captioning Systems*, U.S. Architectural and Transportation Board (Access Board) (June 2003), available at http://www.access-board.gov/adaag/about/bulletins/captioning.htm ("When the ADA was signed into law in 1990, there were no systems available for providing closed captions in theaters; only open-captioning of theatrical films had been in use at that time."). Because open captions were physically integrated into the film itself, a movie theater could not show an open captioned movie unless it was in possession of one of the very limited number of captioned movies created by the movie studios and distributed to the movie theater. The district court's decision, however, incorrectly applies the House Report's outdated discussion of *open*-captioning to all types of presently available captioning.

Second, the district court ignored other language in the same report noting that future technological advances could be expected to require public accommodations to provide auxiliary aids and services that were previously unavailable or infeasible.

> The Committee wishes to make it clear that technological advances can be expected to further enhance options for making meaningful and effective

> opportunities available to individuals with disabilities. *Such advances may require public accommodations to provide auxiliary aids and services in the future* which today would not be required because they would be held to impose undue burdens on such entities.
>
> Indeed, the Committee intends that *the types of accommodation and services* provided to individuals with disabilities * * * *should keep pace with the rapidly changing technology of the times*.

H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 108 (1990) (emphasis added).

Congress explicitly recognized that, as technologies develop, public accommodations will be obligated to incorporate those technologies into their long-standing duty to provide appropriate auxiliary aids and services under the ADA. See H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 108 (1990). Thus, a statement made nearly 20 years ago about open-captioning cannot for all time relieve public accommodations of providing alternative auxiliary aids (*e.g.*, a different type of captioning altogether) to individuals with disabilities. *Ibid.*; see also *Ball* v. *AMC Entm't, Inc.*, 246 F. Supp. 2d 17, 22 (D.D.C. 2003) ("[T]he isolated statement that open captioning of films in movie theaters was not required in 1990 cannot be interpreted to mean that [movie theaters] cannot *now* be expected and required to provide closed captioning of films.").

B. Nothing In The Regulations Implementing The ADA Indicates That Closed-Captioning Cannot Be Required

The district court erroneously concluded that "the ADA regulations * * * support an interpretation that Harkins is not required to provide [open or closed] captioning for the hearing impaired." *Harkins Amusement*, 548 F. Supp. 2d at 730. The district court based its conclusion in part on the regulation's preamble, which states that "[m]ovie theaters are not required * * * to present open-captioned films." 28 C.F.R. Pt. 36, App. B, Subpt. C. The district court misinterpreted the preamble to the regulations.

The district court's conclusion regarding the regulations suffers from the same infirmity as its conclusion regarding the statute's legislative history: the district court's decision incorrectly applies the regulations' statement about *open*-captioning to all types of available captioning. The regulations' requirement that hotels and hospitals provide televisions with closed caption decoder is instructive. See 28 C.F.R. 36.303(e) (requiring hospitals that provide televisions for their patients, and hotels, motels and other places of lodging that provide televisions in five or more guest rooms, to provide closed caption decoder services upon request).[9] At the time Congress passed the ADA, closed-captioning technology

[9] Although the ADA does not apply to television *broadcasters*, all televisions with screens larger than 13 inches that are made or imported into the

(continued...)

was available for television broadcasts and therefore the regulations required captioning. The regulations did not address closed-captioning of films, however, because the technology *did not yet exist*. See *Technical Bulletin: Theatrical Movie Captioning Systems*, U.S. Architectural and Transportation Board (Access Board) (June 2003), available at http://www.access-board.gov/adaag/about/bulletins/captioning.htm. Now that "technological advances * * * [are available] to further enhance options for making meaningful and effective opportunities available to individuals with disabilities," incorporating those technological advances is required under the ADA. H.R. Rep. No. 101-485(II), 101st Cong., 2d Sess. 108 (1990).

