

ORAL ARGUMENT REQUESTED

THE HONORABLE REGINA S. CAHAN

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

THE WASHINGTON STATE
COMMUNICATION ACCESS PROJECT, a
Washington Non-Profit Corporation,

Plaintiff,

vs.

REGAL CINEMAS, INC., a subsidiary of
Regal Entertainment Group, a Delaware
Corporation, AMC ENTERTAINMENT, INC.,
a/k/a American Multi-Cinema, Inc., a Delaware
Corporation, CINEMARK HOLDINGS, INC.,
a Delaware Corporation, SILVER CINEMAS
ACQUISITION CO., LLP., d/b/a Landmark
Theaters, a Delaware Limited Partnership,
LINCOLN SQUARE CINEMAS, LLC, a
Delaware limited liability company, and
KIRKLAND PARKPLACE CINEMAS LLC, a
Washington liability company,

Defendants.

No. 09-2-06322-2 SEA

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

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1 **I. SUMMARY OF ARGUMENT AND RELIEF REQUESTED**

2 Foregoing legislative or agency rulemaking solutions, Plaintiff Washington State
3 Communications Access Project has sued various movie exhibitors in King County in an attempt
4 to impose new accessibility standards via private litigation. Plaintiff admits that its members are
5 not excluded, denied goods or services, or treated differently than anyone else attending movies
6 at these facilities. Plaintiff claims, however, that Defendants violate the Washington Law
7 Against Discrimination when they do not provide captioning for the movies they exhibit, even
8 though no applicable captioning standards exist under state law. Rather than engaging the
9 established rulemaking process, Plaintiff asks this Court to create new requirements concerning
10 when, where, how often, and in what format movie captioning should occur in Defendant’s
11 theaters, if at all.

12 Plaintiff’s lawsuit presents multiple legal problems. As a threshold matter, Plaintiff
13 cannot make the *prima facie* showing required to state a claim for disability discrimination under
14 the WLAD, that is, that Defendants treat Plaintiff’s members differently than the general public.
15 The “excess goods and services” relief Plaintiff seeks cannot be squared with decisions from the
16 Washington Supreme Court and Ninth Circuit in which similar “entitlement” requests have been
17 rejected, and is inconsistent with federal accessibility law, including cases that have expressly
18 held that Title III does not require movie theaters to provide captioning for the movies they
19 regularly exhibit. Granting the relief Plaintiff requests would necessarily require this Court to
20 sanction an unprecedented expansion of the WLAD into the regulation of goods and services
21 themselves, as opposed to the places of public accommodation that make the goods and services
22 available, with resulting burdens to the state’s retailers and courts that were never intended by
23 the Washington Legislature. And, as neither the WLAD nor its implementing regulations even
24 mention captioning, interpreting the WLAD’s “vague standards,” as the Washington Supreme
25 Court has characterized them, to require captioned movie exhibitions would present ill-advised
26 due process and Washington APA conflicts.

27 Multiple practical difficulties presented by Plaintiff’s attempt to impose accessibility

1 standards through litigation, as opposed to legislation or administrative rulemaking, render any
2 judicially-created movie captioning requirement unreasonable. Defendants do not create or
3 caption films themselves, rather, they exhibit movies that others create. Defendants have no
4 control over which movies are made available in any particular captioned format, or the number
5 of captioned films they will receive. The captioning equipment compatible with current film and
6 projector technology is only available from two manufacturers (one for open-captioning and one
7 for closed-captioning), and notwithstanding the fact that each presents its own unique problems,
8 a judicially-compelled investment in either presents both “captive purchaser” problems and
9 “Betamax” risks. Moreover, new technological developments, including that the movie exhibitor
10 industry is currently transitioning from traditional film and projector technology to digital
11 cinema (which has already started in King County), and that new captioning technologies for
12 digital cinemas are being developed, strongly militate against a compelling Defendants to invest
13 in either existing captioning technology now.

14 The “judicially legislated” mandatory movie captioning requirement Plaintiff seeks is
15 unjust for multiple reasons. The myriad legal and practical problems presented by this lawsuit
16 could be remedied, and due process and APA problems avoided, if the Court determines that
17 new accessibility standards must be established prospectively by legislation or administrative
18 rulemaking, as opposed to private litigation, a point the Washington Supreme Court has
19 emphasized in other WLAD cases.

20 **II. STATEMENT OF FACTS AND EVIDENCE RELIED UPON**

21 Plaintiff and Defendants have stipulated to certain facts for purposes of this case. A true
22 and correct copy of the stipulated facts is attached as “Exhibit A” to this filing. Defendants rely
23 upon it, the Declaration of M. Brett Burns, and the Appendix of Non-Washington Authorities
24 submitted herewith, the authorities cited herein, and all the files and records on file in this case.

