

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,  
&

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

No. CV-07-703-PHX-ROS

**PLAINTIFFS-APPELLANTS' JOINT OPENING BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	v
JURISDICTIONAL STATEMENT .....	1
ISSUES PRESENTED FOR REVIEW .....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS .....	5
SUMMARY OF THE ARGUMENT .....	11
ARGUMENT .....	13
I.    The District Court Erred in Holding that Title III of the ADA and the AzDA Do Not Require Harkins to Provide the Auxiliary Aids and Services to Display Captions and Transmit Audio Descriptions for Its Customers with Sensory Disabilities. ....	13
A.    Standard of Review. ....	13
B.    The ADA’s and the AzDA’s Plain Language, Broad Statutory Purposes, and Statutory Designs Compel Reversal of the District Court’s Dismissal of Plaintiffs’ Lawsuit. ....	13
1.    The ADA’s and the AzDA’s plain language unambiguously requires movie theaters to provide auxiliary aids and services including captions and audio descriptions. ....	15
2.    The ADA’s and the AzDA’s plain language is consistent with the express findings that Congress made and the express purpose it identified in enacting the ADA. ....	22
3.    The Acts’ statutory design makes it clear that movie theaters must provide auxiliary aids and services to individuals with sensory disabilities. ....	24

II.	The District Court Erred in Undermining the Acts’ Purpose by Concluding that the Plaintiffs’ Claims Fall Outside Their Scope, by Eviscerating the Auxiliary Aids and Services Provisions, and by Misinterpreting the Extrinsic Tools of Statutory Construction. ....	29
A.	The District Court Erred in Concluding that Plaintiffs’ Claims Fall Outside the Acts’ Scope Because Plaintiffs Do Not Seek a Different Service Other than the Service that Harkins Provides to the General Public.....	30
B.	The District Court Erred in Rewriting the Acts In a Manner that Eviscerates the Auxiliary Aids and Services Provisions. ....	32
1.	The district court rewrote Title III and the AzDA to add exceptions and exemptions in contravention of the Acts’ unambiguous language.....	32
2.	The district court rewrote the ADA and the AzDA in contravention of basic statutory construction canons. ....	36
3.	The district court misplaced its reliance on <i>Weyer</i> , <i>McNeil</i> , and <i>Mutual of Omaha</i> to rewrite the Acts because these insurances cases do not hold that providing the auxiliary aids and services of captions and audio descriptions falls outside the Acts’ scope. ....	39
C.	The District Court Erred in Relying on Extrinsic Tools of Statutory Construction to Hold that Movie Theaters Were Not Required to Provide Captioning and Descriptive Narration for Sensory Impaired Patrons.....	44
1.	The district court erred in relying on the legislative history to dismiss Plaintiffs’ claims. ....	45
2.	The Department of Justice’s Title III regulations require that public accommodations provide auxiliary aids to sensory impaired individuals.....	48
3.	The district court erred in expanding the scope of the DOJ’s Interpretative Guidance and then relying on it to hold that	

movie theaters are not required to provide captions and descriptions.....	50
4.    The district court erred in granting deference to the unadopted ADAAG preamble.....	53
III.    The District Court Erred in Ruling that Plaintiffs-Intervenors Did Not Have Standing to Challenge the Lack of Auxiliary Aids and Services at Any of Harkins’ Theaters Other Than the Harkins North Valley 16. ....	57
A.    Standard of Review. ....	57
B.    Plaintiffs-Intervenors Met the Constitutional Standing Requirements Under <i>Pickern</i> and Its Progeny to Challenge the Lack of Auxiliary Aids and Services in All Harkins’ Theaters in Arizona.....	58
1.    Plaintiffs-Intervenors established that they knew that Harkins had failed to install auxiliary aids and services equipment to provide captions and audio descriptions at Harkins Theatres...	59
2.    Plaintiffs-Intervenors established an interest in going to Harkins Theatres after Harkins installs the auxiliary aids and services equipment to provide captions and audio descriptions. ....	61
C.    The District Court Applied Factors for Establishing Injury in Fact That <i>Pickern</i> and Its Progeny Do Not Support. ....	62
1.    Contrary to the district court’s ruling, an ADA plaintiff need not show past patronage to establish an injury sufficient to confer standing. ....	62
2.    Plaintiffs-Intervenors need not demonstrate an unconditional plan to return to an inaccessible public accommodation to have standing to sue the entity.....	64
CONCLUSION.....	66
STATEMENT OF RELATED CASES .....	67
CERTIFICATE OF COMPLIANCE WITH RULE 32(a) .....	68

CERTIFICATE OF SERVICE .....69  
ADDENDUM .....70

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>62 Cases, More or Less, Each Containing Six Jars of Jam v. United States</i> , 340 U.S. 593 (1951) .....	29
<i>Ariz. ex. rel. Goddard v. Harkins Amusement Entm't, Inc.</i> , 548 F. Supp. 2d 723 (D. Ariz. 2008) .....	passim
<i>Ariz. Health Care Cost Containment Sys. v. McClellan</i> , 508 F.3d 1243 (9th Cir. 2007) .....	14
<i>Ariz. State. Bd. for Charter Sch. v. U.S. Dep't of Educ.</i> , 464 F.3d 1003 (9th Cir. 2006) .....	passim
<i>Ball v. AMC Entm't, Inc.</i> , 246 F. Supp. 2d 17 (D.D.C. 2003) .....	31, 48, 54
<i>Bay Area Addiction Research &amp; Treatment, Inc. v. City of Antioch</i> , 179 F.3d 725 (9th Cir. 1999).....	34
<i>Beeman v. TDI Managed Care Servs., Inc.</i> , 449 F.3d 1035 (9th Cir. 2006) .....	13
<i>Bennett-Nelson v. La. Bd. of Regents</i> , 431 F.3d 448 (5th Cir. 2005).....	42
<i>Boise Cascade Corp., v. U.S. E.P.A.</i> , 942 F.2d 1427 (9th Cir. 1991) .....	36
<i>Botosan v. Paul McNally Realty</i> , 216 F.3d 827 (9th Cir. 2000).....	14, 21, 34, 39
<i>Bowles v. Seminole Rock &amp; Sand Co.</i> , 325 U.S. 410 (1945).....	50

<i>Buono v. Norton</i> , 371 F.3d 543 (9th Cir. 2004).....	57
<i>Celano v. Marriott Int’l, Inc.</i> , 2008 WL 239306 (N.D. Cal. 2008) .....	64
<i>Cent. Va. Cmty Coll. v. Katz</i> , 546 U.S. 356 (2006).....	42
<i>Chevron, U.S.A. v. Natural Res. Council, Inc.</i> , 467 U.S. 837 (1984).....	49
<i>Cohens v. Virginia</i> , 6 Wheat. 264 (1821).....	42
<i>Cole v. Velazquez</i> , 67 Fed. Appx. 252 (5th Cir. 2003).....	42
<i>Doe v. Mut. of Omaha Ins. Co.</i> , 179 F.3d 557 (7th Cir. 1999).....	40, 41
<i>Doran v. 7-Eleven</i> , 524 F.3d 1034 (9th Cir. 2008) .....	12, 58, 59, 64
<i>Earth Island Inst. v. Hogarth</i> , 494 F.3d 757 (9th Cir. 2007).....	53
<i>El Comite Para El Bienestar de EarliMart v. Warmerdam</i> , 539 F.3d 1062 (9th Cir. 2008) .....	54
<i>Fortyune v. Am. Multi-Cinema, Inc.</i> , 364 F.3d 1075 (9th Cir. 2004) .....	15, 26, 28, 55
<i>Fredenburg v. Contra Costa County Dep’t of Health Servs.</i> , 172 F.3d 1176 (9th Cir. 1999) .....	34
<i>Hason v. Med. Bd. of Cal.</i> , 279 F.3d 1167 (9th Cir. 2002) .....	33

<i>Knievel v. ESPN</i> , 393 F.3d 1068 (9th Cir. 2005) .....	13
<i>Lentini v. Cal. Ctr. for the Arts</i> , 370 F.3d 837 (9th Cir. 2004).....	27
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	58
<i>McGary v. City of Portland</i> , 386 F.3d 1259 (9th Cir. 2004) .....	25
<i>McNeil v. Time Ins. Co.</i> , 205 F.3d 179 (5th Cir. 2000).....	40, 41, 42, 43
<i>Miller v. Cal. Speedway Corp.</i> , 536 F.3d 1020 (9th Cir. 2008) .....	50
<i>Molski v. M.J. Cable, Inc.</i> , 481 F.3d 724 (9th Cir. 2007).....	63
<i>Nat’l Automatic Laundry &amp; Cleaning Council v. Shultz</i> , 443 F.2d 689 (D.C. Cir. 1971) .....	33
<i>Natural Res. Defense Council v. U.S. E.P.A.</i> , 542 F.3d 1235 (9th Cir. 2008) .....	57
<i>Odom v. Microsoft Corp.</i> , 486 F.3d 541 (9th Cir. 2007).....	13
<i>Olmstead v. Zimring</i> , 527 U.S. 581 (1999).....	26
<i>Pa. Dep’t of Corr. v. Yeskey</i> , 524 U.S. 206 (1998).....	18, 19, 34
<i>Parr v. L &amp; L Drive Inn Rest.</i> , 96 F. Supp. 2d 1065 (D. Haw. 2000).....	63

<i>PGA Tour, Inc. v. Martin</i> , 532 U.S. 661 (2001).....	18, 19, 34
<i>Pickern v. Holiday Quality Foods</i> , 293 F.3d 1133 (9th Cir. 2002) .....	58, 59, 62, 64
<i>Royal Foods Co. v. RJR Holdings Inc.</i> , 252 F.3d 1102 (9th Cir. 2001) .....	45, 47
<i>Simon v. Value Behavioral Health, Inc.</i> , 208 F.3d 1073 (9th Cir. 2000) .....	57
<i>Spector v. Norwegian Cruise Line Ltd.</i> , 545 U.S. 119 (2005).....	18, 35
<i>Sutton v. United Air Lines, Inc.</i> , 527 U.S. 471 (1999).....	22
<i>Toyota Motor Manufacturing, Kentucky, Inc. v. Williams</i> , 534 U.S. 184 (2002).....	23
<i>Weeks v. S. Bell Tel. &amp; Tel. Co.</i> , 408 F.2d 228 (5th Cir. 1969).....	33
<i>Weyer v. Twentieth Century Fox Film Corp.</i> 198 F.3d 1104 (9th Cir. 2000) .....	40, 41

Statutes

28 U.S.C. § 1291 .....	1
28 U.S.C. § 1331 .....	1
28 U.S.C. § 1367 .....	1
28 U.S.C. § 1446 .....	1
42 U.S.C § 12181 .....	1
42 U.S.C § 12189 .....	1

42 U.S.C. § 12101(a)(2).....	22
42 U.S.C. § 12101(a)(3).....	22
42 U.S.C. § 12101(a)(5).....	22
42 U.S.C. § 12101(a)(8).....	22
42 U.S.C. § 12101(b)(1) .....	22
42 U.S.C. § 12102(1) .....	13, 16, 17, 37
42 U.S.C. § 12102(1)(A).....	37
42 U.S.C. § 12102(1)(C).....	55
42 U.S.C. § 12102(2) .....	28
42 U.S.C. § 12102(2)(A).....	5, 7
42 U.S.C. § 12112(d)(2) .....	35
42 U.S.C. § 12132.....	34
42 U.S.C. § 12181(7)(C).....	8, 28
42 U.S.C. § 12182(a) .....	passim
42 U.S.C. § 12182(b)(1)(A)(ii).....	16
42 U.S.C. § 12182(b)(2)(A)(i) .....	25, 27
42 U.S.C. § 12182(b)(2)(A)(ii).....	25, 27, 34
42 U.S.C. § 12182(b)(2)(A)(iii).....	passim
42 U.S.C. § 12182(b)(2)(A)(iv) .....	25
42 U.S.C. § 12182(b)(2)(A)(v) .....	25

