

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Appeal No. 08-16075

**STATE OF ARIZONA EX REL. TERRY GODDARD, THE ATTORNEY
GENERAL; THE CIVIL RIGHTS DIVISION OF THE ARIZONA
DEPARTMENT OF LAW,**

Plaintiffs-Appellants,

&

FREDERICK 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**

**BRIEF OF *AMICUS CURIAE* THE ALEXANDER GRAHAM BELL
ASSOCIATION FOR THE DEAF AND HARD OF HEARING,
SUPPORTING PLAINTIFFS-APPELLANTS
AND REVERSAL OF DISTRICT COURT**

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STATEMENT OF IDENTITY AND INTEREST

Pursuant to Fed. R. App. P. 29, the Alexander Graham Bell Association for the Deaf and Hard of Hearing (hereinafter “A.G. Bell”) respectfully submits this brief in support of Appellants the State of Arizona, Frederick Lindstrom, and Larry Wanger. A.G. Bell is a non-profit organization based in the District of Columbia. It has chapters throughout the United States and international affiliates worldwide. One of the oldest and preeminent organizations in deafness, A.G. Bell advocates for spoken language in deaf children and adults. A.G. Bell provides advocacy, resources and leadership for parents, professionals, and individuals who are deaf or hard of hearing.¹

A.G. Bell has long advocated for movie captioning accessibility. A.G. Bell has participated as *amicus curiae* in several Americans with Disabilities Act (“ADA”) cases, including cases involving captioning. A.G. Bell believes that its views can inform this Court, and assist the Court in arriving at the correct decision in this appeal.²

¹ References to “deaf individuals” in this brief encompass all individuals whose hearing loss prevents enjoyment of an uncaptioned movie.

² All parties have consented to the filing of this brief. This brief focuses on the ADA issue, but A.G. Bell believes that the district court’s holdings on standing and Arizona state law were erroneous as well. While we have taken efforts to keep repetition to a minimum, some overlap in arguments made by Plaintiffs was unavoidable.

SUMMARY OF ARGUMENT

The district court’s core holding—that captions fundamentally change the nature of the movie watching experience—is extraordinary and cannot withstand scrutiny. The district court reached this highly erroneous conclusion by overlooking relevant precedents of this Court, and by misapplying readily distinguishable precedents. The district court compounded its errors by misreading the pertinent ADA legislative history and regulations.

Deaf individuals have been seeking captioning access in movie theaters for decades. Should this Court affirm the patently erroneous decision below, the result would be catastrophic to deaf individuals’ efforts to obtain movie captioning access in theaters. This Court should reverse the judgment below and remand the case for additional proceedings.

ARGUMENT

I. BACKGROUND TO MOVIE CAPTIONING

If this Court convenes in San Francisco for oral arguments, we encourage the panel judges and their staffs to attend a movie with Rear-Window Captioning (“RWC”). At present, the two theaters with RWC equipment in San Francisco are the AMC Theater at Meteron (101 Fourth Street) and the AMC Van Ness 14 (1000 Van Ness Avenue). Showtimes of RWC movies may be accessed at this website:

www.fomdi.com. It will be readily apparent that the movie's content is not altered in any substantive fashion by captioning.

In addition to viewing a RWC movie, it may be helpful for the Court to have a brief overview of movie captioning and previous efforts to obtain captioning access in theaters.

A. Cultural Significance of Movies and Impact of Lack of Captioning Access

There are thousands of movie theaters nationwide, each showing many features daily. To experience the "magic of movies," deaf individuals need captioning access to the movie's dialogue. For example, deaf individuals cannot follow a movie's storyline if they cannot understand William Hurt explaining the rule against perpetuities in *Body Heat*. Nor can they appreciate the drama of a scene without understanding Chief Brody gravely informing Quint in *Jaws*, "You're gonna need a bigger boat."

Furthermore, a movie (or even a line from a movie) may become a topic of popular discussion because of the movie's entertainment value or social message. Without captioning access, deaf individuals could not share their opinions of *Fahrenheit 9/11* with friends and family, or understand the relevance of quotes such as "Go ahead—make my day" in popular culture. *Cf.* Comment, *District Court Approves Settlement Requiring Movie Theaters to Provide Closed Captioning for*

Deaf and Hard-of-Hearing People, 118 Harv. L. Rev. 1777, 1780 & n.25 (2005) (same point).

B. Movie Captioning Prior to the 1990s

The earliest movies provided full accessibility for deaf individuals, as the dialogue was printed on the screen and visible to the entire audience. The era of “silent” films effectively ended in 1927, when *The Jazz Singer* (a “talking” movie) was a commercial success. In the decades that followed, deaf individuals were largely excluded from the social, cultural, and emotional experience of movies.

The first law to address the lack of captioning issue was the Captioned Films Act, Pub. L. No. 85-905 (1958), when Congress appropriated federal funds to lease or accept films, provide captions for them, and distribute them through state schools for the deaf and other appropriate state agencies. This program proved enormously popular among deaf individuals, and Congress has expanded the captioning appropriations over time. *See generally* Julie Heldman, Comment, *Television and the Hearing Impaired*, 34 Fed. Comm. L. J. 93, 123-24 (1982) (recounting early development of federal captioning laws).