25 **III. STATEMENT OF ISSUES**

26 1. Whether Plaintiff can make the required *prima facie* showing that hearing-
27 disabled movie patrons are treated differently than the general public when Defendants exhibit

1 non-captioned films that all patrons can attend on the same terms and conditions?

2 2. Whether the WLAD permits granting relief that exceeds what is required to
3 access the goods and services regularly provided to the general public?

4 3. Whether the WLAD may be extended to regulate goods and services, as opposed
5 to places of public accommodation?

6 4. Whether the judicial enforcement of an interpretation of the WLAD that would
7 mandate captioned movie exhibitions would unconstitutionally deprive Defendants of their due
8 process rights?

9 5. Whether seeking to impose a mandatory captioning requirement through private
10 litigation conflicts with the Washington APA's rulemaking requirements?

11 6. Whether the multiple practical difficulties presented by Plaintiff's claim for
12 mandatory movie captioning render any judicially-created movie captioning requirement
13 unreasonable or financially unfeasible?

14 IV. ARGUMENTS AND AUTHORITIES

15 A. Plaintiff Cannot Make A *Prima Facie* Showing Of Disability Discrimination Under 16 The WLAD.

17 In *Fell v. Spokane Transit Authority*, 128 Wash. 2d 618, 637 (1996), the Washington
18 Supreme Court held that to establish a *prima facie* case of disability discrimination under the
19 WLAD, a plaintiff must show, among other things, that he received treatment that was not
20 comparable to the level of designated services provided to individuals without disabilities by or
21 at the place of public accommodation. Plaintiff cannot make this required showing in the present
22 case. Defendants do not treat hearing-disabled movie patrons differently than the general public
23 when they exhibit non-captioned films that all patrons, disabled or not, can attend on the same
24 terms and conditions as everyone else. The WLAD does not state to the contrary, and no
25 Washington case interpreting the WLAD has held to the contrary.

26 The relief Plaintiff seeks – a mandatory requirement to exhibit captioned films – is
27 inconsistent with allegations that Plaintiff's members are treated differently than the general

1 public. It is predicated upon a legal theory of alleged “entitlements” to excess goods and
2 services for disabled patrons that has been rejected by the Washington Supreme Court and the
3 Ninth Circuit. In *Fell*, the Washington Supreme Court recognized that the WLAD was not an
4 “entitlement” statute and then expressly distinguished between providing access to goods and
5 services provided to all patrons, which the law requires, and providing additional “services to
6 disabled people *in excess* of the services [] provide[d] to the nondisabled,” which the law does
7 not require. 128 Wash. 2d at 631 (*emphasis in original*). Similarly, in *Weyer v. Twentieth*
8 *Century Fox Film Corp.*, the Ninth Circuit recognized the WLAD is a “statutory mandate to
9 provide access to places of public accommodation,” but “not a mandate to provide services
10 which are not otherwise available to the general public.” 198 F.3d 1104, 1119 (9th Cir. 2000).
11 These holdings are instructive as to the present case. The Court should reject Plaintiff’s theory
12 that its members are entitled to special mandatory captioned movie exhibitions in excess of the
13 movie exhibitions provided to the general public.

14 **B. The Conclusion That Defendants Are Not Required To Exhibit Captioned Movies Is**
15 **Consistent With Analogous Federal Law.**

16 The Fifth, Sixth, Seventh, and Ninth Circuits have each recognized that Title III requires
17 access to places of public accommodation and the right to use and enjoy goods and services as
18 they are regularly provided to the general public, but does not regulate the content of those goods
19 and services, and does not require the provision of special goods that are specifically designed
20 for persons with disabilities. *See McNeil v. Time Ins. Co.*, 205 F.3d 179, 186-87 (5th Cir. 2000)
21 (a public accommodation denies the full and equal enjoyment of goods or services offered “[b]y
22 denying access to, or otherwise interfering with, the use of the goods or services that the business
23 offers,” not by offering to sell goods and services that it normally offers on the same terms
24 offered to others); *Weyer*, 198 F.3d at 1115 (“[Title III] does not require provision of different
25 goods or services”); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999) (“The
26 core meaning of [Title III], plainly enough, is that [a public accommodation] cannot exclude
27 disabled persons from entering the facility and, once in, from using the facility in the same way

1 that the non-disabled do.”); *Lenox v. Healthwise of Kentucky, Ltd.*, 149 F.3d 453, 457 (6th Cir.
2 1998) (affirming summary judgment on a claim deemed “equivalent to construing Title III to
3 compel a video store to stock closed captioned video tapes because ordinary tapes are worth less
4 to a deaf person than to one with normal hearing”).