42 U.S.C. § 12184(a) .....	24
42 U.S.C. § 12184(b)(1) .....	27
42 U.S.C. § 12186(b) .....	48, 49
42 U.S.C. § 12186(c) .....	53
42 U.S.C. § 12188(a)(1).....	59, 62
42 U.S.C. § 12204.....	53, 54
42 U.S.C. § 2000a.....	24
A.R.S. § 1-211(B) .....	33
A.R.S. § 41-1442(B) .....	24
A.R.S. § 41-1492.....	1
A.R.S. § 41-1492(2).....	17, 28, 37
A.R.S. § 41-1492(2)(a) .....	37
A.R.S. § 41-1492(2)(c) .....	55
A.R.S. § 41-1492(5).....	5, 7, 28
A.R.S. § 41-1492(9)(c) .....	8
A.R.S. § 41-1492.02(A) .....	15, 21, 24, 44
A.R.S. § 41-1492.02(B)(2) .....	16
A.R.S. § 41-1492.02(F)(1).....	25
A.R.S. § 41-1492.02(F)(2).....	25
A.R.S. § 41-1492.02(F)(3).....	passim

A.R.S. § 41-1492.02(F)(4).....	25
A.R.S. § 41-1492.02(F)(5).....	25
A.R.S. § 41-1492.09.....	10
A.R.S. § 41-1492.11.....	1
ADA Amendment Act of 2008 (“ADAAA”), Pub. L. No. 110-325, 122 Stat. 3553 (2008).....	22

Rules

Ariz. R. Civ. P. 12(b)(6) .....	3
Fed. R. Civ. P. 12(b)(6).....	3
FRAP 4(a) .....	1

Regulations

28 C.F.R. § 36.101 app. B.....	44, 50
28 C.F.R. § 36.303 app. B.....	17, 50, 51, 57
28 C.F.R. § 36.303(a).....	44, 49
28 C.F.R. § 36.303(b)(1).....	17, 49
56 Fed. Reg. 35,544 (codified at 36 C.F.R. pt. 1191 app. A).....	48, 54
69 Fed. Reg. 44138 (July 23, 2004) (to be codified at 36 C.F.R. pt. 1190-91).....	44, 54, 55, 56
73 Fed. Reg. 34508 (June 17, 2008).....	56

Other Authorities

Faye Kuo, *Open and Closed: Captioning Technology As A Means to Equality*,  
23 J. Marshall J. Computer & Info. L. 159 (2004) ..... 19, 20

H.R. Rep. No. 101-485(II) (1990)  
*as reprinted in 1990 U.S.C.C.A.N 303*) ..... 46, 47, 48

Laura Van Tuyl, *Theater/Television Technology ‘Audio Description’ Helps the Blind Appreciate Theater and Television*,  
Christian Sci. Monitor, May 7, 1990 .....20

S. Rep. No. 101-116 (1989) ..... 47, 48

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## **JURISDICTIONAL STATEMENT**

The State of Arizona (“State”) filed this action in Arizona’s Maricopa County Superior Court alleging violations of the Arizonans with Disabilities Act (“AzDA”), A.R.S. §§ 41-1492 to 41-1492.11 (2008). (ER at 152-65.) On March 21, 2007, the superior court granted the motion to intervene filed by Plaintiffs-Intervenors Rachel Lindstrom on behalf of her son, Frederick Lindstrom, and Larry Wanger (collectively “Plaintiffs-Intervenors”). (ER at 175.) Plaintiffs-Intervenors brought claims for violations of Title III of the Americans with Disabilities Act (“Title III”), 42 U.S.C. §§ 12181-12189 (2006) and the AzDA (collectively “the Acts”). (ER at 125-51.) On April 2, 2007, Harkins Administrative Services, Inc., et al. (collectively “Harkins”) filed a notice of removal to the United States District Court for the District of Arizona pursuant to 28 U.S.C. § 1446 and Local Rule 3.7. (ER at 175.) The district court had federal-question jurisdiction over the Title III claim under 28 U.S.C. § 1331 and supplemental jurisdiction over the AzDA claims under 28 U.S.C. § 1367.

This Court has jurisdiction over appeals from all final district court judgments. 28 U.S.C. § 1291. This appeal is taken from the district court’s March 28, 2008, final order granting Harkins’ motion to dismiss the claims of the State and Plaintiffs-Intervenors (collectively, “Plaintiffs”). Plaintiffs filed a timely notice of appeal on April 25, 2008. (ER at 1; *see also* FRAP 4(a).)

## **ISSUES PRESENTED FOR REVIEW**

1. Did the district court err in holding that Title III of the ADA and the AzDA do not require Harkins to provide auxiliary aids and services to display captions and transmit audio descriptions for its customers with sensory disabilities?
  
2. Did the district court err by undermining the Acts' purpose by concluding that the Plaintiffs' claims fall outside their scope, by eviscerating the auxiliary aids and services provisions and by misinterpreting the extrinsic tools of statutory construction?
  
3. Did the district court err in ruling that Plaintiffs-Intervenors did not have standing to challenge the lack of auxiliary aids and services at any of Harkins' theaters other than the Harkins North Valley 16?

## STATEMENT OF THE CASE

The State filed this case in Arizona state court on December 15, 2006, asserting state-law disability discrimination claims under the AzDA against Harkins for failing to provide descriptive narration and captioning as auxiliary aids and services necessary to provide the named aggrieved persons and a class of sensory disabled Arizonans full and equal enjoyment of the movies that it shows at its movie theaters. (ER at 152-65.) The state court granted Plaintiffs-Intervenors the right to intervene in the State's case. (ER at 175-76.) Plaintiffs-Intervenors alleged violations of state and federal disability discrimination statutes, including Title III of the ADA and the AzDA. (ER at 126-27.)

Harkins filed a motion pursuant to Ariz. R. Civ. P. 12(b)(6) to dismiss the State's claims for failure to state a claim. (ER at 175-76.) It also filed a notice of removal to the United States District Court for the District of Arizona. (ER at 175.) On April 9, 2007, Harkins filed a motion to dismiss Plaintiffs-Intervenors' claims pursuant to Fed. R. Civ. P. 12(b)(6). (ER at 176.) On January 16, 2008, Plaintiffs-Intervenors moved for leave to file a First Amended Complaint. (ER at 180.)

Following oral argument on January 10, 2008, the district court granted Harkins' motion to dismiss Plaintiffs' claims on March 28, 2008. (ER at 14.) The

district court denied the motion for leave to file the First Amended Complaint as moot. (*Id.*) Plaintiffs jointly appealed the district court's dismissal.

## STATEMENT OF FACTS

Plaintiff-Intervenor Frederick Lindstrom is an individual with a *disability* within the meaning of the AzDA and the ADA. *See* A.R.S. § 41-1492(5); 42 U.S.C. § 12102(2)(A). Specifically, he has profound, bilateral hearing loss that is so severe that he cannot hear or discriminate speech. (ER at 22, ¶ 12.) He does not use hearing aids or headsets for sound amplification. (*Id.*) Because of the extent of his hearing loss, assistive listening devices that amplify dialogue do not provide him access to aurally delivered information. (ER at 23, ¶ 17.) As a result, he and the class of similarly situated individuals who are deaf or hard of hearing require textual representations of a movie's dialogue and soundtrack in the form of captioning to have meaningful access to and full enjoyment of movies exhibited in a theater. (ER at 23, ¶ 18; 156, ¶¶ 7-11.)

There are two forms of captioning and several different technologies that currently exist to deliver captions in a movie-theater format. (ER at 130-31, ¶¶ 20-23.) Open captioning provides a textual representation of the dialogue and soundtrack through captions that appear on the movie theater screen itself and are visible to all individuals in the auditorium. (ER at 130, ¶ 18.) The oldest form of open captioning, and the one that existed when Congress enacted the ADA, consists of a special film print with captions that a laser has burned onto each frame of the film. (ER at 130, ¶ 20.) Direct studio distribution of open-captioned

film prints began in 1998, and since then, approximately 300 films have been produced with open captions. (*Id.*) This form of captioning requires acquiring special prints of the film. (ER at 130, ¶ 20.)

The second technology that displays open captioning during movies is open caption projection. (ER at 131, ¶ 23.) Open caption projection allows a theater to display the open captions on demand by using a second projector that superimposes captions onto the screen. (*Id.*) This technology does not require a special print of the film. (ER at 157, ¶ 14.) If there are no deaf patrons in the audience, a theater using this technology exhibits the movie without captions. (*Id.*) Upon a deaf patron's request, the theater can project the captions onto the screen during the movie's regular showing. (*Id.*)

In contrast, closed captioning is a method of displaying captions onto a display device at deaf patrons' seats. (ER at 157, ¶ 15.) Closed captions do not appear on the screen that the general audience views. (*Id.*) There are currently several closed-captioning technologies, including a seat-based caption display system known as Rear Window Captioning ("RWC") that uses an LED text display mounted at the rear of the auditorium to display captions timed to match the film's soundtrack. (ER at 131, ¶ 22.) Patrons who need to view the captions use a transparent acrylic panel mounted on a flexible arm that is inserted in the cup holder at their seats. (*Id.*) Movie theater chains in the United States have installed

RWC in approximately 260 auditoriums.<sup>1</sup> (ER at 146.) Researchers continue to develop additional technologies to display closed captions in movie theater venues. (ER at 158, ¶ 15.)

Plaintiff-Intervenor Larry Wanger is an individual with a *disability* within the meaning of the ADA and the AzDA. *See* A.R.S. § 41-1492(5); 42 U.S.C. § 12102(2)(A). Specifically, he is totally blind in his right eye and has corrected visual acuity of less than 20/400 in his left eye. (ER at 132, ¶ 27.) He and the class of similarly situated individuals who are blind, legally blind, or have low vision and cannot see a movie's visual aspects require an audio representation of those visual aspects to have access to and full enjoyment of movies exhibited in a theater. (ER at 132, ¶¶ 27-29; 158, ¶¶ 17-19.)

Audio descriptions (also referred to as descriptive narration) enables people who are blind or visually impaired to receive visually delivered information about the film through transmission of a separate audio track into headsets. (ER at 158, ¶ 20.) It provides brief audio descriptions about a film's key visual aspects, including scenery, facial expressions, costumes, action settings, and scene changes. (ER at 132-33, ¶ 31.) The audio descriptions are inserted during natural pauses in

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<sup>1</sup> Movie theater chains with RWC include AMC, National Amusements, Cobb Theatres, MUVICO Theaters, Kerasotes Theatres, Consolidated Theatres, Regal, Marcus Theatres, Clearview Cinemas, and Malco Theatres. (ER at 151, note 6 [*see also* MoPix, <http://ncam.wgbh.org/mopix/nowshoing/html> (last visited November 12, 2008)].) An online RWC demonstration is available at <http://ncam.wgbh.org/richmedia/media/lionking/> (last visited November 19, 2008)

dialogue and song. (*Id.*) Currently, there is commercially available technology, such as DVS Theatrical® (“DVS”), that delivers audio descriptions to patrons via listening systems to headsets. (*Id.*, ¶ 30.) At least 250 movie screens in the United States have DVS Theatrical equipment installed.<sup>2</sup> (ER at 150.)

Harkins owned and operated twenty-one movie theaters in Arizona when Plaintiffs filed their complaints. (ER at 128-29, ¶ 11.) Harkins theaters are *places of public accommodation* as the ADA and the AzDA define the phrase. 42 U.S.C. § 12181(7)(C); A.R.S. § 41-1492(9)(c). Harkins has not installed any auxiliary aids and services equipment to show captioned movies on its screens in Arizona. (ER at 159-60, ¶ 26.) At times, it exhibits open-captioned special film prints on limited dates, at limited show times, and in only a few theater locations.<sup>3</sup> (ER at

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<sup>2</sup> See list of movie theater chains and website for technology demonstration *supra* note 1.

<sup>3</sup> The Division’s Reasonable Cause Determination found that

At the time of the complaint, open-captioned films were being shown at only two of Harkins’ 21 theaters in Arizona. . . . [S]how times generally include[d] one matinee and one night show. The night shows were scheduled no earlier than 9:40 p.m. and as late as 10:45 p.m. regardless of whether [it] was a family or animated feature film. . . . [T]here were periods of time when no captioned movies [were] playing at [any] Harkins Theatre location.

(ER at 146.)

146; 160, ¶ 29.) It does not provide auxiliary aids and services to transmit audio descriptions at any show times or locations. (ER at 160, at ¶ 31; ER at 150.)

