

No. 08-16075

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF ARIZONA *ex rel.* TERRY GODDARD, The Attorney General; THE
CIVIL RIGHTS DIVISION OF THE ARIZONA DEPARTMENT OF LAW,
Plaintiff/Appellant,

and

FREDERICK LINDSTROM, by and through his parent and legal guardian,
RACHEL LINDSTROM; 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
Case No. CV-07-703-PHX-ROS

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF THEATRE
OWNERS, INC. IN SUPPORT OF DEFENDANTS-APPELLEES AND
SEEKING AFFIRMANCE OF DISTRICT COURT ORDER

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CONSENT TO FILING

All parties to this action have consented to the filing of this brief by *amicus curiae* National Association of Theatre Owners, Inc.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rules 26.1, F.R.A.P., *amicus curiae* National Association of Theatre Owners, Inc. states as follows:

National Association of Theatre Owners, Inc. is a not-for-profit corporation established under the laws of the State of New York. It has no parent corporation. It is a membership corporation and not a stock corporation, and has no shares, publicly-traded or otherwise.

STATEMENT OF INTEREST

The National Association of Theatre Owners, Inc. (“NATO”) is the national trade association of the motion picture theater industry. Its members operate over 29,000 motion picture screens located in all 50 states. NATO’s membership includes the largest cinema chains in the world, as well as hundreds of independent theater owners.

NATO has a substantial interest on behalf of its members in the issues raised in this case. Retroactive application of the costs of purchasing captioning equipment for motion picture theater auditoria structures built in good-faith conformity to the Americans with Disabilities Act, Title III, 42 U.S.C. § 12181 *et*

seq. (“ADA”), as publicly interpreted by the Access Board and the Department of Justice, would be astronomical—well over \$400,000,000.¹

NATO and its members come to this issue with a history of proactive efforts in support of the letter and spirit of disability law. In May 1989, NATO’s Chairman testified before the Senate Labor and Human Resources Committee in support of passage of the ADA, signed into law the following year. NATO has supported the ADA regulations requiring that every motion picture theater auditorium be equipped with assistive listening systems.

NATO prepared a comprehensive manual designed to give theater owners guidance on ADA compliance. Completed in 1991 and entitled *A Detailed Analysis of Specific Actions That Should Be Taken By a Motion Picture Theatre to Comply With the ADA*, the manual was distributed to approximately 600 theater owners, and many hundreds of copies have been distributed since. In August

¹ In *Todd v. American Multi-Cinemas, Inc.*, No. Civ. H-02-1944, 2004 WL 1764686, *2 n.5 (S.D. Tex. Aug. 5, 2004), the court found that a captioning requirement would cost three major theater chains \$76.8 million, \$39 million, and \$28 million, respectively. This massive investment would be required just to provide the necessary closed captioning playback equipment for the 11,508 auditoriums operated by those companies at the time, or \$12,496 per auditorium. The organization responsible for the Rear Window closed captioning technology currently estimates that “the cost of the equipment for providing both Rear Window captions and DVS Theatrical is estimated at approximately \$11,000.” See MoPix Motion Picture Access, <http://ncam.wgbh.org/mopix/faq.html#providing>. Additionally, cinema operators incur several thousand dollars in installations costs. Even if the lower cost of \$11,000 per auditorium is used, total installations of the country’s current 38,939 auditoriums would cost \$428,329,000.

1999, NATO filed a petition for rulemaking before the Attorney General of the United States requesting a rule that would require wheelchair seating in stadium-style motion picture theaters.

The motion picture theater industry has acted responsibly in striving to make theaters accessible to persons with disabilities, including the provision of: (1) handicap parking; (2) accessible theater entrances; (3) lowered box office counters; (4) lowered concession stands; (5) handicap-accessible bathrooms; (6) wheelchair seating; (7) companion seating; (8) lowered drinking water fountains; (9) assisted listening systems; and (10) special training for employees in assisting persons with disabilities. NATO has encouraged motion picture theaters to voluntarily show captioned films.

In comments filed in the Department of Justice ADA rulemaking proceeding in 2008, NATO explained that the industry was beginning the conversion to digital technology and that any attempt to develop a rule that imposed captioning requirements on the industry, if appropriate at all, was premature until it could be determined what captioning standards would be included in digital cinema transmissions and until competitive equipment reflecting those standards becomes commercially available.

STATEMENT OF THE CASE

This appeal arises out of the United States District Court's grant of defendants' motions to dismiss. The motions presented, *inter alia*, the issue of whether the ADA requires movie theaters to provide captioned movies for patrons who are hearing impaired and audio descriptions for patrons who are seeing impaired.