5 This substantial and fully developed body of law discussing Title III’s scope and purpose
6 is valuable guidance that supports dismissal of Plaintiff’s WLAD claim in this lawsuit.¹ In
7 *McNeil*, the Fifth Circuit discussed the “access to normal goods and services versus provision of
8 special excess goods and services” distinction in the course of discussing the “practical, common
9 sense boundaries” of Title III, explaining:

10 We acknowledge that it is literally possible, though strained, to construe “full and
11 equal enjoyment” to suggest that the disabled must be able to enjoy every good
12 and service offered to the same and identical extent as those who are not disabled.
13 Construed in this manner, the statute would regulate the content and type of goods
14 and services. That would be necessary to ensure that the disabled’s enjoyment of
15 goods and services offered by the place of public accommodation would be no
16 less than, or different from, that of the non-disabled. But such a reading is plainly
17 unrealistic, and surely unintended, because it makes an unattainable demand. The
18 unvarnished and sober truth is that in many, if not most, cases, the disabled
19 simply will not have the capacity or ability to enjoy the goods and services of an
20 establishment ‘fully’ and ‘equally’ compared to the non-disabled It is a
21 flawed and unreasonable construction of any statute to read it in a manner that
22 demands the impossible. . . . In sum, we read Title III to prohibit an owner, etc.,
23 of a place of public accommodation from denying the disabled access to the good
24 or service and from interfering with the disabled’s full and equal enjoyment of the
25 goods and services offered. But the owner, etc., need not modify or alter the
26 goods and services that it offers in order to avoid violating Title III. . . . [We]
27 decline[] to dictate to every business in the country what types of goods and
services may be offered.

20 *McNeil*, 205 F.3d at 186-88. Applying this analysis, the court affirmed judgment for the
21 defendant in the case before it, holding that the defendant offered the disabled plaintiff “non-
22 discriminatory access to the good” it typically provided and did not interfere with the plaintiff’s
23 ability to enjoy the good in the same manner as it was offered to everyone else. *Id.* at 188.

24 ¹ The Court previously recognized that “[c]ase law interpreting the ADA . . . may provide guidance to the Court in
25 certain circumstance.” September 25, 2009 Order Denying Plaintiff’s Motion for Determination of Choice of Law;
26 *accord Davis v. Microsoft Corp.*, 149 Wash. 2d 521, 544 (2003) (“Washington courts also look to federal
27 discrimination law to interpret this State’s own discrimination law.”); *Robel v. Roundup Corp.*, 148 Wash. 2d 35, 43
(2002) (“To determine whether the [WLAD] supports a disability claim based on a hostile work environment, we
may look to federal cases construing analogous federal statutes.”). The Ninth Circuit has described the WLAD as
“Washington’s analogue to Title III.” *See Weyer*, 198 F.3d at 1118.

1 In *Weyer*, the Ninth Circuit summarized the “ordinary meaning” of Title III’s
2 nondiscrimination provisions, stating as follows:

3 This language does not require provision of different goods or services, just
4 nondiscriminatory enjoyment of those that are provided. Thus, a bookstore
5 cannot discriminate against disabled people in granting access, but need not
6 assure that the books are available in Braille as well as print.

7 *Weyer*, 198 F.3d at 1115. The court then affirmed the granting of summary judgment for the
8 defendant, concluding that “there is no discrimination under the Act where disabled individuals
9 are given the same opportunity as everyone else” and are not “treat[ed] any differently because
10 of [their] disability.” *Id.* at 1116. As stated previously, the court interpreted the WLAD in the
11 exact same manner. *Id.* at 1118-19.

12 In *Doe*, the Seventh Circuit focused on the economic costs to businesses and burdens on
13 the judiciary that would result from expansively interpreting Title III to regulate the content of
14 goods and services:

15 The common sense of the statute is that the content of the goods or services
16 offered by a place of public accommodation is not regulated. A camera store may
17 not refuse to sell cameras to a disabled person, but it is not required to stock
18 cameras specially designed for such persons. Had Congress purposed to impose
19 so enormous a burden on the retail sector of the economy and so vast a
20 supervisory responsibility on the federal courts, we think it would have made its
21 intention clearer and would at least have imposed some standards. It is hardly a
22 feasible judicial function to decide whether shoestores should sell single shoes to
23 one-legged persons and if so at what price, or how many Braille books the
24 Borders or Barnes and Noble bookstore chains should stock in each of their
25 stores.

26 *Doe*, 179 F.3d at 560. The court discussed several other examples of what it described as “cases
27 of refusing to configure a service to make it as valuable to a disabled as to a non-disabled
customer,” including a furniture store’s decision not to stock wheelchairs and “*a movie theater’s*
refusal to provide a running translation into sign language of the movie’s soundtrack,”
concluding that “[a] furniture store that does not stock wheelchairs knows that it is making its
services less valuable to disabled than to non-disabled people, but the ADA has not been
understood to require furniture stores to stock wheelchairs.” *Id.* (*emphasis added*).