The participating film studios make captions and descriptions available in many first-run, wide-release films. (ER at 158, ¶ 16; 159, ¶ 22.) The film studios, not the theaters, make the open-caption projected captions, closed captions, and descriptive narration available by including a synchronized CD-Rom that contains captions and descriptions with the movies that they are already sending to theaters. (ER at 131, ¶ 23; 150; 157, ¶ 15.) Therefore, the captioning and descriptions are already available for captioned and described films when they arrive at the theaters that use the technology. (*Id.*) Patrons who are sensory impaired cannot access the captioning and descriptions unless the theaters install the equipment necessary to display the captions and transmit the audio descriptions. Once the equipment is installed, Harkins need only play the CD while the movie is showing to permit sensory disabled customers to view the closed captions on an acrylic panel or other display device, such as a Personal Digital Assistant (“PDA”), or view the projected captions on the screen (ER at 131, ¶¶ 22-23; 157, ¶ 15), or hear the descriptions on headsets (ER at 132, ¶ 30; 158, ¶ 20.)

Plaintiffs-Intervenors filed discrimination complaints with the State against Harkins for failing to provide auxiliary aids and services. (ER at 133, ¶¶ 36, 38.) Plaintiffs-Intervenors alleged that Harkins North Valley 16 lacked the auxiliary

aids and services necessary to allow them to view a closed-captioned or a described movie. (ER at 47; 59.) In addition, Plaintiffs-Intervenors were aware that none of Harkins' Arizona theaters provided auxiliary aids and services to show closed-captioned or described movies. (ER at 27-28, ¶¶ 41-46, ¶¶ 55-56.) Plaintiffs-Intervenors would patronize any Harkins theater in the Phoenix metropolitan area that provided captioning and/or descriptive narration. (ER at 26, ¶¶ 39-40; 30, ¶ 68; 31, ¶ 72; 32, ¶ 79.) Mr. Lindstrom has continued to patronize Harkins theaters without the benefit of auxiliary aids and services since this lawsuit was filed. (ER at 30-31, ¶¶ 69-72.) After the State's Civil Rights Division investigated the complaints, the State issued a Reasonable Cause Determination<sup>4</sup> on both complaints on October 17, 2006. (ER at 160-61, ¶¶ 33-34.) When conciliation efforts failed, this suit commenced.

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<sup>4</sup> Pursuant to A.R.S. § 41-1492.09, the State must file a civil action after finding that reasonable cause exists to believe that a public accommodation is violating the AzDA if conciliation attempts fail.

## SUMMARY OF THE ARGUMENT

The district court committed reversible error when it dismissed the Plaintiffs' lawsuit against Harkins on the ground that Title III of the ADA and the AzDA do not require Harkins to provide the auxiliary aids and services of captioning and descriptions to customers with sensory disabilities. The Acts' plain language, broad remedial purposes, and overall statutory schemes establish that movie theaters, as places of public accommodation, must provide the auxiliary aids and services equipment for patrons with sensory disabilities to access captions and descriptions with the movies shown to the public. *See* 42 U.S.C. § 12182(b)(2)(A)(iii); A.R.S. § 41-1492.02(F)(3). Consequently, the inquiry into the Acts' meaning concerning this issue should end without resort to extrinsic tools of statutory construction. Even if the Court considers these extrinsic tools, which include legislative history and Title III regulations, it must conclude that the district court erred in dismissing Plaintiffs' lawsuit because the suit presents viable claims that Harkins' failure to provide closed captioning and/or open captioning projection and audio descriptions violates the Acts' auxiliary aids and services provisions.

The district court also erred in finding that Plaintiffs-Intervenors did not establish standing to challenge Harkins' failure to provide auxiliary aids and services at theaters other than the North Valley 16. Under the principles that this

Court announced in *Doran v. 7-Eleven*, 524 F.3d 1034, 1040-41 (9th Cir. 2008), Plaintiffs-Intervenors satisfy the standing requirements because taken in the light most favorable to them, the facts demonstrate that they knew that all of the Harkins theaters lacked auxiliary aids and services, that the knowledge of these actual communications barriers deterred them from returning to the theaters, and that they plan to visit Harkins Theatres if it installs the auxiliary aids and services in the future.

## ARGUMENT

### **I. The District Court Erred in Holding that Title III of the ADA and the AzDA Do Not Require Harkins to Provide the Auxiliary Aids and Services to Display Captions and Transmit Audio Descriptions for Its Customers with Sensory Disabilities.**

#### **A. Standard of Review.**

This Court reviews the grant of a motion to dismiss for failure to state a claim de novo. *Knieval v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). The Court will construe the Complaints of the nonmoving parties (the State and the Plaintiffs-Intervenors) in the light most favorable to them and will accept the Complaints' allegations and the reasonable inferences from them as true. *Odom v. Microsoft Corp.*, 486 F.3d 541, 545 (9th Cir. 2007).

This Court also reviews a district court's interpretation of a statute de novo. *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir. 2006).

#### **B. The ADA's and the AzDA's Plain Language, Broad Statutory Purposes, and Statutory Designs Compel Reversal of the District Court's Dismissal of Plaintiffs' Lawsuit.**

Contrary to the district court's assertion that "a simple reading of the ADA does not compel an answer to the issue raised by this case," (ER at 8 [*Ariz. ex. rel. Goddard v. Harkins Amusement Entm't, Inc.*, 548 F. Supp. 2d 723, 727 (D. Ariz. 2008)]), Congress directly mandated in the ADA's text that places of public accommodation provide *auxiliary aids and services*, which by definition include captions and audio descriptions. 42 U.S.C. §§ 12102(1) (definition of *auxiliary*

*aids and services*); 12182(b)(2)(A)(iii) (defining *discrimination* to include the failure to provide auxiliary aids and services). The district court erred by holding that movie theaters are not, as a matter of law, required to provide captions for deaf customers and audio descriptions for blind customers as auxiliary aids and services necessary to provide full and equal enjoyment of the movies that they show to the public.

“Statutory interpretation begins with the plain meaning of the statute’s language. Where the statutory language is clear and consistent with the statutory scheme at issue, the plain language of the statute is conclusive and the judicial inquiry is at an end.” *Botosan v. Paul McNally Realty*, 216 F.3d 827, 831 (9th Cir. 2000); *accord Ariz. Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243, 1249 (9th Cir. 2007); *Ariz. State Bd. for Charter Sch. v. U.S. Dep’t of Educ.*, 464 F.3d 1003, 1006 (9th Cir. 2006). “In construing specific words in a statute,” this Court “must also look to language and design of the statute as a whole and read the specific words with a view to their place in the overall statutory scheme.” *McClellan*, 508 F.3d at 1250 (internal quotation marks and citation omitted); *accord Ariz. State Bd. for Charter Sch.*, 464 F.3d at 1007.

**1. The ADA’s and the AzDA’s plain language unambiguously requires movie theaters to provide auxiliary aids and services including captions and audio descriptions.**

The Acts’ texts are clear: movie theaters, as places of public accommodation, must provide auxiliary aids and services, including captions and audio descriptions to ensure that sensory impaired individuals have access to the service it provides. The service a movie theater provides is the screening of movies for the public. *See Fortune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1084 (9th Cir. 2004) (noting that “the nature of the service provided by [a] [t]heater [is] screening films”). Title III and the AzDA prohibit discrimination against individuals with disabilities.

As a general rule, Title III prescribes the following:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). The AzDA’s language substantively mirrors that of Title III. A.R.S. § 41-1492.02(A). The Acts specifically define *discrimination* to include situations in which a public accommodation affords people with disabilities the opportunity to participate in or benefit from the public accommodation’s goods, services and facilities “that is *not equal* to that afforded to

other individuals.” 42 U.S.C. § 12182(b)(1)(A)(ii); A.R.S. § 41-1492.02(B)(2) (emphasis added).

The Acts go beyond the general prohibition against disparate discriminatory treatment. They also define *discrimination* to include a failure by covered entities to take affirmative steps,<sup>5</sup> including the provision of auxiliary aids and services, to accommodate people with disabilities. Specifically, the Acts expand the meaning of *discrimination* to include

[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); A.R.S. § 41-1492.02(F)(3) (emphasis added).

The ADA<sup>6</sup> and the AzDA broadly define *auxiliary aids and services* to include the following:

(A) qualified interpreters or *other effective methods of making aurally delivered materials available to individuals with hearing impairments*;

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<sup>5</sup> See discussion of affirmative steps required under Title III and the AzDA *infra* § II.B.3.

<sup>6</sup> The definition of *auxiliary aids and services* is contained in the ADA’s general definitions section because it is used in other titles of the ADA, including Title II (state and local government services). See 42 U.S.C. § 12102(1).

(B) qualified readers, taped texts, *or other effective methods of making visually delivered materials available to individuals with visual impairments*;

(C) *acquisition or modification of equipment or devices*;  
and

(D) *other similar services and actions*.

42 U.S.C. § 12102(1); A.R.S. § 41-1492(2) (emphasis added).

Captions and descriptions, by their function and purpose, fall squarely within the broad, nonexhaustive statutory definition of *auxiliary aids and services*.<sup>7</sup> 42 U.S.C. § 12102(1); A.R.S. § 41-1492(2). Captions are the visual representation of a film’s soundtrack. (ER at 130, ¶¶ 17-18; 156, ¶¶ 10-11.) They provide textual representations of the soundtrack, including dialogue, narration, song lyrics, descriptions of sound effects, and special vocal inflection. (*Id.*) Audio description is the narration that conveys the settings, costumes, body language, and sight gags in a visual presentation or performance. (ER at 25-26, ¶¶ 30-31; 132, ¶¶ 30-31; 158, ¶¶ 20-21.) Concise descriptions inserted between natural pauses in the dialogue or songs aid listeners in understanding the film’s important visual elements. (*Id.*) Thus, providing captions is an effective method of making aurally delivered information in the soundtrack available to persons who are deaf or hard

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<sup>7</sup> Although the instant case does not require resort to extrinsic tools of construction, the Department of Justice (“DOJ”), in fact, listed open and closed captioning, 28 C.F.R. § 36.303(b)(1), and audio description services, 28 C.F.R. § 36.303 app. B (2008), as examples of auxiliary aids and services in its regulations.

of hearing, and transmitting audio descriptions is an effective method of making visually delivered information about the settings, costumes, and body language available to persons who are blind or visually impaired. *See* 42 U.S.C. § 12182(b)(2)(A)(iii); A.R.S. § 41-1492.02(F)(3).

The nonexhaustive statutory definition of *auxiliary aids and services* does not specifically list open captions, closed captions, or audio descriptions as examples. This does not, however, establish any textual ambiguity that authorizes resort to extrinsic statutory construction tools. The Supreme Court has repeatedly recognized that Congress intended the ADA’s broad definitions to encompass unspecified concepts to fulfill the Act’s broad remedial purpose. *See Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 129 (2005) (“Although [Title III’s] statutory definitions of ‘public accommodation’ and ‘specified public transportation’ do not expressly mention cruise ships, there can be no serious doubt that the [foreign flag] cruise ships fall within both definitions under conventional principles of interpretation.”); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677 (2001) (concluding that “[i]t seems apparent, from . . . the comprehensive definition of ‘public accommodation’ that petitioner’s golf tours and their qualifying rounds fit comfortably within the coverage of Title III” even though the nonexhaustive examples of covered facilities did not specifically include the PGA Tour, Inc., and professional golf tours); *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998)

(holding that “[s]tate prisons fall squarely within the statutory definition of ‘public entity,’ which includes ‘any department, agency, special purpose district, or other instrumentality of a State or States or local government’” even though the broad definition did not identify prisons).