DISTRICT COURT DECISION

The district court correctly recognized the threshold legal question for application of the ADA: would the desired accommodation provide access to existing goods or services, or would the desired accommodation compel different goods or services? The court concluded that "the requested captions and descriptions would modify the content of the services Harkins offers," and accordingly held that the ADA did not compel Harkins to provide them. *Arizona ex rel. Goddard v. Harkins Amusement Ent.*, 548 F. Supp. 2d 723, 731 (D. Ariz. 2008).

In reaching its decision, the district court analyzed the statutory language of the ADA, its legislative history, DOJ's implementing regulations and the Architectural and Transportation Barrier Compliance Board ("Access Board") ADA accessibility guidelines. Based upon this careful review, the court concluded that the common-sense intent of the Act is to regulate access to goods and services

offered, not the *content* of goods or services. *Id.* at 727. The ADA “does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided.” *Id.*, quoting *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) and citing *Doe v. Mutual of Omaha, Ins. Co.*, 179 F.3d 557, 560 (7th Cir. 1999); *McNeil v. Time Ins. Co.*, 205 F.3d 179, 186 (5th Cir. 2000).

The district court rejected the plaintiffs’ claims that the auxiliary aids and services provision of 42 U.S.C. § 12182(b)(2)(A)(iii) expanded the definition of discrimination under § 12182(a). Citing the plain language of the statute—“[f]or purposes of subsection (a) of this section, discrimination includes...”—the court reasonably concluded that the auxiliary aids and services provision elaborated a subset of discrimination prohibited by § 12182(a). It did not create a new category of discrimination. 548 F. Supp. 2d at 728. In other words, the threshold question, regardless of available auxiliary aids and services, remains: does the desired accommodation require different goods or services than those provided?

The district court further concluded that *Weyer*, *McNeil*, and *Doe*, were not inapposite simply because they considered insurance coverage rather than feature films. *Id.* The court recognized that the appellate courts’ reasoning applied equally to goods and services. Thus, for the same reason that a bookstore cannot discriminate against persons with disabilities in granting access to books, but are

not obligated to make Braille books available, theater owners are not obligated to make a different service—captioned movies—available. *Id.* Under either scenario, public accommodations must ensure that persons with disabilities have access to the actual services provided, but are not required to alter the content of those services. *Id.*

The district court further rejected plaintiffs’ arguments that captions and descriptive audio would not alter content. Plaintiffs’ arguments were premised on its assertions that: (1) the defendants would not be required to show any movies that it would not otherwise show at its theater; (2) the auxiliary aids requested would only require the defendants to provide a “functionally equivalent service for people with sensory disabilities;” and (3) film studios provide captions of some movies at no additional costs on a separate CD-ROM disk. *Id.* at 729.

In rejecting plaintiffs’ first argument, the court recognized the truism in the movie industry that a captioned movie requires a theater owner “to alter the form in which it normally provides its services.” *Id.* In rejecting the second argument—that the demanded accommodations were merely functional equivalents—the court posed the quintessential judicial consideration of how that argument could ever be limited. While recognizing that the ADA prohibits discrimination “on the basis of disability in the full and equal enjoyment” of services, the court concluded that this

language must “be interpreted to have some practical, common sense, boundaries.”

Id., quoting *McNeil v. Times Ins. Co.*, 205 F.3d at 187.

The unvarnished and sober truth is that in many, if not most, cases, the disabled simply will not have the capacity or ability to enjoy the goods or services of an establishment “fully” and “equally” compared to the non-disabled. There would seem to be no statutory boundary if the ADA regulates the content of services.

Id. (citations omitted).

Finally, the court held that a movie theater is not required to change the content of the services it offers merely because additional content is offered to theaters free of charge.² “The expense a public accommodation incurs to provide auxiliary aids and service goes to the undue burden limitation in § 12182(b)(2)(A)(iii), not the scope of the ADA’s prohibition against discrimination in §12182(a).” *Id.* at 729-30. In other words—and this is a key issue before this Court—plaintiff-appellants wish to litigate an “undue burden” case when the district court correctly found that it is unnecessary to engage in this analysis because there was no discrimination.