As to movie theater companies specifically, the District of Arizona, the Southern District

1 of Texas, and the District of Oregon have independently held that movie theaters are not required
2 to provide captioning for the movies they regularly exhibit. *See Arizona v. Harkins Amusement*
3 *Enter., Inc.*, 548 F. Supp. 2d 723, 731 (D. Ariz. 2008); *Todd v. American Multi-Cinema, Inc.*,
4 No. Civ.A. H-02-1944, 2004 WL 1764686, at *4 (S.D. Tex. August 5, 2004); *Cornilles v. Regal*
5 *Cinemas, Inc.*, No. Civ. 00-173-AS, 2002 WL 31440885, at *7 (D. Or. Jan. 3, 2002), *findings*
6 *adopted in part and recommendation adopted*, 2002 WL 31469787, at *1 (D. Or. Mar. 19, 2002).

7 In *Cornilles*, the District of Oregon recommended that summary judgment should be
8 granted to a movie theater group on a Title III captioning claim asserted by a group of deaf
9 plaintiffs, reasoning as follows:

10 [The DOJ's] [r]egulations make it clear that Title III requires all places of public
11 accommodation to have access to the physical environment of the
12 accommodation. In other words, Defendants may not refuse Plaintiffs access to
13 any portion of their theaters or refuse Plaintiffs the right to watch any film that
14 Defendants are showing in their theaters. However, Title III does not require
15 defendants to provide additional access to Plaintiffs to accommodate their
16 disability, such as providing Plaintiffs with a separate theater that is equipped
17 solely for the use of individuals with hearing loss. Plaintiffs are merely entitled to
18 use Defendants' theaters to the same extent as hearing individuals. They may buy
19 a ticket for a film shown by Defendants and sit in the same theater to watch the
20 same movie shown to hearing individuals.

21 2002 WL 31440885, at *2. In *Todd*, the court also granted summary judgment in a Title III
22 captioning case, disagreeing with the plaintiff's definition of the term "access," noting that "[t]he
23 plaintiff does not allege that the defendants are denying the hearing impaired physical access to
24 the movies they show," but rather access to captioned "first-run movies" that Title III does not
25 require. 2004 WL 1764686, at *4. Most recently, in *Harkins Amusement Enter.*, the court
26 granted a motion to dismiss claims in a Title III captioning case, holding that "the common sense
27 of [Title III] is that the content of the goods or services offered by a place of public
accommodation is not regulated." 548 F. Supp. 2d at 727.²

24 ² Additionally, the Architectural Barriers and Compliance Board and the Department of Justice have each
25 recognized that Title III does not require movie theaters to display captioned films. The Access Board stated in its
26 April 20, 2001 Technical Guidance Bulletin that "captioning is not required by the Board's ADA Accessibility
27 Guidelines." In July 2004, when the Access Board issued its final rule, revising and updating its ADAAG, the
agency reiterated its position that "captioning" is not required by ADAAG or the ADA regulations. Preamble to
2004 ADAAG, 69 Fed. Reg. 44084, 44138 (July 23, 2004) ("ADAAG and the Department of Justice's ADA
regulations do not require captioning of movies for persons who are deaf"). Similarly, when the DOJ published its

1 **C. Plaintiff’s Claim Presents Multiple Additional Legal Problems.**

2 **1. The WLAD Regulates Places Of Public Accommodation, Not Goods And**
3 **Services Themselves.**

4 Granting the relief Plaintiff requests would necessarily require this Court to sanction an
5 unprecedented expansion of the WLAD to regulate the accessibility of goods and services
6 themselves, as opposed to places of public accommodation, with resulting burdens to the state’s
7 retailers and courts that surely were never intended by the Washington Legislature. To
8 paraphrase Judge Posner’s concerns in *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d at 560, had the
9 Washington Legislature intended to impose so enormous a burden on the retail sector of the state
10 economy and so vast a supervisory responsibility on its courts, it certainly would have stated its
11 intention to do so more clearly. *See also Harkins Amusement Enter., Inc.*, 548 F. Supp. at 727
12 (“the common sense of [Title III] is that the content of the goods or services offered by a place of
13 public accommodation is not regulated”); *Fell*, 128 Wash. 2d at 631 (“the proposition that [a
14 defendant] violates RCW 49.60 if it fails to provide services to disabled people *in excess* of the
15 services it provides to the nondisabled . . . is more appropriately left to the legislative and
16 executive branches”).³

17 The focus of the WLAD is on regulating places of public accommodation by providing

18 own Notice of Proposed Rulemaking to adopt the Access Board’s 2004 ADAAG as its own regulations, it
19 recognized that it “has not required that the movie theater industry caption its presentations” previously and sought
20 “comments regarding how to require captioning while the film industry transitions to a digital format.” 73 Fed. Reg.
21 34531 (June 17, 2008). The DOJ thus not only recognized that the ADA regulations would need to be amended to
22 require movie captioning, but even then, with prospective application only starting one year after the effective date
23 of the new regulation. *Id.* at 34531. While the DOJ thereafter took an inconsistent litigation position that movie
24 closed-captioning may be required under specific “auxiliary aid” provisions contained in Title III, that position is
25 immaterial here, because the WLAD has no auxiliary aid component.