Moreover, “[t]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” *Yeskey*, 524 U.S. at 212; *Martin*, 532 U.S. at 689 (internal quotation marks omitted). The technology to display open caption projection or closed captions or to transmit audio descriptions in movie theaters did not exist when Congress drafted the ADA.<sup>8</sup> (ER at 91.) Given the auxiliary aids and services definition’s breadth and the mandate that public accommodations provide auxiliary aids and services, the Acts required movie theaters to provide open caption projection, closed captions, and audio descriptions when the equipment that could deliver them became commercially available. This is true whether or not Congress

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<sup>8</sup> Seven years after the ADA became law, in November 1997, closed captions and descriptive narration were available for the first time as part of a regular feature film presentation in a movie theater. *See* Faye Kuo, *Open and Closed: Captioning Technology As a Means to Equality*, 23 J. Marshall J. Computer & Info. L. 159, 174 (2004); *see also* <http://ncam.wgbh.org/mopix/aboutproject.html> (this film debut included audio descriptions).

contemplated that technology would be invented to provide closed captions and audio descriptions at movie theaters.<sup>9</sup>

To summarize, Table 1 demonstrates that when read in conjunction with the Acts' key statutory definitions, the Acts' texts require movie theaters to provide auxiliary aids and services so that sensory disabled moviegoers have meaningful access to a movie's the aurally delivered soundtrack via captions and the visually delivered information via audio descriptions at the screening of movies, which is the service that movie theaters provide to the public. *See Fortune*, 364 F.3d at 1084.

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<sup>9</sup> Although the technology to provide closed captions and audio description in movie theaters did not exist when Congress enacted the ADA, the technology did exist in other venues, including television. Closed-caption decoders existed for television in the late 1970s. *See Kuo, supra* note 8. By the mid-1980s, audio descriptions were provided to blind patrons at stage plays and operas. Laura Van Tuyl, *Theater/Television Technology 'Audio Description' Helps the Blind Appreciate Theater and Television*, *Christian Sci. Monitor*, May 7, 1990, at 10. In 1984, a separate audio track delivered audio descriptions for television. Snigdha Prakash, *Bringing Sight to the Blind: Silver Spring Woman Wins Emmy for Audio Description Service*, *Wash. Post*, Nov. 8, 1990, at M1.

<b>Table 1</b>	
<b>Statute</b>	<b>Same provision with insertion of statutory definitions in bold typeface.</b>
No individual shall be discriminated against on the basis of <i>disability</i> in the full and equal enjoyment of the . . . services of any place of <i>public accommodation</i> by any person who owns, leases (or leases to), or operates a place of <i>public accommodation</i> . 42 U.S.C. § 12182(a); A.R.S. § 41-1492.02(A) (emphasis added).	No individual shall be discriminated against on the basis of [ <b>deafness and blindness</b> ] in the full and equal enjoyment of the . . . services of any [ <b>motion picture houses</b> ] by any person who owns, leases (or leases to), or operates a [ <b>motion picture house</b> ].
[D]iscrimination includes . . . a failure to take such steps as may be necessary to ensure that no individual with a <i>disability</i> is . . . denied services or otherwise treated differently than other individuals because of the absence of <i>auxiliary aids and services</i> , unless such steps would fundamentally alter the nature of the . . . services or result in an undue burden. 42 U.S.C. § 12182(b)(2)(A)(iii); A.R.S. § 41-1492.02(F)(3) (emphasis added).	[D]iscrimination includes . . . a failure to take such steps as may be necessary to ensure that no individual [ <b>who is deaf or blind</b> ] is . . . denied or otherwise treated differently than other individuals because of the absence of [ <b>effective methods of making aurally delivered materials available to persons with hearing impairments or visually delivered materials available to individuals with visual impairments . . . [and] the acquisition . . . of . . . devices</b> ], unless such steps would fundamentally alter the nature of the . . . services or result in an undue burden.

Because the Acts’ unambiguous language is conclusive, the inquiry about the Acts’ meaning must end with it. *See Botosan*, 216 F.3d at 831. Movie theaters, as places of public accommodation, must take steps to provide effective auxiliary aids and services to ensure full and equal enjoyment by people with sensory disabilities of the movies screened at those theaters.

**2. The ADA’s and the AzDA’s plain language is consistent with the express findings that Congress made and the express purpose it identified in enacting the ADA.**

Congress made several relevant findings in enacting the ADA: people with disabilities historically face isolation, 42 U.S.C. § 12101(a)(2); discrimination against individuals with disabilities persists in the “critical area” of recreation, 42 U.S.C. § 12101(a)(3); and individuals with disabilities encounter various forms of discrimination, including “communication barriers” and “relegation to lesser services,” 42 U.S.C. § 12101(a)(5). Congress expressly stated that its purpose in enacting the ADA was to provide a “clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” 42 U.S.C. § 12101(b)(1), and to assure individuals with disabilities “full participation” in society, 42 U.S.C. § 12101(a)(8). This purpose can be accomplished for individuals with sensory disabilities such as deafness and blindness only if the term *auxiliary aids and services* is interpreted broadly and the auxiliary aids and services mandate is enforced.<sup>10</sup> The district court’s narrow construction of

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<sup>10</sup> Congress recently affirmed that the ADA is a remedial statute intended to be construed broadly to address discrimination in the findings of the ADA Amendment Act of 2008 (“ADAAA”), Pub. L. No. 110-325, 122 Stat. 3553 (2008). Although the Supreme Court has generally interpreted the ADA broadly (*see* discussion *supra* § II.B.1), it had not done so in construing the scope of the protected class. In the ADAAA, Congress rejected the narrow interpretation of *disability* that the Court announced in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases and in *Toyota Motor Manufacturing*,

*auxiliary aids and services* to exclude captions and audio descriptions and its exemption of movie theaters from compliance with the auxiliary aids and services provision contravenes the ADA's express statutory findings and purpose.

By failing to install auxiliary aids and services to display captions and transmit audio descriptions, movie theaters relegate sensory disabled customers to a service that is inferior to the service that they provide to the nondisabled public. (ER at 139-40, ¶¶ 72-81; 145-46; 150-51; 162-63, ¶¶ 44-50.) Nondisabled persons would never be expected to pay up to \$10 for a movie lacking its soundtrack or its picture. (ER at 78.) Until Harkins installs equipment to provide captions and audio descriptions at the movies that it presents to the public, individuals with sensory disabilities will continue to be deprived of the full and equal enjoyment of the adventures shown in Spider-Man, X-Men, Pirates of the Caribbean, Star Wars and their sequels; the tragedy portrayed in The Titanic, The Day After Tomorrow, and Pearl Harbor; the comedic relief in Finding Nemo and Monsters, Inc.; the magic and wizardry in Harry Potter and its sequels; and other movies the public experiences. (ER at 131, ¶ 25; 133, ¶ 33; 150; 158, ¶¶ 16 & 22.)<sup>11</sup> Excluding

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*Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) and restored the broad meaning to the definition.

<sup>11</sup> The State's Complaint alleges that major movie studios distribute wide release films with captions and audio descriptions citing to the MoPix® Motion Picture Access's website, which provides a current list of releases and past movies with closed captions and audio descriptions. (ER 158-59, ¶ 16, 22 [citing <http://ncam.wgbh.org/mopix/mopixmovies.html>].)

individuals with sensory disabilities from these cultural and recreational experiences contravenes the ADA's purpose.

**3. The Acts' statutory design makes it clear that movie theaters must provide auxiliary aids and services to individuals with sensory disabilities.**

The Acts' *auxiliary aids and services* definitions mandate and track the statutory schemes established to address a comprehensive solution to disability discrimination. The ADA's Title III and the AzDA require Harkins to take affirmative steps to install equipment to deliver captions and audio descriptions during the movies it shows to the public to accommodate its sensory disabled customers. This duty is limited only by the fact-specific undue burden and fundamental alteration defenses that Harkins must affirmatively prove.

The Acts prohibit public accommodations from discriminating against individuals with disabilities in the full and equal enjoyment of their goods, services, facilities, privileges, advantages, or accommodations. 42 U.S.C. § 12182(a); A.R.S. § 41-1492.02(A). The Acts' general prohibition against discrimination is modeled after other civil rights laws protecting individuals on the basis of race, sex, religion, and national origin. *Compare* 42 U.S.C. § 12182(a) *with* Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a; *compare* A.R.S. § 41-1492.02(A) *with* A.R.S. § 41-1442(B). These provisions prohibit disparate treatment, including denial of participation in the goods and services that a public

accommodation offers; provision of separate services, benefits, and privileges; and provision of unequal, lesser services. However, unlike other civil rights laws that prohibit discrimination based on race, gender, national origin, or religion, Title III and the AzDA include more specific requirements that supplement the general discrimination prohibition. These specific requirements prescribe that public accommodations (1) may not impose “eligibility criteria” that tend to screen out disabled individuals, 42 U.S.C. § 12182(b)(2)(A)(i), A.R.S. § 41-1492.02(F)(1); (2) must make “reasonable modifications in policies, practices, or procedures, when such modifications are necessary” to afford its goods or services to individuals with disabilities, 42 U.S.C. § 12182(b)(2)(A)(ii), A.R.S. § 41-1492.02(F)(2); (3) *must provide auxiliary aids and services to individuals with disabilities*, 42 U.S.C. § 12182(b)(2)(A)(iii), A.R.S. § 41-1492.02(F)(3) (emphasis added); and (4) must remove architectural and structural barriers if barrier removal is readily achievable and must ensure equal access for the disabled individuals through alternative methods if it is not, 42 U.S.C. § 12182(b)(2)(A)(iv)-(v), A.R.S. § 41-1492.02(F)(4)-(5). These additional specific prohibitions create an affirmative duty to accommodate people with disabilities. *McGary v. City of Portland*, 386 F.3d 1259, 1266 (9th Cir. 2004) (stating that the ADA “not only protects against disparate treatment, it also creates an affirmative duty in some circumstances to

provide special, preferred treatment, or reasonable accommodation.”) (internal quotation marks omitted).

In enacting the ADA and the AzDA, Congress and the Arizona legislature shared a more comprehensive view of discrimination than the prohibition against disparate treatment and disparate impact contained in other civil rights laws. *See Olmstead v. Zimring*, 527 U.S. 581, 598 (1999) (rejecting the notion that a disability discrimination claim always requires the plaintiff to identify a comparison class and uneven treatment of similarly situated individuals). Indeed, the accommodation<sup>12</sup> claim’s crux is that the covered entity did not take affirmative steps, such as providing auxiliary aids and services or reasonable modification of rules, to level the playing field for disabled individuals. *See Fortyune*, 364 F.3d at 1086 (“[T]he ADA defines discrimination as a public accommodation treating a disabled patron the same as other patrons despite the former’s need for a reasonable modification.”).

These specific requirements that level the playing field by accommodating disability are subject to practical boundaries in the form of affirmative defenses. For example, eligibility criteria that screen out disabled individuals are permitted when “necessary for the provision” of the services or facilities being offered. 42

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<sup>12</sup> Title III does not use the term *accommodation*. Here, *accommodation* is used as shorthand for claims related to the failure to take required affirmative steps, such as provision for auxiliary aids and services, reasonable modification of policies, and removal of architectural barriers.

U.S.C. §§ 12182(b)(2)(A)(i), 12184(b)(1). Auxiliary aids and services need not be provided if doing so would “fundamentally alter” the nature of the goods, services, facilities, privileges, advantages or accommodations being offered or to the extent that the provision would “result in an undue burden.” 42 U.S.C §

12182(b)(2)(A)(ii)-(iii). The fundamental alteration and undue burden limitations are affirmative defenses that involve intensely fact-specific inquiries. 42 U.S.C. § 12182(b)(2)(A)(iii) (stating the auxiliary aids and services obligation is required “unless the *entity* can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden) (emphasis added); *see also Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 845 (9th Cir. 2004) (concluding that fundamental alteration is an affirmative defense that involves an “intensively fact-based inquiry”).

The district court erred in dismissing Plaintiffs’ lawsuit because Plaintiffs established a prima facie case. Title III requires that a plaintiff establish only the following: 1) the plaintiff is *disabled* as that term is defined by the ADA; 2) defendant owns, leases, or operates a place of public accommodation; and 3) the defendant discriminated against the plaintiff by (a) failing to take such steps as may be necessary to provide auxiliary aids and services to the plaintiff that would ensure that (b) the plaintiff was not 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); *see e.g., Fortynone*, 364 F.3d at 1082 (setting forth prima facie elements in a Title III denial of reasonable modification claim under the ADA); *see also* A.R.S. § 41-1492.02(F)(3).