Plaintiffs-appellants’ misdirected “undue burden” argument ignores the district court’s analysis of legislative history—which speaks directly to the issue of

² As the district court recognized, the additional content is not really free of charge, as theaters must still purchase and install expensive equipment in order to enable persons with disabilities to view the captions or hear the descriptions. 548 F. Supp. 2d at 730, n.9.

captioning in movie theaters. The district court noted the obvious, *id.* at 730, that the House Committee Report states: “[o]pen-captioning, for example, of feature films playing in movie theaters, is not required by this legislation.” H.R. Rep. No. 101-485(II) at 108 (1990), as *reprinted* in 1990 U.S.C.C.A.N. 303, 391. DOJ, with congressionally delegated responsibility for implementing Title III of the ADA, has echoed this legislative history: “Movie theaters are not required by § 36.303 to present open-captioned films.” *Id.* at 731, *citing* 28 C.F.R. Pt. 36, App. B(C).

Plaintiffs sought to evade the simple force of this congressional declaration by arguing that the same report requires places of public accommodation “to keep pace with improvements in technology.” The court appropriately noted that the requirement to keep pace with technology meant simply that “what was once too burdensome may become practical as technology advances.” *Id.*, *citing* 42 U.S.C. § 12182(b)(2)(A)(iii) (defining discrimination to include the failure to provide auxiliary aids and services unless doing so “would result in an undue burden”). In other words, “undue burden” analysis only becomes appropriate if the demanded accommodation seeks access to—rather than alteration of—the goods or services.

Finally, the court recognized that its decision accorded with the overwhelming weight of authority of cases construing the Act. *See, e.g., Weyer; McNeil; Doe; and Todd v. American Multi-Cinemas, Inc.*, No. Civ. H-02-1944, 2004 WL 1764686 (S.D. Tex. Aug. 5, 2004). The court disagreed with the lone

dissenting view in *Ball v. AMC Entertainment, Inc.*, 246 F. Supp. 2d 17 (D.D.C. 2003), which was predicated on legislative history about keeping pace with changing technology. Here, the district court recognized that while the legislative history and the Act reflect a need to consider new technology, such advances do not change the scope of the ADA, which is limited to the actual goods and services offered. Thus, the Court need not reach the question of what technological advances may make possible if the desired accommodation is a different good or service. Without that common-sense limitation, ADA mandates would have no principled boundaries. Accordingly, the court held that:

[G]iven the language of §12182(b)(2)(A)(iii), the reasoning in *Weyer*, *McNeil*, and *Doe*, the legislative history, and the ADA regulations and guidelines, the Court concludes that the ADA does not require Harkins to provide captions or descriptions. Section 12182(b)(2)(A)(iii) requires public accommodations to ensure that persons with disabilities have access to the services they provide (utilizing auxiliary aids and services if necessary), but does not require public accommodations to alter or modify the content of the services. The requested captions and descriptions would modify the content of the services Harkins offers.

548 F. Supp. 2d at 731.

SUMMARY OF ARGUMENT

The plaintiffs seek to require theater owners to change the nature of the services they offer in order to meet the needs of hearing impaired and vision impaired people. Specifically, plaintiffs seek an order compelling theater owners to caption and describe the films they display. The relief plaintiff seeks is not an

available remedy under the ADA. While the ADA requires a public accommodation to make its products or services reasonably accessible to all, it does not require a public accommodation to offer products or services different from those it already provides.

ARGUMENT

I. DOJ REGULATIONS AND DELIBERATIONS INTERPRETING THE ADA SUPPORT THE DISTRICT COURT’S CONCLUSION THAT CAPTIONING IS NOT REQUIRED BECAUSE THE ADA DOES NOT REQUIRE ALTERATION OF GOODS AND SERVICES.

Congress enacted the ADA in 1990 to eliminate discrimination against individuals with disabilities. 42 U.S.C. § 12101, *et seq.* Title III of the ADA prohibits operators of public accommodations from discriminating against disabled persons “in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations.” 42 U.S.C. § 12182(a). In particular, the ADA prohibits a public accommodation from discriminating against persons with disabilities by (1) denying the disabled the opportunity to participate in or benefit from the goods or services provided, 42 U.S.C. § 12182(b)(1)(A)(i); (2) providing goods and services to the disabled that are not equal to those afforded other individuals, 42 U.S.C. § 12182(b)(1)(A)(ii); or (3) providing goods or services that are different or separate from those provided to others, unless doing

so is necessary to meet the needs of persons with disabilities. 42 U.S.C. § 12182(b)(1)(A)(iii).

Congress directed DOJ to promulgate regulations to implement the ADA and to provide more specific guidance regarding the obligations imposed on public accommodations. 42 U.S.C. § 12182(b). A public accommodation must make reasonable modifications to its policies, practices or procedures, when necessary to provide its goods and services to persons with disabilities, unless doing so would fundamentally alter the nature of the goods and services provided. 28 C.F.R. § 36.302. A public accommodation must make available necessary auxiliary aids or services, unless doing so would fundamentally alter the nature of the goods or services provided or result in an undue burden to the operator of the public accommodation. 28 C.F.R. § 36.303.