26 ³ These burdens are exacerbated by the fact that Plaintiff’s claim is predicated on an argument that the WLAD
27 requires Defendants to caption the movies they exhibit in order to make them “understandable” to hearing-disabled
patrons. To Defendants’ knowledge, there are no cases addressing WLAD “understandability.” Setting aside for the
moment the issue of regulating movie exhibitions, as opposed to traditional notions of access to movie theaters, how
would compliance with an “understandable” standard possibly be measured? Plaintiff suggests that captioning will
make movies “understandable” to its members, but what about deaf patrons who cannot read, cannot read quickly
enough to follow real time captions, or cannot “understand” English language captions? Might they argue that the
“understandable” standard requires Defendants to provide a different excess service, such as a sign language
interpreter for deaf patrons who cannot read, less frequent “synopsis” text for deaf patrons who cannot read quickly,
or foreign language captions for deaf patrons who cannot “understand” English language captions? Moreover, the
challenges presented by Plaintiff’s “understandability” claim would not be limited to movie theater exhibitors.

1 access to them and the goods and services they regularly make available to the general public,
2 not on regulating the goods and services themselves. The WLAD generally provides that
3 persons with disabilities shall have the “right to the full enjoyment of any of the
4 accommodations, advantages, facilities, or privileges of any place of public resort,
5 accommodation, assemblage, or amusement.” RCW 49.60.030(1)(b). Pursuant to legislative
6 mandate, the Washington State Human Rights Commission issues administrative regulations
7 interpreting the general provisions of the WLAD. *See* RCW 49.60.120(3).⁴ One regulation
8 explains what “reasonable accommodation” means under the WLAD as follows:

9 The law . . . does not prohibit treating disabled persons more favorably than
10 nondisabled persons in circumstances where same service will defeat the purposes
11 of the law against discrimination. For example, this would be true if persons in
12 wheelchairs and nondisabled persons are equally entitled to use the stairway to
13 reach the second floor of a store. A reasonable accommodation would be to
14 permit the shopper in the wheelchair to use an elevator to reach the second floor,
15 even though the public in general is not permitted to use the elevator. If there is
16 no elevator and no other safe and dignified way for the customer to reach the
17 second floor, another reasonable accommodation would be to bring merchandise
18 requested by the customer to the first floor.

15 WAC 162-26-060(2). This example is telling. The Commission plainly contemplates providing
16 access to regularly provided goods and services located on the second floor of a store with
17 stairways (for which a duty to reasonably accommodate exists), but is silent with respect to
18 providing special goods and services in excess of those provided to the general public. Likewise,
19 the Commission contemplates that a blind patron may need Brailled signage (*see id.*) to, for
20 example, enter a bookstore, but there is no suggestion that the law requires the bookstore to sell
21 Brailled books specially made for blind patrons. Similarly, while the Commission suggests that

23 ⁴ In WAC 162-26-060, the Commission stated that RCW 49.60 is best satisfied when disabled persons are treated as
24 if they were not disabled, *i.e.*, when the public entity provides the “same service” to the disabled as it provides to the
25 nondisabled. WAC 162-26-060(1). The “same service” is “everything available to persons from a place of public
26 accommodation” “without regard to the existence of a disability.” WAC 162-26-040(2). That noted, the
27 Commission nonetheless recognizes that “[i]t is an unfair practice for a person in the operation of a place of public
accommodation to fail or refuse to make reasonable accommodation to the known physical, sensory, or mental
limitations of a person with a disability,” but defines “reasonable accommodation” as an “action, reasonably
possible in the circumstances, to make the *regular* services of a place of public accommodation accessible to
persons who otherwise could not use or fully enjoy the services because of the person’s sensory, mental, or physical
disability.” WAC 162-26-080(1), (2) (*emphasis added*).

1 a deaf patron may need a sign interpreter (*see id.*) to, for example, communicate with an
2 electronics store regarding product information about alarm clocks, there is no suggestion that
3 the law requires the store to sell flashing light alarm clocks specially made for deaf patrons. The
4 Court should reject arguments from Plaintiff that seek to compel a different result by extending
5 the WLAD to regulate goods and services themselves, as opposed to accessibility to the places of
6 public accommodations that offer them.⁵

7 **2. Interpreting The WLAD To Mandate Captioned Movie Exhibitions Would**
8 **Be An Unconstitutional Deprivation Of Defendants’ Due Process Rights.**

9 Interpreting the WLAD’s “vague standards,” as the Washington Supreme Court has
10 characterized them (*see Fell*, 128 Wash. 2d at 628), to mandate captioned movie exhibitions
11 would be an unconstitutional deprivation of Defendants’ due process rights.