Plaintiffs met the first element because deafness and blindness satisfy the Acts' *disability* definitions because these conditions are physical impairments that substantially limit the major life activities of hearing and seeing, respectively. *See* 42 U.S.C. § 12102(2); A.R.S. § 41-1492(5). Plaintiffs met the second because the Acts define the term *public accommodation* to include "motion picture house[s]." 42 U.S.C. § 12181(7)(C); A.R.S. § 41-1492(2). Harkins, in fact, conceded these points. (ER at 7 [*Harkins*, 548 F. Supp. 2d at 727].) Finally, Harkins has discriminated against individuals with sensory disabilities by refusing to provide the auxiliary aids and services that would ensure that they were not excluded, denied services, or otherwise treated differently in the service of screening movies. Plaintiffs pled sufficient facts to establish that Harkins has not installed the equipment necessary to provide captioning and audio descriptions for those movies that it screens for the public that the film studios have captioned and described. (ER at 159-60, ¶ 26, 34.) Harkins has failed to take these necessary steps even though numerous technologies exist to enable it to do so (ER at 130-31, ¶¶ 18-20,

22-24; 132, ¶ 30; 145-46; 150; 157-58, ¶¶ 12-15, 20) and hundreds of other movie theater auditoriums have already done so (ER at 146, 150).

The Acts' unambiguous language establishes as a matter of law that captioning and audio descriptions are *auxiliary aids and services*, and the district court erred in continuing its judicial inquiry beyond that plain language.

**II. The District Court Erred in Undermining the Acts' Purpose by Concluding that the Plaintiffs' Claims Fall Outside Their Scope, by Eviscerating the Auxiliary Aids and Services Provisions, and by Misinterpreting the Extrinsic Tools of Statutory Construction.**

The district court incorrectly held that providing the effective *auxiliary aids and services* of captions to customers who are deaf and of audio descriptions to customers who are blind falls outside the Acts' scope. (ER at 10 [*Harkins*, 548 F. Supp. 2d at 729].) Instead of following basic statutory construction canons for remedial statutes, the district court rewrote the Acts in a manner that undermines the Act's purpose. *Ariz. State Bd. for Charter Sch.*, 464 F.3d at 1007 (“[Courts] are not vested with the power to rewrite the statutes, but rather must ‘construe what Congress has written . . . . It is for [courts] to ascertain—neither to add nor to subtract, neither to delete nor to distort.’” [quoting *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951)]).

A roadmap of the district court's erroneous rewriting of the Acts follows:

- 1) The Acts do not require public accommodations to provide goods and services different from the ones that they provide to the general public.

- 2) The Acts, therefore, do not require public accommodations to modify the content of their goods or services.
- 3) The Acts, therefore, do not require public accommodations to alter the form in which they provide their service.
- 4) The Acts, therefore, do not require a public accommodation to change audio elements into a visual format and to change visual elements into an audio format in providing a movie screening service.
- 5) Public accommodations, therefore, do not violate the auxiliary aids and services provision if they provide sensory disabled customers with the same form of service that they offer to other members of the public.

(ER at 8-10 [*Harkins*, 548 F. Supp. 2d at 727-29].) This Court must reject the district court's interpretation because it concluded that Plaintiffs' claims fall outside the Acts' scope, eviscerated the purpose of the auxiliary aids and services provision, and improperly looked to extrinsic tools of statutory construction.

**A. The District Court Erred in Concluding that Plaintiffs' Claims Fall Outside the Acts' Scope Because Plaintiffs Do Not Seek a Different Service Other than the Service that Harkins Provides to the General Public.**

Plaintiffs merely seek nondiscriminatory enjoyment of the *same* service that Harkins offers to the public. Nor do Plaintiffs seek a *different* good, or a *different*

mix of inventory<sup>13</sup> (e.g., requiring Harkins to select only movies with captions and descriptions available from the film studios) than Harkins offers to the public.

By statute, nondiscriminatory enjoyment of a service includes the provision of *auxiliary aids and services*, such as captioning and audio description. See 42 U.S.C. § 12182(b)(2)(A)(iii); A.R.S. § 41-1492.02(F)(3); see also discussion *supra* § I.B.1. Plaintiffs seek the provision of the auxiliary aids and services of captions and audio descriptions for nondiscriminatory enjoyment of the *same* movies Harkins screens for the public. Film studios arrange for many first-run movies to be captioned and described and provide them to the theaters at no charge. (ER at 133, ¶ 33; 158, ¶ 16; 159, ¶ 22.) Sensory disabled customers cannot access the captioning and descriptions (already available with the films) unless Harkins installs the equipment necessary to display the captions and transmit the audio

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<sup>13</sup>Plaintiffs seek *auxiliary aids and services*, not *goods* or *special goods*. Plaintiffs' claims also do not run afoul of a regulation promulgated by the Department of Justice ("DOJ") about special goods. See 28 C.F.R. § 36.307. Movie theaters provide a service and their "inventory" is a rotating one as determined by agreement with movie studios, and not an "inventory" of goods for sale, rent, or loan as envisioned under 28 C.F.R. § 36.307(a). See *Ball*, 246 F. Supp. 2d at 24 ("Defendants fail to recognize that they are not similarly-situated to bookstores and video stores that provide goods because Defendants provide the *service* of screening first run movies.") Assuming *arguendo* that this regulation is applicable to Harkins' screening of movies to the public, it would not support dismissal of Plaintiffs' claims because Plaintiffs' claims can proceed to the merits based on installing equipment to display open captioning via open caption projection, closed captioning, and audio descriptions. Today, the CD-Rom with the captions and audio descriptions is produced by and delivered at no cost with each film from the studios. (ER at 87.)

descriptions. Once the equipment is installed, Harkins need only play the CD while the movie is showing. (ER at 24, ¶ 22-23.) Harkins' sensory disabled customers will then be able to view the closed captions on an acrylic panel or other display device, such as a Personal Digital Assistant ("PDA) or to see the projected captions on the screen (ER at 131, ¶ 22-23; 157, ¶ 15) and hear the descriptions on headsets (ER at 132, ¶ 30; 158, ¶ 20) during the regular showing of the movies that Harkins screens for the public (ER at 131, ¶ 22-23; 132, ¶ 30; 157, ¶ 15; 158, ¶ 20) as sensory disabled patrons at some of their competitors now do (ER at 146, 150).

**B. The District Court Erred in Rewriting the Acts In a Manner that Eviscerates the Auxiliary Aids and Services Provisions.**

The district court incorrectly rewrote the Acts' auxiliary aids provisions to include exceptions and exemptions; interpreted the auxiliary aids provisions in a manner that rendered them meaningless; and misapplied obiter dicta in several inapposite insurance cases to support its faulty analysis.

**1. The district court rewrote Title III and the AzDA to add exceptions and exemptions in contravention of the Acts' unambiguous language.**

The district court disregarded the Acts' unambiguous language, which requires movie theaters as public accommodations to provide captions and audio descriptions as *auxiliary aids and services*, subject only to the fact-intensive undue burden and fundamental alteration defenses. Through its restrictive reading of the

Acts, the district court improperly limited the plain text of the Acts' *auxiliary aids and services* definition by excluding closed captions, open captions, and audio descriptions from it; and narrowed the auxiliary aids and services provisions' coverage by exempting movie theaters from providing *any* auxiliary aids and services under *any* circumstances.

The Acts are remedial statutes. *Hason v. Med. Bd.*, 279 F.3d 1167, 1172 (9th Cir. 2002). Basic statutory construction canons require that the scope of such statutes be interpreted broadly, that exceptions to such statutes be construed narrowly, and that the burden of establishing exceptions to such statutes be placed on the party claiming that such exceptions exist. *See Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 232 (5th Cir. 1969) (stating that “when dealing with a humanitarian remedial statute which serves an important public purpose, it has been the practice to cast the burden of proving an exception to the general policy of the statute upon the person claiming it”); *Nat’l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971) (recognizing that “[r]emedial legislation is traditionally construed broadly to effectuate its purposes, with exceptions narrowly construed.”) (internal quotation marks and citation omitted); *see also* A.R.S. § 1-211(B) (“Statutes shall be liberally construed to effect their objects and to promote justice.”).

Time after time, the Supreme Court has rejected statutory interpretations that added exceptions to the ADA's broad coverage where no such limitations appeared in its text. In *Martin*, the Supreme Court rejected the PGA Tour, Inc.'s claim that all the substantive rules for its highest-level competitions were sacrosanct and could not be modified under the ADA's Title III reasonable modification provision (42 U.S.C. § 12182(b)(2)(A)(ii)) because that provision's text "carve[d] out no exemption for elite athletics." *Martin*, 532 U.S. at 689; accord *Yeskey*, 524 U.S. at 209 (determining that the ADA's Title II provision prohibiting public entities from discriminating against qualified individuals with disabilities applied to state prisons because Congress did not expressly exclude prisons or prisoners from these protections).

This Court has also rejected attempts to narrow the ADA's scope by reading limitations into it that did not appear in its text. In *Botosan*, this Court held that Title III's clear and unambiguous text could not be interpreted to include a requirement that plaintiffs notify any state or local authority as a prerequisite for filing a private Title III lawsuit where no such limitation appeared in the Act's text. *Botosan*, 216 F.3d at 832; accord *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 731-32 (9th Cir. 1999) (holding that the ADA's Title II applied to zoning and concluding that Congress specifically rejected an approach that could have left room for exceptions to its general prohibition [42

U.S.C. § 12132] against discrimination by public entities); *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999) (holding that the ADA's Title I medical examination provisions [42 U.S.C. § 12112(d)(2)-(4)] applied to the *broader* group of "employees" and "job applicants" rather than to the more narrow group of "qualified individuals with disabilities" because the plain text said so).

For these reasons, this Court should reject the district court's judicially created exceptions of captions and audio descriptions from the *auxiliary aids and services* statutory definition and its exemption of movie theaters from the auxiliary aids and services mandate. *See Spector*, 545 U.S. at 132 ("Cruise ships flying foreign flags of convenience offer public accommodations and transportation services to over 7 million United States residents annually, departing from and returning to ports located in the United States. . . . To hold there is no Title III protection for disabled persons who seek to use the amenities of foreign cruise ships would be a harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled.") Based on availability, usage, and price comparisons, movie theaters play a more significant role than cruise ships do in Americans pursuit of recreational opportunities. As of 2007, there were 5,928 movie theaters offering movies to the public on 38,794 screens in the United

States.<sup>14</sup> In 2007, there were 1.4 billion movie tickets sold in the U.S.<sup>15</sup> Movie theaters remain the least expensive form of out-of-home entertainment.<sup>16</sup> To hold that there is no Title III protection for movie patrons with sensory disabilities who require captions for meaningful access to the soundtrack and audio descriptions for meaningful access to the picture is a harsh and unsupportable interpretation.

**2. The district court rewrote the ADA and the AzDA in contravention of basic statutory construction canons.**

The district court's analysis contravenes accepted statutory construction canons and renders the Acts' auxiliary aids and services protections meaningless for deaf and blind persons. *See Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to every word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

The district court's faulty analysis led it to conclude that the Acts do not require Harkins to provide the auxiliary aids of captions and descriptions because

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<sup>14</sup> *See* National Association of Theatre Owners ("NATO"), <http://www.natoonline.org/statistics.htm> (last visited November 12, 2008).

<sup>15</sup> *See* Motion Picture Association of America ("MPAA") 2007 Entertainment Market Industry Statistics, <http://www.mpa.org/USEntertainmentIndustryMarketStats.pdf> (last visited November 19, 2008).

<sup>16</sup> *See* NATO, <http://www.natoonline.org/pdfs/Talking%20Points/TP-Economic%20Downturns%20and%20the%20Box%20Office.pdf> (last visited November 19, 2008).

doing so changes audio elements of a movie into a visual format and to change visual elements into an audio format. (ER at 10 [*Harkins*, 548 F. Supp. 2d at 729].) The Acts require that an auxiliary aid or service be “effective.” 42 U.S.C. § 12102(1) (defining *auxiliary aids and services* to include “other *effective* methods of making aurally delivered materials available to individuals with hearing impairments” and “other *effective* methods of making visually delivered materials available to individuals with visual impairments”) (emphasis added); *see also* A.R.S. § 41-1492(2). An auxiliary aid or service for a deaf patron, however, will *never* be effective unless it conveys aurally delivered information in a visual format and an auxiliary aid for a blind person will never be effective unless it conveys visually delivered information in a different sensory format (e.g., audio).<sup>17</sup> For example, the *auxiliary aids and services* statutory definition (42 U.S.C. § 12102(1)(A); A.R.S. § 41-1492(2)(a)) specifically includes qualified interpreters, but interpreters would never be required under the district court’s narrow construction of the auxiliary aids and services provision’s requirements because they translate spoken English into American Sign Language (“ASL”).<sup>18</sup> ASL is a

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<sup>17</sup> Braille changes visually delivered information of printed words into a system that makes the information accessible through touch.