Section 36.307 of the Regulations makes clear that the “reasonable modifications of policies, practices and procedures” and “auxiliary aids and services” requirements are only intended to ensure the nondiscriminatory availability of the goods or services already offered by a public accommodation. A public accommodation is not required by Title III of the ADA to provide different or altered goods or services to meet the needs of persons with disabilities.

DOJ prepared a section-by-section analysis of its Regulations under Title III. *See* Preamble to Regulation of Nondiscrimination on the Basis of Disability by

Public Accommodations and in Commercial Facilities, July 26, 1991, published as Appendix B to the DOJ's ADA Regulations at 28 C.F.R. Part 36 (hereafter "Appendix B"). In Appendix B, DOJ analyzed each provision of the ADA Regulations and gave clarifying illustrations. DOJ's analysis of § 36.307 of the regulations leaves no doubt that a public accommodation is not required to change the nature or mix of the products or services it offers to meet the special requirements of the disabled:

Section 36.307 establishes that the rule does not require a public accommodation to alter its inventory to include accessible or special goods with accessibility features that are designed for, or facilitate use by, individuals with disabilities. As specified in Section 36.307(c), accessible or special goods include such items as Brailled versions of books, books on audio-cassettes, close-captioned video tapes, special sizes or lines of clothing and special foods to meet particular dietary needs.

The purpose of the ADA's public accommodation requirements is to insure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided. In other words, a book store, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but it is not required to stock close-captioned video tapes. The Department has been made aware, however, that the most recent titles in video tape rental establishments are, in fact, closed caption.

28 C.F.R. Part 36, Appendix B, Subpart C, discussion of § 36.307. Accordingly, just as a bookstore is not required to sell Braille books, and a video store is not required to rent or sell captioned video tapes, theater owners are not required by

the ADA to exhibit captioned films to meet the special needs of hearing-impaired individuals.

Finally, the Appendix to § 36.303 clarifies that “[m]ovie theaters are not required by § 36.303 to present open-captioned films.” 28 C.F.R. Pt. 36, App. B(C) (1992). DOJ has consistently taken the position that the current ADA regulations do not require motion picture theaters to show open or closed captioned films. Although DOJ has brought several enforcement actions against motion picture theater companies, DOJ has never alleged that a motion picture theater company violated the ADA by failing to show open or closed captioned films. Further, DOJ has never included in a negotiated settlement against a motion picture theater company a requirement that it show open or closed captioned films.

The Access Board—the agency charged with responsibility for developing ADA guidelines—has addressed the issue of captioning for motion pictures on two occasions. In April 2001, the Access Board issued a technical bulletin addressing available and developing technologies for exhibiting closed caption motion pictures. *See* Technical Bulletin #8: Theatrical Movie Captioning Systems, April 20, 2001. While indicating that the voluntary adoption of closed captioning for motion pictures would be beneficial to severely hearing impaired persons who cannot be helped by assisted listening devices, the Access Board made clear in the

accompanying April 20, 2001 Press Release that “[c]aptioning [is] ... not required by the Board’s ADA Accessibility Guidelines.”

In connection with its efforts to comprehensively revise and update the ADAAG, the Access Board again addressed the issue of movie captioning in its final rule, revising and updating its ADA Accessibility Guidelines “(ADAAG)”. *See* 69 Fed. Reg. 44084 (July 23, 2004). The Access Board confirmed that the “ADAAG, and the Department of Justice’s Regulations, do not require captioning of movies for persons who are deaf.” *Id.* at 44138.

DOJ recently issued a Notice of Proposed Rulemaking which posed the following questions in regard to film captioning:

Should the Department require that, one year after the effective date of this regulation, public accommodations exhibit all new movies in captioned format at every showing? Is it more appropriate to require captioning less frequently? Should the requirement for captioning be tied to the conversion of movies from film to the use of digital format? Please include specifics regarding how frequently captioning should be provided.

73 Fed. Reg. 34531.

In the preamble to the proposed rulemaking, DOJ states that it is “considering options under which it *might* require that movie theater owners and operators exhibit movies that are captioned for patrons who are deaf or hard of hearing.” *Id.* at 34530 (emphasis added); *see also id.* at 34531 (“[w]hile the Department of Justice has not required that the movie industry caption its

presentations...”). The preamble further acknowledges that DOJ is considering options under which “it *might* require that movie theater owners and operators exhibit movies with narrative descriptions.” *Id.* (emphasis added).