Despite extensive efforts by deaf advocates, captioning access in theaters historically has been (and still is) woefully inadequate. Prior to the 1990s, captioned films were generally not available for deaf audiences until long after they had been available to hearing audiences. Until relatively recently, captioning was a laborious

process, often taking several months after a film had been released. Theaters were not interested in showing a (now captioned) movie that had outlived its commercial run. See generally Gail L. Kovalik, “*Silent*” *Films Revisited: Captioned Films for the Deaf*, 41 *Library Trends* 100, June 22, 1992.

Moreover, until the late 1990s, the only form of movie captioning that existed was “open captioning.”³ Theaters have long resisted extensive use of open captions, ostensibly because they are “too distracting” to non-deaf members of the audience.⁴ While technological improvements have greatly simplified the captioning process

³ In the movie theater context, “open” captions are seen by the entire audience, whereas “closed” captions are seen only by the deaf patron. See *Ball v. AMC Entm’t, Inc.*, 246 F. Supp. 2d 17, 20 n.9 (D.D.C. 2003). Unlike subtitles in foreign films, captions include additional aural information (i.e., “doorbell” or “telephone ringing”), as well as tone (i.e., “shouting,” “whispering,” “falsetto”).

⁴ See, e.g., Holm, *Captioning System Allows Deaf Patrons to Experience Movie Magic*, *Waterloo Courier*, Nov. 1, 2006 (“[Open captioning] is on the screen, and normal customers may find that disruptive”); Beifuss, *Caption The Action - Movie Theaters Install Systems for Hearing-Impaired*, *Com. Appeal*, July 30, 2004 (“[T]heaters don’t like to book [open-captioned showings] too often because patrons with full hearing are annoyed by the captioning”); Singer, *Hearing-Impaired Get Movie Treat*, *Chi. Trib.*, May 7, 2004 (“[T]heater executives adamantly oppose [open captions], saying such subtitles would be a distraction to their hearing clientele Richard King, a spokesman for AMC Theaters, said his company has tested open captioning and ‘we have found that is something that is not appealing to moviegoers [who] are not hearing-impaired’”); Robitaille, *Movie Magic for the Hearing Impaired*, *Bus. Week*, Nov. 1, 2001 (“Hollywood has always stood firmly against open captions, arguing that they would drive away hearing viewers, who would instead come to the movies only on the days the captions weren’t shown”); Kisor, *System a Golden Opportunity to Rediscover the Silver Screen*, *Chi. Sun-Times*, July 18, 1998 (“[H]earing moviegoers don’t care for [open captions]. Too distracting”).

(today many amateurs caption their films and videos on media such as YouTube and MySpace), and studios have assumed responsibility for captioning their films, theaters are still reluctant to show open captioned movies beyond non-premium times, such as Tuesday evenings.

C. Development of Closed-Captioning

When the ADA was enacted in 1990, deaf advocates were dismayed when the ADA's House Report contained a passage stating that "open captioning" was not required. *See* H. Rep. 101-485, pt. 2 at 108 (1990). However, deaf advocates were encouraged by language in the Report indicating that the ADA contemplated utilization of future technologies. *See id.* (ADA requirements "should keep pace with the rapidly changing technology of the times"). Based upon this language, deaf advocates pressed for the development of closed captioning technologies.⁵

Since the late 1990s, RWC became the most popular form of closed-captioning technology among deaf individuals. Although open captions are preferred among

⁵ Although this brief focuses on closed-captioning, we dispute that open captions are "too distracting" for hearing patrons. And even if they were, the alleged discomfort of other patrons is *not* a defense for theaters under other civil rights laws. *Compare United States v. Gulf-State Theaters, Inc.*, 256 F. Supp. 549, 552 (N.D. Miss. 1966) (three-judge court; rejecting theater's defense that white patrons objected to presence of African-American patrons); *Baylies v. Curry*, 21 N.E. 595, 595-96 (Ill. 1889) (rejecting theater's defense that exclusion of African-American woman was justified "to avoid collision between the races").

deaf individuals because they are generally easier to read, RWC is viewed as an acceptable form of captioning access.⁶

A.G. Bell will continue to advocate for the development of new closed-captioning systems, but this should not be an impediment to installation of RWC screens in theaters today. Although only a handful of movies were produced with