12 Fundamental due process requires “that laws give the person of ordinary intelligence a
13 reasonable opportunity to know what is prohibited, so that he may act accordingly [I]f
14 arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards
15 for those who apply them.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S.
16 489, 498 (1982). The Washington Supreme Court similarly has recognized that a Washington
17 “statute is void for vagueness under the Fourteenth Amendment if it is framed in terms so vague
18 that persons of common intelligence must necessarily guess at its meaning and differ as to its
19 application.” *State v. White*, 97 Wash. 2d 92, 98-99 (1982), *overruled on other grounds by State*
20 *v. Corrillo*, 89 Wash. App. 1014 (1998). To pass constitutional muster, government regulations
21 must articulate predictable standards of conduct to which persons can conform. *E.g., Giaccio v.*
22 *Penn.*, 382 U.S. 399, 402 (1966) (“[i]t is established that a law fails to meet the requirements of
23 the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to

24 ⁵ Of course, any place of public accommodation may voluntarily provide special goods and services in excess of
25 those provided to the general public, just as multiple Defendants in this case undisputedly do when they voluntarily
26 exhibit captioned films in King County. AMC, Regal Cinemas, and Cinemark each presently do so in different
27 ways. AMC exhibits closed-captioned movies using the Rear Window Captioning System in two King County
multiplexes, Regal Cinemas exhibits open-captioned movies using the DTS-CSS open-caption system at selected
times in two King County multiplexes, and Cinemark contracts with a third-party vendor to obtain traditional
“burned-in caption” film prints to show at selected times at its King County multiplex.

1 the conduct it prohibits”). It is not lawful for an agency to “promulgate mush” that is only given
2 concrete form through subsequent “interpretations.” *See Paralyzed Veterans of Am. v. D.C.*
3 *Arena, L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997).

4 Defendants should not be relegated to guessing whether they comply with terms like “full
5 enjoyment” and “understandable,” under the WLAD generally or in the context of movie
6 exhibitions specifically.⁶ The law entitles them to receive clear, precise, and prospective
7 instruction on what they must do to comply with the law. As of now, that does not include
8 captioning movies. The Washington state legislature has never promulgated a captioning
9 requirement. Neither the WLAD nor its implementing regulations mention captioning.
10 Moreover, the fact that Plaintiff is now suing every major movie exhibitor in King County,
11 Washington to enforce its “interpretation” that the WLAD requires mandatory captioning to
12 make movies “understandable” to deaf patrons strongly suggests a serious problem with the
13 underlying law, or, alternatively, with Plaintiff’s interpretation of it. It is implausible that each
14 and every major movie theater exhibitor in Washington independently “got it wrong” on the
15 same accessibility issue.

16 **3. A Judicially-Created Mandatory Captioning Requirement Would Conflict**
17 **With The Washington APA’s Rulemaking Requirements.**

18 When the WLAD was enacted, the Washington Legislature tasked the Commission with
19 the duty to “adopt, amend, and rescind suitable rules to carry out the provisions of [the WLAD],”
20 as well as enforce those rules. RCW 49.60.120(3), WAC 162-04-020(5); *see also Doe v. Boeing*
21 *Co.*, 121 Wash. 2d 8, 14 (1993) (WLAD “delegates the authority to [the Commission] to adopt
22 and promulgate rules and regulations to carry out the Act’s provisions”). The Commission has

23 _____
24 ⁶ This point has been recognized numerous times under federal law. Federal courts analyzing accessibility claims
25 under the “full and equal enjoyment” provision of the ADA have determined that Congress did not intend for the
26 ADA’s general nondiscrimination mandate to give rise to an independent cause of action. *See, e.g., Caruso v.*
27 *Blockbuster-Sony Music Entm’t Ctr.*, 968 F. Supp. 210, 216 (D. N.J. 1997) (“Congress did not intend for defendants
to be responsible, in the absence of applicable regulations, for determining whether a design provides full and equal
enjoyment, for the disabled . . . Congress has elected to pass a very general statute and leave it to the regulatory
process to fill in the necessary details”), *aff’d in part, rev’d in part on other grounds*, 193 F.3d 730 (3d Cir. 1999).

1 adopted rules for public accommodations that “flesh out” the general accessibility requirements
2 in the WLAD. *See* WAC 162-26, *et seq.*

3 The Commission may change or amend the substantive regulations governing the WLAD
4 through the rulemaking process set forth in the Washington Administrative Procedure Act. “To
5 adopt a rule, an agency must adhere to formal rule-making procedures, which include notice,
6 public hearing and comment, agency adoption, public filing, and opportunity for petitions for
7 adoption, amendment, and repeal.” *Wash. Edu. Ass’n v. Wash. State Public Disclosure Comm’n*,
8 150 Wash. 2d 612, 619 (2003); *see also* RCW 34.05.320(1) (explaining rulemaking procedures).
9 The Commission may adopt a new rule on its own, or pursuant to a petition for rulemaking filed
10 by any interested party. RCW 34.05.330(1); WAC 162-08-610.⁷