In sum, DOJ and the Access Board have consistently proclaimed that the remedy demanded by plaintiff-appellants is not presently available under the ADA. As addressed further below, DOJ may well wish to preserve its option to consider captioning rules (hence its *amicus* brief), but that *wish* fails to support the demanded accommodation in this case, and indeed contradicts it.

II. THE OVERWHELMING WEIGHT OF JUDICIAL AUTHORITY HOLDS THAT THE ADA DOES NOT REQUIRE A PLACE OF PUBLIC ACCOMMODATION TO CHANGE THE NATURE, CONTENT OR MIX OF THE PRODUCTS OR SERVICES IT OFFERS.

In interpreting Title III of the ADA, courts have recognized that the purpose of the ADA is to “regulate the *availability* of the goods and services that a place of public accommodation offers as opposed to the *contents* of goods and services offered by the public accommodation.” *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1012 (6th Cir. 1997) (emphasis added). Accordingly, courts have repeatedly found that, while a public accommodation must ensure that persons with disabilities have reasonable access to its products or services, it is not required to alter the nature or mix of goods that it provides. *See, e.g. McNeil v. Time Ins. Co.*, 205 F.3d 179, 188 (5th Cir. 2000) (“In sum, we read Title III to prohibit an

owner, etc., of a place of public accommodation from denying the disabled access to the good or service But the owner, etc., need not modify or alter the goods and services that it offers in order to avoid violating Title III");³ *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 1999) (finding that Title III "does not require provision of different goods or services, just nondiscriminatory enjoyment of those that are provided"); *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) ("We conclude that section 302(a) does not require a seller to alter his product to make it equally valuable to the disabled and to the nondisabled"); *Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453, 457-58 (6th Cir. 1998) (rejecting construction of ADA which would "compel a video store to stock closed caption video tapes because ordinary tapes are worth less to a deaf person than to one with normal hearing").

In *Doe*, the Seventh Circuit succinctly described why the distinction between access and content is fundamental to a reasonable construction of the ADA:

The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons. Had Congress proposed to impose so enormous a burden on the retail sector of the

³ The *McNeil* court noted that the Third and Sixth Circuit thought that limiting the ADA to access, as opposed to content, was so obvious as to require little analysis. 205 F.3d at 188, citing *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998), and *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1012 (6th Cir. 1997).

economy and so vast a supervisory responsibility on the federal courts, we think it would have made its intentions clearer and would at least have imposed some standards. It is hardly a feasible judicial function to decide whether shoe stores should sell single shoes to one-legged persons and if so at what price, and how many Braille books the Borders or Barnes and Noble bookstore chains should stock in each of their stores.

Doe, 179 F.3d at 560. Significantly, in supporting its holding that the ADA does not require an owner of a public accommodation to alter the available product, the court cited as an example “a movie theater’s refusal to provide a running translation into sign language of the movie’s soundtrack.” *Id.*

The Fifth Circuit applied similar reasoning in holding that the ADA does not require a business to alter or modify the goods or services it offers in order to satisfy the ADA:

We acknowledge that it is literally possible, though strained, to construe “full and equal enjoyment” to suggest that the disabled must be able to enjoy every good and service offered to the same and identical extent as those who are not disabled. Construed in this manner, the statute would regulate the content and type of goods and services. That would be necessary to ensure that the disabled’s enjoyment of goods and services offered by the place of public accommodation would be no less than, or different from, that of the non-disabled. But such a reading is plainly unrealistic, and surely unintended, because it makes an unattainable demand.

* * *

Furthermore, were we to try to construe the statute in this manner, its application would force impracticable results. If the blind must be able to enjoy all goods and services to the same extent as the sighted, bookstores would be forced to limit the selection of books they carried because they would need to stock Braille versions of every book. Shoe stores would reduce the styles available to their general customers, because they would

need to offer special shoes for people with foot deformities in every style sold to the non-disabled. Sporting goods stores might have to close altogether. Restaurants would have to limit their menus to avoid discriminating against diabetics. After all, to offer food to the public that a diabetic could not eat would, in the literal words of the statute, deny the diabetic the full and equal enjoyment of the goods of the restaurant compared to those with no limitations on their diets.

By citing such examples, we do not mean to make the statute sound ridiculous. We do this to illustrate that the language of the statute can only reasonably be interpreted to have some practical, common sense boundaries. Based on the language of the statute, we simply see no non-arbitrary way to distinguish regulating the content of some goods from regulating the content of all goods.