⁶ For a sampling of positive feedback RWC has garnered from deaf individuals—and a full account would fill several pages of this brief—see, e.g., Livadas, *Putting Words to Film*, Rochester Democrat and Chronicle, Oct. 18, 2007 (“We’re very thankful we have [RWC] . . . I’m just thrilled to have this here”); *Supra*, Holm, *Captioning System Allows Deaf Patrons to Experience Movie Magic*, Waterloo Courier, Nov. 1, 2006 (“After the movie was done, excitement struck me . . . I couldn’t believe I was able to go to the theaters along with hearing people and enjoy it”); Egerton, *Technology Allows the Deaf To ‘Read’ First-Run Movies*, Louisville Courier-Journal, July 31, 2006 (“[RWC is] the most fantastic thing . . . I have recently seen ‘Superman,’ ‘The Devil Wears Prada’ and ‘Pirates of the Caribbean’”); Morse, *Rear Window Captioning: It Gets Two Thumbs Up!*, The Leader-Post, June 8, 2005 (“I saw [RWC] movies in Calgary theatres three years ago! What a thrill that was! . . . You may take it for granted, but I’ll never forget the experience”); Walls, *Doable*, Asbury Park Press, Feb. 23, 2005 (theater manager reported that RWC is “bringing more deaf people to the movies, which is a good thing”); Wolgamott, *MoPix Gets Thumbs Up*, Lincoln J. Star, Feb. 8, 2005 (“With RWC, ‘Now I can go to a movie any time,’ Mike Rentschler, an avid deaf moviegoer, signed after watching ‘Elektra.’ ‘Before, we could go to a movie only once a month, and if you couldn’t go on that night, you didn’t get to see the movie that month. Now we can go when we want to go, just like everyone else”); Geroulis, *Yorktown Theater Screens New World; Enhancements Open Films to Deaf, Blind*, Chi. Trib., Aug. 9, 1999 (“We’ve had parents drive two to three hours to bring their kids to see a [RWC] film and literally had tears in their eyes saying, ‘Thank you for allowing my son or daughter to come and see ‘Titanic’ or ‘Star Wars’ at the same time as all their friends’”); Kisor, *System a Golden Opportunity to Rediscover the Silver Screen*, Chi. Sun-Times, July 18, 1998 (“With [RWC], I was able to understand everything onscreen for the first time in more than 50 years of deafness. I had not been to the movies in almost two decades”).

RWC-compatible captions at the turn of this century, today most movies released from major studios comes with RWC captions. *See* Elekes, *New Movie Theater's Services are Welcome*, Myrtle Beach Sun-News, Apr. 28, 2008 (“According to the Motion Picture Association of America, more than 100 [RWC] first-run movies are expected to be released by the major studios this year”).

Deaf individuals cannot enjoy movies because theaters such as Defendants refuse to install the equipment necessary to communicate RWC captions to deaf viewers. At the time this brief was written, there were only nine theaters equipped with RWC in the entire state of Arizona.⁷ The only other states within this Court's jurisdiction that have RWC equipment are California (30 theaters) and Washington (5 theaters). *See id.*

D. Previous Captioning Lawsuits

There have been several attempts to obtain captioning access in theaters through litigation. Two federal courts dismissed captioning lawsuits on grounds that are either factually distinguishable from this case, or to the extent that they made legal conclusions, were wrongly decided. *See Todd v. Am. Multi-Cinema, Inc.*, 2003 U.S. Dist. LEXIS 25317 (S.D. Tex. Aug. 5, 2003); *Cornilles v. Regal Cinemas, Inc.*,

⁷ *See* <http://ncam.wgbh.org/mopix/nowshowing.html#AZ> (visited December 5, 2008).

2002 U.S. Dist. LEXIS 7023 (D. Or. Mar. 12, 2002). The reasons why *Todd* and *Cornilles* are inapposite here are discussed *infra* at 27-28.

However, a federal court in the District of Columbia ruled that the ADA does require some closed-captioning access, rejecting many of the same arguments that the district court below accepted. *See Ball*, 246 F. Supp. 2d at 21-26. The *Ball* decision has been well-received by commentators. *See, e.g.*, Comment, *supra*, 118 Harv. L. Rev. at 1779-83 (*Ball* was correctly decided); Comment, *Open and Closed, Captioning Technology as a Means to Equality*, 23 J. Marshall J. Computer & Info. L. 159, 189-90, 196-97 (2004) (same).

Additionally, the States of New York and New Jersey have charged theaters with violating anti-disability discrimination laws by not providing captioning access to deaf patrons. Both states entered into settlements with theaters comparable to the *Ball* decision.⁸ Finally, deaf individuals in Ontario, Canada likewise sued for movie captioning access under the Ontario Human Rights Code, and entered into a settlement that resulted in widespread installation of RWC.⁹

⁸ *See* http://www.oag.state.ny.us/press/2005/dec/dec05a_05.html (New York); <http://www.state.nj.us/oag/newsreleases05/pr2005030205a.html> (New Jersey).

⁹ *See* <http://www.ohrc.on.ca/en/resources/news/backgrounderclosedcaption/view>.

II. THEATERS MUST AFFIRMATIVELY PROVIDE ACCOMMODATIONS TO DEAF INDIVIDUALS

As a remedial civil rights statute, the ADA must be interpreted liberally in favor of promoting accessibility. *See McGary v. City of Portland*, 386 F.3d 1259, 1268-69 (9th Cir. 2004). Defendants do not dispute that deafness is a “disability” (*see ER at 7; Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1007 (9th Cir. 2007) (recognizing point)) or that theaters are “public accommodations” under the ADA. *See ER at 7; 42 U.S.C. § 12181(7)(c)*.