11 Allowing the judicially-created mandatory captioning requirement Plaintiff seeks would
12 conflict with the Washington APA’s rulemaking requirements. A lawful captioning requirement
13 would require notice, comment, and prospective application by and through proper rulemaking
14 procedures established by the state legislature. Plaintiff has not yet initiated, or attempted to
15 initiate, this administrative process, choosing instead to pursue “judicial” legislation of an
16 alleged interpretation that movie exhibitions must be captioned to be “understandable” by
17 hearing-disabled patrons. This should not be permitted. It would be unjust to permit Plaintiff to

18 _____
19 ⁷ In *Cornilles*, the District of Oregon recognized the importance of formal rulemaking when assessing a claim under
federal law seeking mandatory closed-captioning of movies:

20 The question of whether the ADA requires Defendants to install closed-captioning devices
21 requires more than just the consideration of existing law. Several additional issues are raised by
22 this question. Will the new technology provide sufficient accommodations for dual-disabled
23 individuals? Will the movie makers support the changes made by the movie theaters? Is rear-
window captioning the best new technology or is something better just around the corner? The
court is not in a position to consider all of these issues. The appropriate venue for resolution of
this dispute is before the agencies empowered by Congress to implement and enforce the ADA.

24 2002 WL 31440885, at *7. Six years later, the DOJ acknowledged in its Notice of Proposed Rulemaking that
captioning regulations could not be considered until it assessed “the flux in the technology used to exhibit movies,”
25 the impending transition to digital cinema, the availability of different captioning technology depending on whether
theater owners use digital projectors or not, and “the potential cost to exhibit captioned movies.” 73 Fed. Reg.
26 34531 (June 17, 2008). This analysis is consistent with what is required under the Washington APA. A party
requesting that the Commission adopt a new rule must set forth the reasons why the rule should be adopted, which
27 would necessarily include answering questions similar to those raised by Magistrate Judge Ashmanskas and the
DOJ, and give interested parties notice and an opportunity to comment on the proposed rule.

1 “interpret” into existence and then retroactively apply a new mandatory captioning accessibility
2 obligation when neither the obligation nor its underlying technical requirements have been
3 subjected to proper Washington APA rulemaking procedures. If individual plaintiffs with
4 varying interpretations of what the law ought to be are allowed to engage in *de facto* rulemaking
5 without following the Washington APA, due process will be circumvented, courts will have no
6 way of knowing whether the Commission or any affected non-party opposed some or all
7 requirements, places of public accommodation will have no way to determine whether or not
8 they are accessible, and places of public accommodation will be subject to new (and very
9 possibly conflicting) obligations created by litigants with different interpretations of what the law
10 ought to be based on their own individual preferences.⁸ Avoiding these scenarios is the very
11 reason the state legislature requires the Commission to follow a rulemaking procedure when
12 creating or amending substantive regulations in the first place. Plaintiff’s failure to avail itself of
13 rulemaking procedures under the Washington APA before filing this lawsuit should bar
14 Plaintiff’s judicial claim as a matter of law and a matter of policy.

15 **D. Multiple Practical Difficulties Unique To This Lawsuit Render Any Judicially-**
16 **Created Movie Captioning Requirement Unreasonable.**

17 In WAC 162-26-080, the Commission stated that “[w]hether a possible accommodation
18 is reasonable or not depends on the cost of making the accommodation, the size of the place of
19 public accommodation, the availability of staff to make the accommodation, the importance of
20 the service to the person with a disability, and other factors bearing on reasonableness in the
21 particular situation. See WAC 162-26-080(3). In *Fell*, the Washington Supreme Court

22
23 ⁸ The risk of conflicting obligations is not hypothetical. Defendants AMC, Cinemark, and Regal Cinemas have
24 already been subjected to national class action lawsuits seeking mandatory captioning in which private plaintiff
25 groups disagreed on the type of movie captioning. For example, the plaintiffs in *Cornilles* sought to require movie
26 theater operators to purchase the Rear Window Captioning System (a closed-captioning technology), but that
27 particular technology was expressly, and very heatedly, disavowed in *Todd*, where the plaintiffs not only sought
DTS-CSS open-captioning, but presented an accessibility expert who opined that RWC closed-captioning is not
“acceptable,” awkward to use, “stigmatizes” and “embarrasses” its users, distracts members of the audience, and that
requiring it would be a “dastardly mistake.” See Defendants’ Motion for Summary Judgment filed in *Todd v.*
American Multi-Cinema, Inc., et al., No. H-02-1944 (S.D. Tex.), Docket 57, at Section II (¶ 27) (true and correct
excerpts from which are attached as “Exhibit B” to this motion).