<sup>18</sup> American Sign Language is “[O]ne of several communication options available to deaf people. ASL is said to be the fourth most commonly used language in the United States.” *See* National Institute on Deafness and Other Communication Disorders (“NIDCD”) online Health Topics: American Sign Language, <http://www.nidcd.nih.gov/health/hearing/asl.htm#a> (last visited October 30, 2008).

complete, complex language that employs signs made with the hands and other movements, including facial expressions and body postures.<sup>19</sup> ASL interpreters not only change spoken English’s audio elements into ASL’s visual elements, they also translate English into ASL—a different language with its own syntax, order, and structure. Under the district court’s analysis, a visual delivery of aural information and an audio delivery of visual information fall outside the ADA’s scope and consequently, a public accommodation need not provide effective auxiliary aids and services to deaf or blind individuals.

The district court’s interpretation also violated another statutory construction rule because it led to the absurd result that the Acts’ auxiliary aids and services provision would protect people with less severe hearing and visual impairments but would not protect deaf or blind people. “[W]ell accepted rules of statutory construction caution [courts] that statutory interpretations which produce absurd results are to be avoided.” *Ariz. State Bd. for Charter Sch.*, 464 F.3d at 1008 (internal quotation marks omitted). Amplification is an auxiliary aid that is effective for some people who are hard of hearing; magnification is an auxiliary

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<sup>19</sup> “Sign language is based on the idea that sight is the most useful tool a deaf person has to communicate and receive information. Thus, ASL uses hand shape, position, and movement; body movements; gestures; facial expressions; and other visual cues to form its words. [ASL] contains all the fundamental features a language needs to function on its own—it has its own rules for grammar, punctuation, and sentence order.” *See* NIDCD online Health Topics: American Sign Language, <http://www.nidcd.nih.gov/health/hearing/asl.htm#a> (last visited October 30, 2008).

aid that is effective for some people who are visually impaired. Neither of these types of auxiliary aids requires a change from one sensory modality to another. Under the district court's analysis, the auxiliary aids and services provision would conceivably require that amplification and magnification be provided. However, these auxiliary aids are not effective for many sensory disabled people, including people who are deaf or blind. (ER at 156, ¶ 9; 158, ¶ 17.)

Contrary to the district court's interpretation, the Acts do not expressly exclude captions and audio descriptions from the *auxiliary aids and services* definition or limit the provision of auxiliary aids and services to those methods that may be provided in the *same form* (i.e. same sensory modality) as provided to the public. No such limitations appear in the Acts' plain text. 42 U.S.C. § 12182(b)(2)(A)(iii); A.R.S. § 41-1492.02(F)(3). Adding these limitations by judicial fiat is reversible error. *See Ariz. State Bd. for Charter Sch.*, 464 F.3d at 1007.

- 3. The district court misplaced its reliance on *Weyer, McNeil, and Mutual of Omaha* to rewrite the Acts because these insurance cases do not hold that providing the auxiliary aids and services of captions and audio descriptions falls outside the Acts' scope.**

The district court misplaced its reliance on several insurance cases to conclude that providing effective auxiliary aids and services to deaf and to blind persons (i.e. changing audio elements into a visual format and changing visual

elements into an audio format) constitutes providing a *different* service outside the Acts' scope. (ER at 8-10 [See *Harkins*, 548 F. Supp. 2d at 729 (citing *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) [holding that Title III did not address the terms of the policies that the defendant insurance company sold]; *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000) [same]; *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999) [same]].)

The holding and dicta in *Weyer* do not support the district court's restrictive interpretation of the meaning of *auxiliary aids and services* and the mandate to provide them because its relevant holding is limited to the insurance policy context. The plaintiff in *Weyer* sued an insurance company alleging that the policy her employer had purchased through the insurance company discriminated against persons with mental disabilities because it had a twenty-four-month cap on benefits for mental disabilities but no similar cap on benefits for physical disabilities. See *Weyer*, 198 F.3d at 1114-15. Although the insurance company had a long-term disability policy without the twenty-four-month cap, plaintiff's employer did not purchase it. *Id.* at 1108. *Weyer* held that "Title III does not address the terms of the policies that [the defendant insurance company] sells." *Id.* at 1115. *Weyer* did not address the auxiliary aids and services provision and cannot be read to hold that providing auxiliary aids and services, such as captions and descriptions, means providing a *different* service outside the Acts' scope. In *Weyer*, this Court

examined Title III’s applicability to a *good*—an insurance policy—rather than to a service. Even if the *Weyer* dicta that Title III does not require public accommodations to provide a different *service* than they provide the general public were applied to this case, the district court erred in dismissing Plaintiffs’ claims. Plaintiffs seek nondiscriminatory enjoyment of the *same service* Harkins provides to the public: the screening of movies. *See* discussion *supra* § II.B.1.

In concluding that the ADA’s auxiliary aids and services provision merely requires that Harkins provide sensory disabled moviegoers with the *same form of services* (i.e. *not* changing audio elements into a visual format and *not* changing visual elements into an audio format), the district court relied on *Mutual of Omaha*’s broad statement that “the common sense of the [ADA] is that the contents of the goods or services offered by a place of public accommodation is not regulated.” (ER at 8 [*Harkins*, 548 F. Supp. 2d at 727 (quoting *Mut. of Omaha*, 179 F.3d at 560)].) The district court also relied on *McNeil*’s broad statement that “a business is not required to alter or modify the goods or services it offers” to comply with the ADA. (ER at 8 [*Harkins*, 548 F. Supp. 2d at 728 (quoting *McNeil*, 205 F.3d at 186)].) The district court’s reliance on these statements was misplaced because the cases are inapposite.

Neither the Seventh Circuit in *Mutual of Omaha* nor the Fifth Circuit in *McNeil* addressed the *auxiliary aids and services* definition and provision at issue

here. The parties did not brief the issue, and the courts did not discuss it in their opinions. Thus, the pronouncements on which the district court relied are nothing more than obiter dicta with respect to this provision because it “was not fully debated” in those decisions. *Cent. Va. Cmty Coll. v. Katz*, 546 U.S. 356, 363 (2006).

“[I]t is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”

*Id.* (quoting *Cohens v. Virginia*, 6 Wheat. 264, 399-400 (1821)). Moreover, subsequent Fifth Circuit decisions support the conclusion that *McNeil*'s broad pronouncements do not apply to auxiliary aids and services. See *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 455 n.11 (5th Cir. 2005) (recognizing a school's obligation to provide auxiliary aids and services, such as interpreters and notetakers, to allow deaf students to participate in education programs in an action filed under Title II of the ADA); *Cole v. Velazquez*, 67 Fed. Appx. 252 (5th Cir. 2003) (reversing and remanding dismissal of a legally blind prisoner's claim for auxiliary aids and services to use the library in a Title II action) (The panel that decided *Cole* included Circuit Judges Garza and DeMoss, who also decided *McNeil*).

The district court incorrectly concluded it needed to add “some practical, common sense boundaries” to the Acts’ prohibition against discrimination on the basis of disability in the full and equal enjoyment of services. The “boundaries” it created resulted in its holding that Harkins need not provide effective auxiliary aids and services by changing audio elements into a visual format and change visual elements into an audio format. (ER at 10 [*Harkins*, 548 F. Supp. 2d at 729 (quoting *McNeil*, 205 F.3d at 187)(internal quotation marks omitted)].) To support its creation of these “boundaries,” it relied on *McNeil*’s statement that “[t]he 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 and services of an establishment ‘fully’ and ‘equally’ compared to the non-disabled.” *Id.* (quoting *McNeil*, 205 F.3d at 187) (some internal quotations marks omitted). This Court should reject the district court’s imposition of this boundary because the district court disregarded the existing practical boundaries created by the undue burden and fundamental alteration defenses that Congress erected in Title III’s auxiliary aids and services provision. *See Ariz. State Bd. for Charter Sch.*, 464 F.3d at 1007.

For all these reasons, the movies Harkins screens at its theaters for the public are *services* that fall squarely within the scope of the Acts’ covered “goods, services, facilities, privileges, advantages, or accommodations . . . .” 42 U.S.C. § 12182(a); A.R.S. § 41-1492.02(A), and therefore, their exhibition is subject to the

auxiliary aids and services provisions. The auxiliary aids and services of captions and descriptions provide sensory disabled customers with nondiscriminatory enjoyment of the movies Harkins screens for the public.

**C. The District Court Erred in Relying on Extrinsic Tools of Statutory Construction to Hold that Movie Theaters Were Not Required to Provide Captioning and Descriptive Narration for Sensory Impaired Patrons.**

The district court should not have looked beyond the ADA's unambiguous language to determine that Plaintiffs had stated a claim against Harkins. (ER at 11-13.) Having done so incorrectly, it then compounded its mistake by holding that the extrinsic tools to which it looked—including the legislative history, the Title III regulations, a Title III Interpretive Guidance, and the preamble to the unadopted ADA Access Guidelines (“ADAAG”)—supported dismissing Plaintiffs’ claims. *Id.* In fact, the first three of those authorities support a finding that movie theaters must provide auxiliary aids and services so that sensory impaired individuals are not denied the service provided. Because it is unadopted, the preamble to the ADAAG, 69 Fed. Reg. 44138 (July 23, 2004) (to be codified at 36 C.F.R. pt. 1190-91), has no persuasive value on the issues before the Court, and the Court should not consider it. *See* discussion *infra* II.C.4.

**1. The district court erred in relying on the legislative history to dismiss Plaintiffs' claims.**

The district court erred by dismissing Plaintiffs' claims relying, in part, on the ADA's legislative history. There are no legitimate grounds to overcome the strong presumption that the ADA's unambiguous auxiliary aids and services definition expressed congressional intent. This Court has stated as follows:

There is a strong presumption that the plain language of the statute expresses congressional intent, which is rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed. . . .

Even where the express language of a statute appears unambiguous, a court must look beyond that plain language where a literal interpretation would thwart the purpose of the overall statutory scheme, would lead to an absurd result, or would otherwise produce a result demonstrably at odds with the intentions of the drafters.

*Royal Foods Co. v. RJR Holdings Inc.*, 252 F.3d 1102, 1108 (9th Cir. 2001)

(citations and internal quotation marks omitted). For the reasons discussed *supra* in § I.B., a literal interpretation of the *auxiliary aids and services* definition and provision would *not* 1) thwart the overall statutory scheme's purpose, 2) lead to an absurd result, or 3) produce a result demonstrably at odds with the drafters' intentions. Therefore, the district court erred by considering the legislative history.

Even if the district court was justified in turning to the legislative history to determine whether auxiliary aids and services were required in movie theaters, it erred in analyzing that history. The court relied on a single statement in the House

Committee Report to determine that Congress did not intend to require movie theaters to provide auxiliary aids and services to sensory impaired movie patrons. (ER at 11-12 [*Harkins*, 548 F. Supp. 2d at 730 (quoting H.R. Rep. No. 101-485(II) at 108 (1990) *as reprinted in* 1990 U.S.C.C.A.N 303, 391)].) The statement that the Court quoted reads as follows:

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) at 108.

This single statement does not address any congressional intent regarding closed captions, open caption projection, or audio descriptions because these technologies did not exist at that time.<sup>20</sup> (ER at 91.) Furthermore, this isolated statement does not indicate a legislative intent contrary to Plaintiffs' position on the auxiliary aids and services issue because the legislative history as a whole demonstrates that Congress intended to create a broad definition of *auxiliary aids and services* that technology advancements would ever expand. When drafting the auxiliary aids and services provision, Congress noted as follows:

The [*auxiliary aids and services*] definition includes illustrations of aids and services that may be provided. The list is not meant to be exhaustive; rather, it is

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<sup>20</sup> See sources *supra* note 8.

intended to provide general guidance about the nature of the obligation. The legislation specifies that auxiliary aids and services includes qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments. Other effective methods may include: telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for the deaf, closed captions, and decoders. The legislation also specifies that auxiliary aids and services include qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments. Additional examples of effective methods of making visually delivered materials available include audio recordings and the provision of brailled and large print materials.