The district court suggested (ER at 10) that Defendants did not discriminate because they “offered the same form of services [to deaf individuals] as other members of the public.” Such reasoning, however, “misses the point of the ADA.” *Soto v. City of Newark*, 72 F. Supp. 2d 489, 496 n.12 (D.N.J. 1999) (rejecting argument that defendants need only treat deaf individuals “in the same fashion” as everyone else).

Merely providing the same services or refraining from impeding physical access is not sufficient under the ADA. Rather, it is beyond cavil that theaters must affirmatively accommodate a person with a disability. *See, e.g., Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 846-47 (9th Cir. 2004) (failure to provide accommodations is discrimination); *Walker v. Carnival Cruise Lines*, 63 F. Supp. 2d 1083, 1092 (N.D. Cal. 1999) (defendants violate ADA “not simply for denying their

services to disabled customers outright, *but for failing to modify or adjust their services so as to meet the needs of the disabled customers they do serve*” (emphasis added)).

For example, “discrimination” includes a failure to provide “auxiliary aids and services”:

[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) (emphases added). The ADA’s regulations also mandate that a “public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.” 28 C.F.R. § 36.303(c).

The ADA further defines “Auxiliary Aids and Services” broadly to include, *inter alia*, “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments.” 42 U.S.C. § 12102(1)(A). Potential auxiliary aids include “close caption decoders, open and closed captioning,” as well as “[a]cquisition or modification of equipment or devices.” 28 C.F.R. § 36.303(b)(1) & (3).

Thus, theaters are required to provide auxiliary aids necessary to ensure access for deaf individuals, and captioning is an example of such an auxiliary aid. In the movie context, captioning is the *only* auxiliary aid that can effectively provide access for deaf individuals. Assistive listening devices such as infrared systems only benefit people with mild or moderate hearing losses and provide no benefit to deaf individuals. *See Ball*, 246 F. Supp. 2d at 23-24 & n.17 (recognizing point); Comment, *supra*, 23 J. Marshall J. Computer & Info. L. at 182 & n.207 (same).

After an accommodation is shown to be necessary (as captioning certainly is here), theaters must show that the accommodation would “alter the fundamental nature of [their] business.” *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1082 (9th Cir. 2004). Whether an accommodation fundamentally alters a service is “an intensively fact-based inquiry.” *Lentini*, 370 F.3d at 845 (internal quotation marks omitted); *accord Wilson v. North Carolina*, 981 F. Supp. 397, 400 (E.D.N.C. 1997) (reasonableness of accommodations for deaf plaintiff is factual inquiry inappropriate for summary judgment). As discussed below, the district court grievously erred in finding that captions fundamentally alter the services provided by Defendants’ business.

III. THE DISTRICT COURT ERRED IN HOLDING THAT ANY ALTERATION OF SERVICES IS PRECLUDED BY THE ADA

This Court has recognized that movie theaters provide only one service to the public: screening films. *See Fortyune*, 364 F.3d at 1085. The district court found—on a motion to dismiss—that *any* modification or alteration of a business’ services is not required by the ADA. *See* ER at 8-9, 10, 13. This holding constitutes reversible error on several levels.

A. Only “Fundamental” Alterations are Precluded by the ADA

The district court’s conclusion that *any* change to a public accommodation’s services was explicitly rejected by this Court in *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1000-01 (9th Cir. 2000), *aff’d*, 532 U.S. 661 (2001). *Martin* ruled that a mere alteration services *per se* is not enough. The inquiry must determine whether the proposed alteration is *fundamental*. *See id.* (“The difficulty with [defendant’s] position is that it reads the word ‘fundamentally’ out of the statutory language”).

Here, too, the word “fundamental” does not appear anywhere in the district court’s opinion. Such analysis is contrary not only to this Court’s precedent in *Martin*, but also the ADA’s statutory language that the alteration must be “fundamental.” *See* 42 U.S.C. § 12182(b)(2)(A)(ii), (iii).

B. Closed Captioning Does Not “Fundamentally Alter” the Content of a Movie

Even if the district court had applied the “fundamentally alter” test (which it did not), the sole basis for its determination was that “[c]aptioning changes audio elements into a visual format.” ER at 10.¹⁰ To the extent that the district court meant that captions somehow “fundamentally alter” a movie, such a finding is infirm for several reasons. And again, we strongly encourage the Court and its staff to watch a movie with RWC equipment so the Court may see for itself that no substantive change has occurred. *See supra* at 2-3.

1. Closed Captioning Has a “Negligible Effect” on the Movie Watching Experience

As noted *supra*, movie theaters such as Defendants provide only one service to the public: screening films. If the requested accommodation has a “negligible effect” on the service provided by the theater, then the accommodation does not fundamentally alter the service. *See Fortune*, 364 F.3d at 1085.