McNeil, 205 F.3d at 187; *see also Cornilles v. Regal Cinemas, Inc.*, 2002 WL 31440885 (D. Or), *aff'd in relevant part*, 2002 WL 31469787 (D. Or. 2002) (denying plaintiffs' suit to require close captioned movies); *Todd v. America Multi-Cinema, Inc.*, 2004 WL 1764686, *4 (S.D. Tex. 2004) (rejecting plaintiff's demand for captioning in all movies and at all movie theaters on undue burden grounds and because "[e]qual access does not mean equal enjoyment," and finding that "access has been granted as a matter of law").

As the district court recognized, the ADA's distinction between providing equal access to products or services offered by a public accommodation, as opposed to altering or tailoring the products or services that are offered to meet the special needs of the disabled, is directly applicable here. Imposing the requirement that theaters show captioned films or describe movies would not constitute equal

access to the product or service that NATO members currently provide in their theaters. Instead, it would compel theater operators to provide a different type of product more suitable for hearing and sight impaired patrons. “The requested captioning and description would modify the contents of the services Harkins offers.” 548 F. Supp. 2d at 731. This is precisely the type of relief the above-cited cases found beyond the scope of the ADA’s requirements. Accordingly, the district court’s opinion should be affirmed.

III. CAPTIONING AND DESCRIPTIVE AUDIO FUNDAMENTALLY ALTER THE CONTENT OF MOTION PICTURES AND THUS CANNOT BECOME AN ADA MANDATE.

Captioning and descriptive audio are art forms, that can be done well or poorly, added to the artistry of a motion picture. Successful captioning and descriptive audio require artistic interpretation, by highly skilled individuals, of the copyrighted content of a motion picture. These artistic interpretations must then be added directly to the content of a motion picture in exactly the same way one would add additional music or narrative. *See generally MPAA v. FCC*, 309 F.3d 796, 803 (D.C. Cir. 2002) (noting that narrative description is “a creative work [that] requires a producer to evaluate a program, write a script, select actors, decide what to describe, decide how to describe it and choose what style or what pace”). While captioning involves quantitatively less subjective artistic activity than narrative description, captioning for movies, unlike the rote replication of dialogue

in television captioning, includes descriptions of sounds, sound effects, music, and voice tones—and the dialogue is often modified to compress the written message on screen. Such substantial artistic undertakings cry out for characterization as fundamental alterations. Indeed, if captioning and narrative description are *not* fundamental alterations in the service offered at movie theaters, it is difficult to conceive what might be, apart perhaps from mandating only happy endings.

The fact that captioning and descriptive audio may be described as “auxiliary aids” does not answer the threshold question: does the demanded accommodation alter the content of the good or service? Open captioning is included in the definition of an auxiliary aid, and open captioning plainly assists some disabled patrons in enjoying motion pictures—but even DOJ concedes that the ADA does not require open captioning of films exhibited in movie theaters. Excluding this “auxiliary aid” from the scope of the ADA is inexplicable *unless* that auxiliary aid fundamentally alters content.

Illustratively, movie theaters do make available to patrons certain auxiliary aids that do not alter the content of the goods or services provided. Assistive listening devices (“ALDs”) augment the existing sounds systems in movie theaters to enable persons with hearing disabilities to access the same soundtrack heard by the general public. They do not alter content.

The effort by DOJ and one lone court (*Ball v. AMC Entertainment, Inc.*, 246 F. Supp. 2d 17 (D.D.C. 2008)) to distinguish open captioning from closed captioning again ignores the threshold question. True, closed captioning was not available in 1990 when the ADA was enacted. And true, closed captioning is less intrusive than open captioning. Availability and unobtrusiveness, however, are irrelevant to whether the demanded accommodation alters content. The content-altering aspects of closed captioning and descriptive audio are exactly the same as the content-altering aspects of open captioning. That is why the district court noted that “Plaintiffs offer no reason why the Attorney General would distinguish closed captioning descriptions from open captioning in determining what is covered under the ADA.” 548 F. Supp. 2d at 731.

If one answers fairly why open captioning was expressly excluded from the scope of the ADA in the House Committee Report, the distinction between open captioning and closed captioning collapses. In *Ball*, 246 F. Supp. 2d 17 (denying defendant’s motion for summary judgment), the court did not even ask that question, instead dismissing the House Committee Report statement that “open captioning of feature films in movie theaters is not required,” by curiously characterizing it as defendant’s “lone friend” in the crowd. *Id.* at 22. If that clear statement—which answers the very question posed—is a “lone friend,” it is nevertheless a very good and persuasive friend. The *Ball* court proceeded to

distinguish open captioning from closed captioning on the grounds that closed captioning might not impose an undue burden—improperly leaping to analysis that is irrelevant to the threshold question of scope. As DOJ fairly acknowledges in its brief, “[t]his appeal does not present the issue whether exhibiting closed captioned or described movies would constitute an undue burden.” DOJ Amicus Br. at 7, n.5.