H.R. Rep. No. 101-485(II) at 107-08; *see also* S. Rep. No. 101-116 at 63-64 (1989). Here, the literal text mirrors the expressed congressional intent. Where Congress has “intentionally and unambiguously drafted a particularly broad definition, it is not [the court’s] function to undermine that effort.” *Royal Foods*, 252 F.3d at 1106 (internal quotation marks omitted).

In the legislative history, Congress stated that the ADA’s coverage would extend to future technological advances that would expand the opportunities for auxiliary aids and services in additional settings:

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 accommodations and services provided to individuals with disabilities . . . keep[] pace with the rapidly changing technology of the time.

H.R. Rep. No. 101-485(II) at 108; *see also* S. Rep. No. 101-116, at 64-65.

These statements, taken together, indicate a congressional intent that comports with the ADA's plain language and compel the conclusion that the broad, unambiguous *auxiliary aids and services* definition evolved based on technical advancements and that it necessarily included closed captions, open caption projection, and audio description as they became available. *See Ball v. AMC Entm't, Inc.*, 246 F. Supp. 2d 17, 22 (D.D.C. 2003) (rejecting movie theater chain's reliance on this same statement in a lawsuit seeking captioning and stating that "reviewing legislative history is like looking over a crowd and picking out your friends. . . . Defendants have only one friend in this particular crowd.") (citation and internal quotation marks omitted).

**2. The Department of Justice's Title III regulations require that public accommodations provide auxiliary aids to sensory impaired individuals.**

Congress expressly authorized the Department of Justice ("DOJ") to issue regulations to carry out the provisions of Title III of the ADA. 42 U.S.C. § 12186(b). The DOJ issued Title III regulations in 1991. 56 Fed. Reg. 35,544 (codified at 36 C.F.R. pt. 1191 app. A). An agency's regulatory interpretation of a statute that it is charged with enforcing is granted controlling weight unless the

regulations are arbitrary, capricious, or manifestly contrary to the statute. *Chevron, U.S.A. v. Natural Res. Council, Inc.*, 467 U.S. 837, 844 (1984). The DOJ's Title III regulations are entitled to *Chevron* deference because the statute specifically authorizes the DOJ to issue regulations to carry out Title III's provisions. 42 U.S.C. § 12186(b).

The DOJ's regulations reiterate Title III's requirement that a public accommodation provide auxiliary aids and services to ensure that no individual with a disability is excluded or denied services. 28 C.F.R. § 36.303(a). The regulations state as follows:

General. A public accommodation shall 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 the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

28 C.F.R. § 36.303(a). The regulations also specifically define auxiliary aids to include open and closed captioning. 28 C.F.R. § 36.303(b)(1). The regulations cannot be interpreted as exempting movie theaters from the auxiliary aids and services provision. Contrary to the district court's conclusion, the Title III regulations support Plaintiffs' claims.

**3. The district court erred in expanding the scope of the DOJ’s Interpretative Guidance and then relying on it to hold that movie theaters are not required to provide captions and descriptions.**

As a preamble to its Title III regulations, the DOJ issued an ADA Title III Interpretative Guidance. 28 C.F.R. § 36.101 app. B. The Interpretive Guidance is the DOJ’s interpretation of its own Title III regulations. The Court “must give an agency’s interpretation of its own regulations controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). An agency’s interpretation of regulatory language controls if the interpretation “sensibly conforms to the purpose and wording of the regulations.” *Miller*, 536 F.3d at 1028 (internal citation omitted).

The Interpretive Guidance includes one comment on captioning in movie theaters, which constitutes the DOJ’s only statement concerning movie theaters’ obligations regarding the provision of auxiliary aids and services. 28 C.F.R. § 36.303 app. B. The guidance states as follows:

Movie theaters are not required by § 36.303 to present *open-captioned films*. However, other public accommodations that impart verbal information through soundtracks on films, video tapes, or slide shows are required to make such information accessible to persons with hearing impairments. Captioning is one means to the make information accessible to individuals with disabilities.

28 C.F.R. § 36.303 app. B (emphasis added). This single statement in the Interpretive Guidance cannot form the basis for exempting a subset of public accommodations from the Acts’ auxiliary aids and services requirements because it is limited to open-captioned films.

Open captioning is one type of auxiliary aid for hearing impaired individuals. (ER at 130-31, ¶ 18, 20-21; 145; 157 ¶ 13.) In the movie theater context, open captions can be exhibited in two ways: via special film prints with the captions burned into the film (ER at 130-31, ¶ 20-21; 145; 157, ¶ 13) or via open caption projection, which does not require a special film print (ER at 131, ¶ 23; 157, ¶ 14). When Congress enacted the ADA in 1990 and the DOJ promulgated regulations in 1992, open captioning in movie theaters was available only in the form of special film prints. (ER at 91.)<sup>21</sup>

Acquiring special film prints was the only way to exhibit open captions, indeed it was the only form of captioning available in the movie theater context, when DOJ issued the Interpretive Guidance. The DOJ regulations do not require public accommodations to order special goods, 28 C.F.R. § 36.307(a), and possibly to conform with that position, the Interpretive Guidance stated that movie theaters were not required to present special open-captioned film prints.<sup>22</sup> The Interpretive

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<sup>21</sup> See sources cited *supra* note 8.

<sup>22</sup> In exhibiting films, movie theaters provide a service—the screening of movies—not “goods.” See *supra* note 13. It is Plaintiffs’ position that the films exhibited

Guidance’s statement regarding open-captioned films does not exempt movie theaters from providing auxiliary aids and services by offering captioning and descriptive narration to sensory impaired individuals. The district court erred in failing to distinguish between open-captioned film prints and open caption projection, closed captioning, and descriptive narration. Open caption projection, closed captioning, and descriptive narration do not require movie theaters to acquire special goods or to alter the mix of their inventory.<sup>23</sup>

The district court expanded the statement regarding open-captioned films beyond its intended meaning by applying it to *all* forms of captioning and to audio descriptions. The DOJ could not have intended that statement to cover all auxiliary aids and services in the movie theater context<sup>24</sup> because if it had, the Interpretive Guidance would not conform to the purpose and wording of the auxiliary aids and services provision in the Title III regulations. Nowhere in the ADA or its regulations are movie theaters exempted from the definition of public accommodation or from the prohibitions against discrimination. Under the district

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are not “goods” and therefore, are not subject to the limitation set out in 28 C.F.R. § 36.307(a). However, Plaintiffs believe that this regulation is the genesis of the statement exempting movie theaters from showing open-captioned films in the Interpretive Guidance.

<sup>23</sup> Plaintiffs’ complaints do not seek to enjoin Harkins to alter its mix of inventory by selecting more movies with captions and audio descriptions. *See* discussion *supra* § II.B.1.

<sup>24</sup> *See* sources cited *supra* note 8.

court's flawed analysis, the Interpretive Guidance's text would contradict the statute's plain language and therefore, would not be entitled to any deference. *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 765 (9th Cir. 2007) (finding that deference to an agency's interpretation or application of a statute must be rejected where the construction is contrary to clear congressional intent or frustrates the policy that Congress sought to implement).

The district court's interpretation of the Interpretive Guidance is plainly erroneous and inconsistent with the statute and the DOJ's Title III regulations because it carves out an exception to Title III's auxiliary aids and services provision for a specific public accommodation, movie theaters, that does not exist in either the text of the statute or in the regulation interpreting the statute. *See* 42 U.S.C. § 12182(b)(2)(A)(iii).

**4. The district court erred in granting deference to the unadopted ADAAG preamble.**

Congress required that the DOJ adopt architecture and design, transportation, and communication standards consistent with the minimum guidelines that the Architectural and Transportation Barriers Compliance Board ("ATBCB") promulgated pursuant to 42 U.S.C. § 12204. 42 U.S.C. § 12186(c). The ATBCB is entrusted with issuing guidelines to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible in terms of architecture and design,

transportation, and communication but its guidelines have no authority over Title III enforcement until the DOJ adopted them. 42 U.S.C. § 12204.

The 2004 ADAAG preamble states that the ADAAG and the DOJ regulations do not require captioning of movies. 69 Fed. Reg. at 44138. The district court erred in granting any persuasive value to this statement because it has no authoritative weight and it is factually and legally incorrect. First, a preamble does not generally have the force of a regulation or even the persuasive power of an agency interpretation. *El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008) (“preamble language should not be considered unless the regulation itself is ambiguous”).

Second, the DOJ, the agency that enforces Title III, has not adopted the ADAAG revision and therefore, it is owed no deference. *See Ball*, 246 F. Supp. 2d at 23 (stating that the unadopted ADAAG is entitled to no deference). The ADAAG standards currently in effect are those that the ADAAG issued in 1991 and the DOJ adopted on the same day. 56 Fed. Reg. at 35,544 (codified at 36 C.F.R. Pt. 1191 app. A). The 1991 guidelines do not address the issue of captioning or descriptive narration in movie theaters and provide no basis upon which to exempt movie theaters from the Acts’ auxiliary aid provision.

Third, the ATBCB does not issue guidelines to regulate Title III’s auxiliary aids and services requirement and the ADAAG does not control operational issues,

such as the provision of auxiliary aids and services. *See Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1085 (9th Cir. 2004) (stating that the ADAAG controls the public accommodation's *design* under the ADA but that it does not control *policy concerns regarding the design's use or operational issues*).

Independent of the design guidelines, the Acts require a public accommodation to provide auxiliary aids and services. The meaning of *auxiliary aids and services* specifically includes the acquisition or modification of equipment or devices to deliver auxiliary aids and services. 42 U.S.C. § 12102(1)(C); A.R.S. § 41-1492(2)(c). Based on available technologies, movie theaters may chose from several systems to provide open captions or closed captions. *See discussion supra* pp. 5-7. While the ATBCB acted within the scope of its authority in considering whether to require built-ins for auxiliary aids and services, it went well beyond its authority when it stated in its 2004 preamble that “ADAAG and the Department of Justice’s ADA regulations do not require captioning of movies for persons who are deaf.” 69 Fed. Reg. at 44138. The district court erred in giving any weight to this unsupported, unadopted statement.

Finally, even if the unadopted ADAAG preamble provided any general persuasive value, it cannot support the district court’s ruling because its statement

regarding captioning is incorrect and it does not even mention audio descriptions.<sup>25</sup>

In the preamble to the 2004 ADAAG guidelines, the ATBCB stated that its intention was to gather information on movie-theater captioning as it related to the built environment and the technical provisions that would be necessary to include in the ADAAG to facilitate the use of auxiliary aids and services. 69 Fed. Reg. at 44138. The ATBCB decided not to include a “requirement for built-in features that can help support the provision of captioning technologies.” 69 Fed. Reg. at 44138. The only explanation provided for this decision was the following statement in the preamble:

“most of these commentators stated a strong preference for open captioning over closed captioning . . . [and] the movie theater industry pointed out that the Department of Justice’s Title III ADA regulations state that movie theaters are not required to present open captioned films, but are encouraged to voluntarily provide closed captioning.”<sup>26</sup>

69 Fed. Reg. at 44138. The ATBCB appears to have declined to adopt a requirement for a specific type of built-in system because of a perceived lack of

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<sup>25</sup> In fact, the DOJ issued a Notice of Proposed Rulemaking on June 17, 2008, asking for comment on proposed regulations that would specifically require movie theaters to install equipment to show captions and audio descriptions. 73 Fed. Reg. 34508 (June 17, 2008). Though these regulations have not been issued and have no authority at this time, the fact they were promulgated combined with the DOJ’s failure to adopt the 2004 ADAAG revision is evidence that the DOJ disagrees with the ATBCB’s assertion that movie theaters are not required to provide any captioning.