And as explained *supra*, hearing patrons do not see closed captions such as RWC. The captions are only visible to the deaf patron. Studios—not theaters—pay

¹⁰ The district court proffered no further factual explanation beyond this *ipse dixit* assertion. *Cf. United States v. CBS, Inc.*, 666 F.2d 364, 371 (9th Cir. 1982) (criticizing district court for failing to articulate basis for findings). In contrast, *Ball* cited affidavits from movie studios (which actually hold the rights to movies) attesting that captioning does not alter the content of their movies. *See Ball*, 246 F. Supp. 2d at 21 n.11.

for the costs of captioning and do not charge theaters for making the captions available. *See Ball*, 246 F. Supp. 2d at 25-26. Once Defendants install RWC equipment, they simply show movies that they would ordinarily show, and deaf patrons would simply watch the captioned movies through the RWC reflectors. *See id.*

The district court opined “merely because Harkins would not be required to show movies that it would not otherwise offer does not mean that providing captions and descriptions would not change the content of its services.” ER at 10. In addition to ignoring the *Martin* rule that the purported change must be “fundamental” (*see supra* at 13), this analysis likewise ignores the “negligible effect” test of *Fortyune*. Like providing accessible seating to wheelchair users, installing closed-captioning equipment has no effect whatsoever on the services (i.e., screening movies) provided by theaters. *See Fortyune*, 364 F.3d at 1085; Comment, *supra*, 23 J. Marshall J. Computer & Info. L. at 197 (“The movie product is not itself altered in any way, shape, or form when RWC is used”).

2. Converting Dialogue into Captions Does not Change the Content of a Movie in any Substantive Manner

The district court’s conclusion that captions alter the content of a movie is factually and legally incorrect. First and foremost, movie studios do not believe that captioning alters the content of movies at all, let alone “fundamentally” so. *See Ball*,

246 F. Supp. 2d at 21 n.11. The *Ball* opinion cited one affidavit from a Dreamworks executive, but additional affidavits from different studios expressing wholehearted support for captioning were filed in *Ball*. For the Court's convenience, the *Ball* affidavits (originally filed in *Cornilles*) are attached in this Brief's Appendix.¹¹

Second, the district court ignored that RWC is already being widely used in the District of Columbia, New York, New Jersey, and Ontario (Canada). *See supra* at 9. To the best of our knowledge, all theaters using RWC are operating as normal with no complaints from hearing patrons.

Third, the district court ignored the long history of movies. During the "silent" era from the 1880s until the late 1920s, movies effectively contained open captions to convey the dialogue to the audience. *Compare PGA Tour, Inc. v. Martin*, 532 U.S. 661, 683-85 & n.39 (2001) (rejecting contention that "walking" was fundamental to golf when, *inter alia*, golf's early rules made no reference to walking). Just because technology improved and allowed for "talking" pictures (which audiences clearly enjoyed more) does not mean that "silent" films were no longer considered "movies."

¹¹ This Court may take judicial notice of filings in other proceedings. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *Biggs v. Terhune*, 334 F.3d 910, 915-16 n.3 (9th Cir. 2003); *cf. Marshall v. Horn Seed Co.* 509 F. Supp. 1, 3 n.1 (W.D. Okla. 1979) (judicially noticing affidavit filed in separate case), *aff'd*, 647 F.2d 96 (10th Cir. 1981).

Even after the “silent” era passed, there was nothing sacrosanct about auditory dialogue in movies. Jane Wyman (*Johnny Belinda*), Marlee Matlin (*Children of a Lesser God*), and Holly Hunter (*The Piano*) all won Academy Awards for acting in leading roles even though their respective characters had no auditory dialogue. Mel Brooks’ *Silent Movie* in 1976 was a homage to the silent era and was well-received by audiences.

And even more compelling is the critical and commercial successes of foreign and/or “subtitled” movies in recent years, such as *The Passion of the Christ*, *Crouching Tiger, Hidden Dragon*, and *Life is Beautiful*. If American audiences had no problem watching the subtitles visible to the entire audience in *The Passion of the Christ* (which grossed over \$370 million domestically), then it is nonsensical for theaters to argue that closed captions (which are not visible to anyone but the deaf patron) somehow fundamentally alter the nature of a movie. Cf. Comment, *supra*, 23 J. Marshall J. Computer & Info. L. at 197-98 (similar point).¹²

¹² The district court also quoted language (ER at 10-11) from the Seventh Circuit’s decision in *Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557 (7th Cir. 1999) to the effect that sign language interpreting would not be required in movie theaters. The district court overlooked that the “sign language in movies” example was one of several examples of possible alterations to services conjured by *Doe*, and that it was *an open question* whether those alterations would be required by the ADA. *See id.* at 560 (“some of them might find shelter in the ‘fundamental alteration’ defense”). Cf. *Nat’l Fed’n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 955 (N.D. Cal. 2006) (museum offering audio tours must provide alternative formats of the tour for deaf patrons). Even if the Seventh Circuit had not qualified its statement, its language was

The district court's conclusion is at odds with other aspects of federal law. For example, federal copyright law recognizes that an original work does not lose its copyright protection (i.e., is not fundamentally altered) merely because it is converted into another language or medium. *See* 17 U.S.C. §§ 101, 103(a), 106; *Marling v. Ellison*, 218 U.S.P.Q. 702, 712 (S.D. Fla. 1982) (copyright laws protect translations of original works).