Appellants and amici seek to avoid application of Section 36.307 of the DOJ Regulation (which explicitly provides that a public establishment need not alter its inventory in order to comply with the ADA) by arguing that Section 36.307 applies only to “goods” and not “services.” However, plaintiffs cite no support for that proposition, nor does there appear to be any sound policy reason for such an arbitrary distinction. To the contrary, the ADA applies equally to goods and services provided by public accommodations. Indeed, courts that have addressed § 36.307 have routinely discussed its application to both goods and services. *See, e.g., Weyer*, 198 F.3d at 1115 (“Title III does not require provision of different goods or services”); *McNeil*, 205 F.3d at 186 (“[t]he goods and services that the business offers exist *a priori* and independently from any discrimination”).

Moreover, even if the distinction between goods and services enjoyed some precedent, the content alteration of captioning and descriptive audio indisputably occurs to a thing—a motion picture embodied in celluloid film (or, increasingly, a

digital file). Captioning and descriptive audio change that thing. The film is therefore analogous to a book, which may be provided in printed word or in Braille, or to a film on tape, which may be rented with or without captions. There is no logical basis for concluding that a public accommodation, such as a video store, is not required to stock captioned video tapes but that a movie theater is obligated to screen captioned films.

IV. DOJ'S CONTEMPLATED RULEMAKING AND DYNAMIC DEVELOPMENTS IN DIGITAL CINEMA MILITATE AGAINST FINDING ANY ADA CAPTIONING OR DESCRIPTIVE AUDIO MANDATE.

We believe DOJ filed its well-crafted *amicus* brief in support of plaintiffs' position in good faith, and that DOJ does not intend to insist that its *amicus* brief constitutes notice of a new ADA mandate. Out of an abundance of caution, however—and the industry's costly experience with DOJ rulemaking-by-*amicus*-brief in the wheelchair seating context counsels some caution—we address what may fairly be concluded from DOJ's brief, and what may not. We then urge judicial restraint in the captioning field based upon questions (as opposed to answers) formally posed by DOJ, and by dynamic developments in the new and evolving technology of digital cinema.

DOJ's *amicus* brief never claims that under the current law or regulations a motion picture theater is obligated to show captioned feature films. Indeed, such a

position would flatly contradict DOJ’s own regulations as well as its recent pronouncement on the issue. As set forth above, DOJ’s implementing regulations expressly recognize that “[m]ovie theaters are not required by § 36.303 to present open-captioned films.” In addition, DOJ’s preamble to its Notice of Proposed Rulemaking last year acknowledges that it is “considering options under which it *might* require that movie theater owners and operators exhibit movies that are captioned.” 73 Fed. Reg. 34530. That DOJ is considering the possibility of such a regulation—which would become operative one year after the effective date of a new rule—effectively concedes that no such obligation currently exists.

Consistent with the foregoing, DOJ argues in its brief that “under the regulations, closed captions and audio recordings are two auxiliary aids that “*may be required* of theater owners.” DOJ *Amicus* Br. at 12 (emphasis added). Similarly, it observes that the Access Board’s statement that ADA regulations do not require captioning “in no way limits the authority of the [DOJ] to address” the issues of captioning or audio descriptions. *Id.* at 32.

Thus understood, DOJ’s participation in this case is driven entirely by its desire to preserve its option to make captioning rules. If the district court’s analysis is correct, and we believe it is, then DOJ cannot make captioning or descriptive audio rules for movie theaters. DOJ understandably chafes at that peril to its regulatory power.

We respectfully request explicit rejection of any suggestion that DOJ's *amicus* brief could, in and of itself, impose a current obligation on theater owners to screen captioned and audio-described feature films. In *Doe*, the Seventh Circuit recognized that the position asserted by DOJ in an *amicus* brief is not entitled to weight “when it is the brief of an agency that has, and has exercised, rulemaking powers, yet has unaccountably failed to address a fundamental issue on which the brief takes a radical stance.” 179 F.3d at 563.