<sup>26</sup> In fact, the Title III regulations do not contain that language.

consensus from commentators about the type of captioning the ADAAG should support. However, the ATBCB's failure to identify a specific type of captioning system does not support the conclusion that captioning is not required.<sup>27</sup>

### **III. The District Court Erred in Ruling that Plaintiffs-Intervenors Did Not Have Standing to Challenge the Lack of Auxiliary Aids and Services at Any of Harkins' Theaters Other Than the Harkins North Valley 16.**

#### **A. Standard of Review.**

The Court reviews a district court's determination of standing questions de novo. *Natural Res. Defense Council v. U.S. E.P.A.*, 542 F.3d 1235, 1244 (9th Cir. 2008) (citing *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004)). It reviews the denial of a motion to amend a complaint is reviewed for an abuse of discretion. *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1084 (9th Cir. 2000).

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<sup>27</sup> The community of persons who are deaf or hard of hearing presumably is not a monolith and individuals within it have varying preferences about auxiliary aids and services because the DOJ encourages public accommodations to consult the preferences of disabled individuals in selecting effective auxiliary aids and services they utilize. 28 C.F.R. § 36.303 app. B. Varied preferences among persons who are deaf or hard of hearing do not exempt a public accommodation from providing auxiliary aids and services. It would be manifestly unfair to find that a public accommodation need not provide the auxiliary aid or service that a sensory disabled individual preferred and that the same public accommodation could avoid providing *any* effective auxiliary aid or service because it was not the one the sensory disabled individual preferred.

**B. Plaintiffs-Intervenors Met the Constitutional Standing Requirements Under *Pickern* and Its Progeny to Challenge the Lack of Auxiliary Aids and Services in All Harkins' Theaters in Arizona.**

The district court erred in ruling that Plaintiffs-Intervenors lacked Article III standing to challenge the lack of auxiliary aids and services at any Harkins theater other than the Harkins North Valley 16. (ER at 6, n.5.) Where the standing issue is raised, a plaintiff must satisfy the “case or controversy” requirement of Article III of the U.S. Constitution. To establish constitutional standing, a plaintiff must show (1) that he has suffered an injury in fact that is concrete and particularized and actual or imminent; (2) a causal connection between the injury and the conduct complained of, and (3) that the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The only element at issue here is whether the Plaintiffs-Intervenors suffered an injury in fact. The district court misapplied the holdings of *Doran v. 7-Eleven*, 524 F.3d 1034, 1040-41 (9th Cir. 2008), and *Pickern v. Holiday Quality Foods*, 293 F.3d 1133, 1137-38 (9th Cir. 2002), by failing to acknowledge that the key inquiry when determining whether an “injury in fact” has occurred is whether non-compliance with the ADA deterred plaintiff from patronizing a public accommodation. A plaintiff seeking to enforce accessibility under Title III may establish “injury” with the following minimal showing: (1) he or she encountered barriers to accessibility at the place of public accommodation and (2) as a result of

those barriers, he or she is deterred from returning there. *See, e.g., Doran*, 524 F.3d at 1040-41 (finding that allegations that the plaintiff had previously visited the public accommodation and that barriers currently deterred him from visiting it again established an actual or imminent injury).

Congress's decision to expressly entitle "any person" who is "being" or who "is about to be subjected to" disability discrimination to judicial relief informs the standing issue and makes it clear that either a continuing or a threatened ADA violation is an "injury" within the Act's meaning. *See Pickern*, 293 F.3d at 1137-38 (9th Cir. 2002) (citing 42 U.S.C. § 12188(a)(1)).

In *Pickern*, this Court held that plaintiffs have standing to challenge barriers in a public accommodation when, like Plaintiffs-Intervenors, they have actually encountered or had knowledge of the barriers and, as a result, have been deterred from patronizing the public accommodation. 293 F.3d at 1138-39. Similarly, a plaintiff who is threatened with harm in the future because of existing or imminently threatened noncompliance with the ADA suffers "imminent injury." *Pickern*, 293 F.3d at 1138.

- 1. Plaintiffs-Intervenors established that they knew that Harkins had failed to install auxiliary aids and services equipment to provide captions and audio descriptions at Harkins Theatres.**

Plaintiffs-Intervenors stated in the proposed Amended Complaint that they lodged with the district court that they knew about the discriminatory

communication barriers that the lack of auxiliary aids and services at all of Harkins other theaters caused. Plaintiffs-Intervenors Lindstrom and her son actually patronized Harkins Arrowhead Fountains 18 and attended movies that lacked auxiliary aids and services necessary to enable a deaf person to fully and equally enjoy the movies being shown there. (ER at 26-31, ¶ 38-39; 44, ¶¶ 20-23.)

Plaintiff-Intervenor Wanger also attempted to patronize the Harkins Arizona Mills 24 and was informed that auxiliary aids and services were not available. (ER at 28, ¶¶ 50-51; 56, ¶ 7-8.)

Plaintiff-Intervenor Rachel Lindstrom stated that she knew that Harkins did not have auxiliary aids and services to provide captions at most movies based on past visits to other Harkins locations, calls to Harkins theaters about availability of movies, visits to Harkins' and other movie-listing websites, and the State's Reasonable Cause Determination Letter. (ER at 26, ¶¶ 37-38, ¶¶ 41-46, ¶¶ 58-67, ¶¶ 70-71.) Plaintiff-Intervenor Wanger stated he knew that audio descriptions were not available at Harkins Theatres because of past visits to other Harkins theaters, to other movie-listing websites, and the State's Reasonable Cause Determination Letter. (ER at 27-28, ¶¶ 49-56; 31-32, ¶¶ 73-80.) Furthermore, Plaintiffs-Intervenors Lindstrom and Wanger believed that Harkins had not taken any steps to provide more films with captions or any movies with descriptions. (ER at 32, ¶¶ 82-83.)

Here, Plaintiffs-Intervenors established that they encountered the lack of auxiliary aids and services at theaters other than the Harkins North Valley 16 and knew that these same communication barriers existed throughout the Harkins chain of theaters in the Phoenix metropolitan area and in other Arizona communities. These barriers deterred them from returning to Harkins Theatres and, in some cases, injured Frederick Lindstrom by denying him full and equal enjoyment of the movie experience that it provided to the general public.

**2. Plaintiffs-Intervenors established an interest in going to Harkins Theatres after Harkins installs the auxiliary aids and services equipment to provide captions and audio descriptions.**

The record also demonstrates that Plaintiffs-Intervenors intend to return to the chain of Harkins Theatres when it installs equipment to provide captions and audio descriptions at its theaters. (ER at 30-31, ¶¶ 68-69, 72.) Plaintiff-Intervenor Wanger would like to view movies at the chain of Harkins Theatres when Harkins equips its theaters to provide audio descriptions. (ER at 32, ¶ 81.) Plaintiff-Intervenor Lindstrom and her son indicate a willingness to travel throughout the metropolitan Phoenix area, which includes Mesa, Tempe, Chandler, Scottsdale, Avondale, and Peoria, to attend movies at the chain of Harkins Theatres once auxiliary aids and services to display captions are provided. (ER at 30-31, ¶¶ 68-72; 43-44, ¶¶ 8, 18-24.)

**C. The District Court Applied Factors for Establishing Injury in Fact That *Pickern* and Its Progeny Do Not Support.**

The district court concluded that Plaintiffs-Intervenors lacked standing to challenge any theater other than the Harkins North Valley 16 because they had not alleged that they had “attempted to access any of Harkins’ other theaters” or that they “would access any of the other theaters if the requested services were provided.” (ER at 6-7, n.5 [*Harkins*, 548 F. Supp. 2d at 727, n.5].) Controlling authority, however, does not require Plaintiffs-Intervenors to prove that they have patronized or have attempted to patronize Harkins’ other theaters. *See Pickern*, 293 F.3d at 1135. Nor does it require a more definite plan to return to each theater. *Pickern*, 293 F.3d at 1135.

**1. Contrary to the district court’s ruling, an ADA plaintiff need not show past patronage to establish an injury sufficient to confer standing.**

A plaintiff need not actually visit a place of public accommodation to satisfy the “injury in fact” requirement if he has actual notice of the barrier’s existence. *See* 42 U.S.C. § 12188(a)(1) (“Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.”); *see also Pickern*, 293 F.3d at 1135 (holding that “when a plaintiff who is disabled within the meaning of the ADA has actual knowledge of illegal barriers at a public accommodation to which he or she desires

access, that plaintiff need not engage in the ‘futile gesture’ of attempting to gain access in order to show actual injury”); *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 733 (9th Cir. 2007) (recognizing that “one need not be a client or customer of a public accommodation to feel the sting of discrimination” and thus, to have standing to pursue the claim); *Parr v. L & L Drive Inn Rest.*, 96 F. Supp. 2d 1065, 1081 (D. Haw. 2000) (concluding that once the plaintiff either encountered discrimination or learned of the alleged violations through expert findings or personal observation, he had “actual notice” that the defendant did not intend to comply with the ADA).

Therefore, Plaintiffs-Intervenors may establish an injury in fact for Harkins theaters other than Harkins North Valley 16 without actually encountering Harkins’ failure to provide auxiliary aids and services at each of its theaters. Reviewing the movie listings in newspapers, special sites for listing movies, and Harkins’ website informed Plaintiffs-Intervenors that Harkins did not provide the auxiliary aids and services of captions and audio descriptions. This Court has explained as follows:

[L]imiting a plaintiff to challenging the barriers he encountered or personally knew about would burden businesses and other places of public accommodation with more ADA litigation, encourage piecemeal compliance with the ADA, and ultimately thwart the ADA’s remedial goals of eliminating widespread discrimination against and integrating people with disabilities into American life’s mainstream.

*Doran*, 524 F.3d at 1047.

The district court incorrectly concluded that concerns about piecemeal litigation apply only to cases that involve barriers in the same building. (ER at 6-7, n.5 [*Harkins*, 548 F. Supp. 2d at 727, n.5].) Enforcement through piecemeal litigation will more likely thwart uniform enforcement when the issue is the lack of auxiliary aids and services throughout an entire chain of movie theaters under common control. There is no reason under controlling standing jurisprudence why Plaintiffs-Intervenors would need to sue each and every Harkins theaters in a separate lawsuit. Courts have concluded that in cases involving Title III claims against public accommodation chains that have similar barriers, plaintiffs need not personally encountered the barriers in have been deterred in each of the chains' facilities to have standing to sue the facilities. *See, e.g., Celano v. Marriott Int'l, Inc.*, 2008 WL 239306 (N.D. Cal. 2008) (holding that all plaintiffs had standing to bring their ADA claims against Marriott's twenty-six golf courses nationwide).

**2. Plaintiffs-Intervenors need not demonstrate an unconditional plan to return to an inaccessible public accommodation to have standing to sue the entity.**

Plaintiffs-Intervenors are not required to prove that they had an unconditional plan to return to an inaccessible public accommodation to meet the “injury in fact” requirement. In *Pickern*, this Court found that the plaintiff had standing to challenge barriers after indicating that “he would shop at the Paradise

market *if it were accessible.*” 293 F.3d at 1138 (emphasis added). Similarly, Plaintiffs-Intervenors presented sufficient evidence to establish actual or imminent injury for the standing purpose. They stated that they would return to Harkins’ theaters *when they became accessible.* (ER at 30, ¶¶ 68-69; 31, ¶ 72; 32, ¶ 81.) They cannot and are not required to be more definite about their intent to return given the communication barriers.

Moreover, Plaintiffs-Intervenors live, work, or go to school in the Phoenix metropolitan area. (ER at 44, ¶¶ 19-20; 127, ¶¶ 4, 7.) Like other Americans who enjoy movies, they presumably may select the theaters they visit based on movie times or on the proximity to work, home, or other public accommodations, such as restaurants. Consequently, Plaintiffs-Intervenors’ right to choose from the same array of movies, show times, and locations available to the general public should not be diminished by Harkins’ denial of auxiliary aids and services.

## CONCLUSION

For the reasons identified above, this Court should reverse the district court's dismissal of Plaintiffs' lawsuit and remand the case for trial.

Respectfully submitted this 1st day of December, 2008.

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## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs state that they are not aware of any related cases pending in the Ninth Circuit.

s/Rose Daly-Rooney

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 28-4 because it contains 15, 077 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 1<sup>st</sup> day of December, 2008.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 1<sup>st</sup> day of December, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing.

By: s/Cathleen M. Dooley

## **ADDENDUM**

[Optional—delete if not necessary. Please see comment number twenty-three concerning addenda in the “General Comments” section of this template.]