Moreover, the Federal Communications Commission does not believe that captioning alters the content of television programming in any fashion. *See, e.g., In re Captioning for the Deaf*, 63 F.C.C.2d 378, at *5 (1977) (noting FCC's longstanding interest in promoting television captioning for deaf viewers); Comment, *supra*, 23 J. Marshall J. Computer & Info. L. at 169-70 (similar point). Likewise, Congress never indicated in the 1958 Captioned Films Act that captioning fundamentally alters movies.

C. The District Court Misunderstood or Overlooked Key Distinctions in the Authorities it Cited

The erroneous conclusion that *any* change in services is precluded was predicated upon the district court's misreading of authorities and its failure to appreciate key distinctions between those authorities and the instant case.

clearly dicta and not binding. *See United States v. Pinjuv*, 218 F.3d 1125, 1129 (9th Cir. 2000). Moreover, A.G. Bell assures this Court that captions—rather than sign

1. The District Court Misinterpreted Precedents Involving “Goods”

The district court’s erroneous conclusions were premised heavily upon precedents interpreting the alteration of “goods,” rather than “services.” *See, e.g.*, ER at 7-8 (citing, *inter alia*, *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000)). Precedents such as *Weyer* (which involved an employer’s insurance benefit plan and had nothing to do with movies) noted that bookstores are not required to stock books in Braille. Thus, the district court reasoned, movie theaters are not required to install captioning equipment. Such an unwarranted conclusion misreads *Weyer* and its progeny.

First, *Weyer* did not involve a request for an auxiliary aid that was necessary to ensure access for the plaintiff. As explained *supra* at 10-12, the ADA specifically mandates that public accommodations provide such auxiliary aids, and captioning is an example of such an auxiliary aid.

Second (and more importantly), *Weyer* cited *Ford v. Schering-Plough Corp.*, 145 F.3d 601 (3d Cir. 1998) for the proposition that bookstores need not stock books in Braille. *See* 198 F.3d at 1115 n.63. *Ford*, in turn, cited the following regulation:

The purpose of the ADA’s public accommodations requirements is to ensure accessibility to the **goods** offered by a public accommodation, not to alter the nature or mix of **goods** that the public accommodation has typically

language interpreters—are the preferred choice by an overwhelming (if not unanimous) margin within the deaf community for movie theater accessibility.

provided. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books. Similarly, a video store must make its facilities and rental operations accessible, but is not required to stock closed-captioned video tapes.

Ford, 145 F.3d at 613 (emphasis added) (citing 28 C.F.R. pt. 36, app. B, at 640 (1997)).

This regulation states that a public accommodation need not alter its inventory to include certain “goods.” The examples given in the regulation are all physical goods (books and video tapes) held by a business for sale or rent. *Cf.* Webster’s New College Dictionary at 480 (1995) (defining “goods” as “commodities,” “wares,” and “portable personal property”).

“Services,” however, are not mentioned in this regulation. *See, e.g., Ball*, 246 F. Supp. 2d at 24-25 (making same point); *Walker*, 63 F. Supp. 2d at 1094 & n.4 (same). This distinction is crucial.

Generally, a retailer has less control over the nature of the goods within its inventory (which are produced by other manufacturers) than non-retailers do for their services (which are given by the public accommodation itself). *See, e.g., Doe*, 179 F.3d at 560 (noting that the no alteration of “goods or services” rule was to protect “the *retail* sector of the economy”; emphasis added). We agree that the ADA does not require retailers to offer (for sale or rent) goods that it would not otherwise keep

in its inventory. We further submit that the defendant-employer in *Weyer* offering an employee insurance benefit plan was comparable to a retailer in this regard.

However, a movie theater is definitively *not* a retailer. A patron does not purchase or rent any tangible item from Defendants for personal use (other than perhaps drinks or snacks), but instead arrives at a scheduled time to watch a movie. *See Fortune*, 364 F.3d at 1085 (screening movies is the “service” provided by theaters). Defendants would not be required to stock additional and/or different movies, but simply to use available auxiliary aids (i.e., RWC equipment) to impart the information in the movies to deaf patrons. There would be absolutely no alteration in Defendants’ purported “inventory” (if one were to even use that term) because, as noted *supra* at 8, most major studio movies are produced with RWC-compatible captions today. The same movie will be shown at the same time, whether one patron, several patrons, or no patrons use RWC. Installation of RWC equipment has as much impact upon the Defendants’ “inventory” as do ramps allowing wheelchair users access to the theater (i.e., none).

To be sure, the ADA does not require a fundamental alteration of services either. *See Weyer*, 198 F.3d at 1115. For example, a psychiatrist is not required under the ADA to perform dental work for a deaf patient because such work would be a fundamental change from the psychiatrist’s ordinary services. However, the psychiatrist *is* required to provide a sign language interpreter to communicate with a

deaf patient, and cannot seriously argue (as Defendants do here) that the interpreter's conversion of the psychiatrist's speech and diagnoses into signs fundamentally alters the nature of the psychiatrist's services.