If this Court concludes that the district court was incorrect, and that captioning and descriptive audio may be the subject of DOJ rulemaking, then issues as complex as these must be undertaken in formal and careful deliberations pursuant to the Administrative Procedures Act. As the Seventh Circuit noted further, “to be entitled to deference, the DOJ must take a more deliberative, public, and systematic procedure than the filing of an *amicus curiae* brief.” *Id.*

Indeed, last year, DOJ began precisely such “a deliberative, public, and systematic” undertaking. Its Notice of Proposed Rulemaking set forth far-reaching and comprehensive adjustments to ADA accessibility requirements. *See* 73 Fed. Reg. 34508-34557. Conspicuously, however, DOJ expressly declined to issue any formal proposal regarding captioning or descriptive audio. Instead, uniquely as to these issues, it posed open questions, signaling intent to take special care before

concluding that any rule was appropriate, much less what the actual content of such a rule might be. For many reasons, DOJ's restraint was wise.

In its open questions, DOJ suggested that any future captioning requirement might be tied to the conversion of movies from film to digital format. NATO's response to the DOJ's open questions (filed on August 8, 2008, and accessible at www.regulations.gov, Document ID: DOJ-CRT-2008-0015-2646.1) explained that the advent of digital cinema could enhance enjoyment for disabled movie patrons, and that any legal requirements for captioning or description in the film world would distort or altogether thwart meaningful progress. For the past one hundred years, movies have been distributed and projected on celluloid film prints. Today, the industry has begun the transition to digital distribution and projection. Compared to film, digital cinema may reduce the cost burden of closed captioning and narrative description.

In enacting the ADA, Congress declared that "[o]pen-captioning ... 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), at 108 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 391. As one of the industries that openly advocated for passage of the ADA, and that continues a robust

commitment to making movie theaters an accommodating place for the disabled, the exhibition industry has taken Congress' exhortation very seriously.

The industry is in the process of developing specific digital technology standards applicable to the accommodations sought in this case. NATO's Digital Cinema System Requirements specifically call for requirements that digital cinema servers be capable of playing narrative audio tracks and closed captions when included in content distribution, an issue about which NATO has been aggressive.⁴ The publication of user requirements tells system providers, product developers, and formal standards committees what exhibitors will want from vendors. The Society of Motion Picture and Television Engineers (SMPTE) constitutes the main standards body for digital cinema. NATO successfully petitioned SMPTE for standards on closed caption delivery and display. One of two necessary standards is complete and the second is nearing completion.

Competitive closed-caption systems are undeveloped, but emerging as NATO and our members work with equipment companies to provide technical guidance, cinema testing locations, design requirements and other collaborative efforts. In May 2008, NATO distributed an open letter (also available at

⁴ NATO's Digital Cinema System Requirements can be accessed at www.natoonline.org/Digital.htm. For an article in a leading industry blog addressing NATO's aggressive pursuit of closed captioning standards and equipment development, see <http://celluloidjunkie.com/2009/01/29/nato-reviews-d-cinema-requirements-with-vendors/#more-447>.

www.natoonline.org/Digital.htm) to movie distributors and equipment vendors calling for voluntary support of accommodations such as plaintiffs seek in this case. The letter described developing technologies and ongoing standards efforts, and suggested steps to be taken by the broader industry. On June 4, 2009, at NATO's request, the Inter-Society Digital Cinema Forum will convene a summit with movie studios, standards officials, equipment companies and theater operators to further these goals. See http://www.isdcf.com/Public_ISDCF/Home.html.

Any requirement of captioning or narrative description by this Court at this juncture would be a blunt and counterproductive approach, require enormous expenditures for film-based equipment adaptations that will become obsolete in the near future, and divert attention and resources from promising new technologies.

Captioning and descriptive audio indisputably assist some disabled patrons to better enjoy motion pictures—which is why the exhibition industry is energetically engaged in digital cinema standard-setting and equipment development for these additional services. That worthy private sector initiative, however, does not become a legal mandate merely because it is possible.

CONCLUSION

The district court correctly rejected plaintiffs' demand that defendants screen captioned and/or audio-described films. The ADA regulates access to goods and services offered, not the content of those goods or services. Thus, the relief sought

is beyond the scope of the ADA. Accordingly, movie theaters are not required to show captioned or audio description feature films or to otherwise change the nature, content or mix of the products and services that they provide. We respectfully request that the district court judgment be affirmed.

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DATE: May 12, 2009

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I do hereby certify that in accordance with Fed. R. App. P. 32(a)(7)(C), Ninth Circuit Rule 32-1 and a separate Court Order dated April 10, 2009, the foregoing brief has been prepared in a proportionally-spaced typeface using 14-point Times New Roman, and contains 6964 words.

/s/ Steven John Fellman
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DATE: May 12, 2009

CERTIFICATE OF SERVICE

I do hereby certify that I have electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I do hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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