The district court nonetheless questioned "why the Attorney General would distinguish closed captioning or descriptions from open captioning in determining what is covered under the ADA." *Harkins Amusement*, 548 F. Supp. 2d at 731. As explained above, the regulation did not address closed captions because closed-captioning technology for films did not exist at the time the regulations were passed; therefore, there was no other form of captioning in existence from which to

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[9](...continued)
United States are required to provide closed captions. 47 U.S.C. 303(u); 47 U.S.C. 330(b). The FCC requires all licensed television broadcast stations to provide all of their non-exempt new video programming with closed captions. 47 C.F.R. 79.1(b)(1)(iv). Movie studios must therefore caption their movies prior to their release to cable and television media. See, *e.g.*, 47 C.F.R. 79.1.

distinguish open-captioning. Moreover, unlike open captions, closed captions in no way alter a theater's service (*i.e.*, screening movies) for persons without sensory disabilities. Only those patrons requesting closed captions will be able to view the captions.

In fact, the Department of Justice, in settlement agreements, *has* required movie theaters to provide closed captions under the ADA. For example, the Department and Walt Disney World Co. (Disney) signed an agreement under the ADA that obligated Disney to provide specific auxiliary aids for its patrons who are deaf or hard of hearing. See *Agreement Between the United States of America and Walt Disney World Co. Under the Americans With Disabilities Act Concerning the Use of Auxiliary Aids at Walt Disney World* (January 17, 1997), available at http://www.ada.gov/disagree.htm#anchor809008. In addition to sign language interpreters, ALDs and written aids, the agreement required Disney to provide closed captions for many of its attractions – *including Disney's Main Street Cinema*. *Id.* at Attachment A. The district court was thus incorrect in concluding that the Attorney General makes no distinction between open captions and closed captions in determining what is covered under the ADA. *Harkins Amusement*, 548 F. Supp. 2d at 731.

C. The Access Board's ADA Accessibility Guidelines Do Not Limit The Department's Authority To Address The Auxiliary Aids And Services Provision Of The ADA

The district court also relied in part on the Architectural and Transportation Barriers Compliance Board's (Access Board) ADA Accessibility Guidelines (ADAAG) when concluding that the ADA did not require Harkins to provide closed captions and video descriptions for its patrons with sensory disabilities. The Access Board is an independent federal agency composed of 13 individuals appointed by the President and representatives from 12 federal agencies, including the Department. 29 U.S.C. 792(a)(1). The ADA requires that the Department's regulations be "consistent with the minimum guidelines" issued by the Access Board, 42 U.S.C. 12186(c), but the Board's guidelines are not legally binding or enforceable. As this Court recently explained, "the Board establishes 'minimum guidelines' for Title III, but [the Department] promulgates its own regulations, which must be consistent with - but not necessarily identical to - the Board's guidelines." *Miller* v. *California Speedway Corp.*, 536 F.3d 1020, 1025 (9th Cir. 2008), petition for cert. pending, No. 08-782 (filed Dec. 15, 2008). Thus, the Attorney General is free to interpret the ADA more strictly than does the Access Board. *Ibid.*

In 2004, the Access Board issued ADA Accessibility Guidelines. In the preamble to these guidelines, the Access Board briefly discussed subject areas, including movie captioning, on which it received public comment but was not promulgating a rule. In that discussion, the Access Board stated that neither the ADAAG nor the ADA regulations "require captioning of movies for persons who are deaf." 69 Fed. Reg. at 44,138. But the Access Board lacks authority to adopt a general captioning requirement. The ADA authorizes the Access Board only to issue design guidelines for accessible buildings and facilities. The Board implicitly recognized in the preamble that its authority was limited to design and construction issues surrounding any built-in features that can help support the provision of captioning technology. The Access Board's observations about captioning are entitled to no weight and its decision not to establish a captioning or video description requirement in no way limits the authority of the Department to address these issues.

CONCLUSION

The district court's ruling dismissing the plaintiffs' complaint should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation required by Fed. R. App. P. 32(a)(7)(B) and 29(d). This brief was prepared using WordPerfect 12 and contains no more than 6994 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: February 6, 2009

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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