Moreover, an expansive definition of "goods" would potentially emasculate the protections of the ADA for deaf persons. *See Walker*, 63 F. Supp. 2d at 1094 & n.5 (similarly warning against overbroad construction of the regulation regarding goods). For example, if Defendants' feature presentations were considered "goods" under the ADA, then schools could argue that their class lectures are "goods," and thus, exempt from providing interpreting for deaf students. This Court should not tolerate such a result, and should hold that the regulation referring to inventory is limited only to goods, rather than services. *Cf.* 42 U.S.C. § 12101(b)(1) (ADA's purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

2. The District Court Misread the ADA's Legislative History and the Regulations

The district court further cited a passage in the aforementioned House Report stating that "open-captioning . . . of feature films playing in movie theatres, is not required by this legislation." H.R. Rep. No. 101-458 (II), at 108 (1990). The district court also cited a regulation expressing the same sentiments. *See* 28 C.F.R. pt. 36, App. B(C). The district court interpreted (ER at 11-13) the "no open captioning is

required” language of the Report and regulation as effectively meaning “no captioning is required,” completely omitting the word “open” from both the Report and Regulation. This was erroneous.

If anything, the Report and regulation support *Plaintiffs*. Courts employ the same principles of statutory construction to non-statutes.¹³ An elementary tenet is that each word must be given effect. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (courts should not render any language in statute superfluous). Had Congress and the Attorney General meant to completely foreclose captioning access in theaters, they could have done so without including the word “open.” *Cf. Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring) (noting that committee reports “presumably are well considered and carefully prepared”).

The district court surmised (ER at 13) that no reason existed to distinguish between closed and open captioning. To the contrary, there are several rationales why Congress would have excluded only “open” captioning. Interpreting the Report and regulation as only excluding “open” captions is not only consistent with statutory

¹³ *See, e.g., Maine v. Thiboutot*, 448 U.S. 1, 10 n.10 (1980); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1259 (9th Cir. 1995) (applying “expressio unius principle” to Senate Report); *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 836 n.58 (D.C. Cir. 1984) (“The exclusion-by-implication logic applies outside the context of statutory construction.”).

construction principles, but also with the mandate that the ADA be interpreted broadly and in favor of accessibility. *See supra* at 10.

When the ADA was passed, no effective closed-captioning technology for movie theaters existed. Indeed, RWC did not debut in theaters until seven years later. *See Comment, supra*, 23 J. Marshall J. Computer & Info. L. at 207. By including the word “open,” Congress most likely anticipated that a future closed-captioning technology would be developed to provide captioning access. *See Ball*, 246 F. Supp. 2d at 22 (same point). More closed captioning technologies are also being developed, and theaters may likewise wish to utilize those systems rather than RWC in the future.

Furthermore, theaters oppose open captions because they are (allegedly) too distracting to hearing patrons. *See supra* at 5-6 & n.4. Closed captions, not being visible on the screen, do not affect hearing patrons’ experience. Congress most likely excluded “open” captioning to provide theaters with an “undue burden” defense—a defense that is greatly diminished in the closed captioning context.

3. The District Court Gave Unwarranted Deference to the ATBCB Guidelines

The district court also relied (ER at 13) upon Guidelines issued in 2004 by the Architectural and Transportation Barriers Compliance Board (“ATBCB”). These guidelines went beyond the Report and the regulation, and indicated that theaters are

not required to install closed captioning. The district court's reliance on these guidelines was erroneous for several reasons.

First, the Department of Justice ("DOJ") never adopted the ATBCB's guidelines. It is well-settled that ATBCB guidelines are not entitled to deference unless they have been adopted by DOJ as regulations. *See Ball*, 246 F. Supp. 2d at 23 (making point; citing *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 585 (D.C. Cir. 1997)). Second, even if the guidelines had been adopted, which they have not, under this Court's precedent, the Guidelines are only controlling as to the *design* of a theater. *See Fortyune*, 364 F.3d at 1085. In matters regarding services, the Guidelines are of no effect. *See id.* Because the installation of RWC does not affect the design of a theater, the Guidelines are inapplicable here. Third, the guidelines are inconsistent with the ADA's mandate that theaters provide deaf individuals with auxiliary aids such as captioning. *See Ball*, 246 F. Supp. 2d at 23; *see also supra* pages 10-12 (additional discussion and authorities).

Additionally, it appears that the ATBCB may have been intentionally misled by the movie theater industry during the comment period:

Comments from the movie theater industry pointed out that the [DOJ's] ADA regulations issued under title III state that movie theaters are not required to present open captioned films, *but are encouraged to voluntarily provide closed captioning.*

69 Fed. Reg. 44084, 44138 (July 23, 2004) (emphasis added).

The theater industry's representations to the ATBCB are a gross distortion of what the ADA and its regulations stated. No regulation ever stated that theaters are "encouraged voluntarily to provide closed captioning." We presume that the theaters were referring to this passage of the House Report:

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

H.R. Rep. No. 101-485, pt. 3, at 59.

Clearly, the House Report was referring to open—rather than closed—captioning when it encouraged theaters to exhibit captioned movies. No closed-captioning system existed at the time the Report was written. Comment, *supra*, 23 J. Marshall J. Computer & Info. at 186-87 ("It is improper to surmise that the Report relieves movie theaters of any obligation to provide access to deaf people through any form of captioning"). For the theaters to assert that they were only "encouraged to voluntarily provide closed captioning" is a perversion of what the House Report actually said. If the ATBCB relied upon these misrepresentations, it reached a conclusion inconsistent with Congressional direction.

4. The District Court Completely Misunderstood the “Equal Access Does Not Mean Equal Enjoyment” Principle

The district court (ER at 11) cited *Todd* for the proposition that “equal access does not mean equal enjoyment.” *Todd*, in turn, cited nothing for the proposition. *See Todd*, 2003 U.S. Dist. LEXIS 25317, at *16. This proposition “flatly contradicts the statutory prohibition on discrimination ‘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.’” Comment, *supra*, 118 Harv. L. Rev. at 1780 (quoting 42 U.S.C. § 12182(a)); *accord* Comment, *supra*, 23 J. Marshall J. Computer & Info. at 186-87 (similar criticism).¹⁴

We presume that *Todd* had this passage from the House Report in mind when it asserted the “equal access does not mean equal enjoyment” proposition:

“Full and equal enjoyment” does not encompass the notion that persons with disabilities much achieve the identical result or level of achievement of

¹⁴ *Todd* (as well as *Cornilles*) is also distinguishable from the instant case because most of the analyses focused on the “undue burden” defense. *See id.* at *13-*15; *Cornilles*, 2002 U.S. Dist. LEXIS 7023, at *2. Neither case considered the “fundamental alteration” issue that is presently *sub judice*. Also, both *Todd* and *Cornilles* were persuaded partially because at the time those decisions were rendered, very few movies were being produced with RWC-compatible captions. *See Todd*, 2003 U.S. Dist. LEXIS 25317, at *14-*15; *Cornilles*, 2002 U.S. Dist. LEXIS 7023, at *2. As explained *supra* at 8, such is no longer the case today. *Compare Ball*, 246 F. Supp. 2d at 25 (noting that studios were rapidly increasing number of captioned movies).

nondisabled persons, but it does mean that persons with disabilities must be afforded equal opportunity to obtain the same result.

H.R. Rep. No. 101-485, pt. 2, at 101.

All this passage recognizes is that, in some circumstances, people with disabilities will never literally achieve full equality as the able-bodied and that public accommodations are not required to achieve an impossible result. No accommodation will enable a deaf person to equally appreciate the melody of a song from a movie as much as a hearing person. Likewise, no description can truly capture the essence of a beautiful cinematographic landscape for a blind person.

However, the passage does *not* mean (as Defendants argue here) that public accommodations are exempt from providing accommodations for people with disabilities beyond physical access. *See Walker*, 63 F. Supp.2d at 1092-93 (“equal enjoyment” means that defendants must modify services when necessary to accommodate patrons with disabilities); *see also supra* pages 10-12 (additional discussion and authorities). Other civil rights laws providing for “equal access” reject arguments that as long as the plaintiff is allowed to enter the public accommodation, the defendant’s obligation to provide “equal enjoyment” is over. *See, e.g., Magruder v. Sawyer*, 1999 U.S. Dist. LEXIS 23060 at *6-*7 (D. Me. Dec. 13, 1999) (African-American plaintiff was denied equal enjoyment of premises even

though she “has not alleged she was denied entry to the entertainment event, but rather that she was poorly treated once inside”).

* * *

At the end of the day, theaters’ real objection to (open) captions is—and has always been—that hearing patrons find the captions too distracting and would stop attending movies. If anything, this is an “undue burden” defense, not a “fundamental alteration” defense. Whatever the merits of an “undue burden” defense may be regarding open captions, such a defense is entirely misplaced in the closed captioning context, as only the deaf patron can see closed captions.¹⁵ Closed captions do not alter a movie’s content in any substantive manner, let alone “fundamentally” so.

¹⁵ The “undue burden” standard is high. *See, e.g., Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 781 (E.D. Tex. 1996) (defining “undue hardship” as a “concept approaching financial ruin”). While theaters still must purchase RWC equipment, a reasonable accommodation mandate “contemplates some financial burden resulting from accommodation.” *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1417 (9th Cir. 1994).

CONCLUSION

The judgment below should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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Dated: December 10, 2008

CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1
for Case Number 08-16075

I certify that: (**check appropriate option(s)**)

 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

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December 10, 2008

Date

s/ Molly S. Askin

Signature of Attorney or
Unrepresented Litigant

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**CORPORATE DISCLOSURE STATEMENT
OF *AMICUS CURIAE* ALEXANDER GRAHAM BELL ASSOCIATION
FOR THE DEAF AND HARD OF HEARING**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure Amicus Curiae Alexander Graham Bell Association for the Deaf and Hard of Hearing certifies that it is a registered 501(c)(3) nonprofit organization. It certifies that it has no parent corporation and that no publicly held corporation holds 10 percent or more of its stock.

Dated: December 10, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2008, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participant:

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