1 recognized that a legitimate, non-discriminatory reason for not taking the action sought by a
2 disabled plaintiff is “financial unfeasibility.” 128 Wash. 2d at 642.⁹

3 The federal case law assessing the issue of undue burden in the context of movie theater
4 captioning is limited but instructive. In *Cornilles*, the District of Oregon recommended granting
5 summary judgment for Regal Cinemas and Cinemark on a Title III claim seeking to require those
6 defendants to provide closed-captioning at every movie exhibition, reasoning that “requiring
7 Defendants to expend thousands of dollars per auditorium to install new technology is unduly
8 burdensome when such action will not immediately increase the number of films available to
9 Plaintiff’s members and when the technology installed may become obsolete in the next three to
10 five years.” 2002 WL 31440885, at *7. Likewise, in *Todd*, the court held that imposing
11 mandatory closed captioning on AMC, Cinemark, and Regal Cinemas constitutes an undue
12 burden because (1) “the film-makers caption a limited number of movies, and therefore the
13 plaintiff’s request that all first-run movies be captioned is unreasonable because the defendants
14 have to share the captioned movies,” and (2) “the cost of purchasing and installing” the
15 captioning equipment sought by plaintiff “would cost approximately \$12,500 per screen.” 2004
16 WL 1764686, at *4.

17 In the present case, in addition to similar costs issues (the parties have stipulated that
18 special open-captioned equipment would cost approximately \$11,000 per movie auditorium, and
19 special closed-captioning equipment would cost approximately \$20,000 per movie auditorium),
20 multiple practical difficulties render a judicially-created movie captioning requirement
21 unreasonable.

22 First, Defendants have no control over the captioning process or the development of

23
24 ⁹ This test is similar to the “undue burden” standard utilized under federal law. 42 U.S.C. § 12182 (b)(2)(A)(iii);
25 TAM III-4-3600; 28 C.F.R. § 36.303 (a). The DOJ’s regulations define the phrase “undue burden” as a “significant
26 difficulty or expense.” 28 C.F.R. § 36.104 (2003). To determine whether captioning constitutes an undue burden,
27 courts consider the following factors: “(1) the nature and cost of the action needed; and (2) the overall financial
resources of the site or sites involved in the action; the number of persons employed at the site; the effect on
expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime
prevention measures; or the impact otherwise of the action upon the operation of the site.” *Todd*, 2004 WL
1764686, at *3.

1 captioned movie products. Movie theater operators are a distinct and separate industry from
2 what is commonly referred to as “Hollywood.” Movie theater operators exhibit movies made by
3 the movie studios. They do not create movies, and they lack both the ability and the legal right
4 to enhance, modify, or otherwise alter the movies they exhibit. Movie theater operators thus
5 have no control over which movies are made available in a captioned format, the number of
6 captioned films they will receive, or whether captioned movies will be made available to them in
7 the future. It would be unreasonable to require Defendants to purchase captioning equipment
8 and exhibit captioned films under these circumstances.

9 Second, the captioning equipment compatible with traditional film and projector
10 technology is only available from two manufacturers (DTS-CSS open-captioning and RWC
11 closed-captioning), and thus any judicially-compelled investment in captioning presents both
12 “captive purchaser” problems and “Betamax” risks. It would be inequitable and unlawful to
13 require Defendants to be captive purchasers of special accessibility goods from either
14 manufacturer, as the Court essentially would be awarding a monopoly (or set the table for a
15 state-sanctioned oligopoly), depending on how the Court ruled. Moreover, forcing Defendants to
16 choose now between the two competing commercially available captioning technologies may
17 have the unintended effect of limiting overall captioned movie availability in the same way a
18 premature “Betamax VCR” purchase ultimately limited video availability for customers who
19 “guessed wrong” (albeit voluntarily) with respect to video cassette recorder technology.

20 Third, both captioning options are the subject of longstanding, verifiable complaints,
21 including complaints from the hearing-disabled community. While some hearing-impaired
22 patrons reportedly “like” Rear Window Captioning, a seat-based closed-captioning technology,
23 others have expressed a strong dislike for RWC for multiple reasons, including that using it is
24 “awkward,” “stigmatizing,” “embarrassing” to users, subjects some users to eye strain and
25 nausea by requiring the user to repeatedly refocus their vision between the reflective panel near
26 to them and the movie screen far from them, and distracts members of the audience. *Compare,*
27 *e.g.,* Jamie Berke, *Is Rear Window Captioning a Failure?*, January 18, 2009, <http://deafness>.

1 about.com/b/2009/01/18/is-rear-window-captioning-a-failure.htm (blog postings ranging from “I
2 like RWC” to “I don’t know a single deaf person who prefers rear window captioning of
3 movies”); *Open Captions or RWC?*, <http://thumpaflash.livejournal.com/14190.html> (93% of
4 respondents to an informal internet poll prefer open captioning to RWC); August 18, 2008
5 Comment by District of Columbia Association of the Deaf to the DOJ, [http://www.regulations.
6 gov/search/Regs/home.html#documentDetail?R=090000648070dcb4](http://www.regulations.gov/search/Regs/home.html#documentDetail?R=090000648070dcb4) (“DCAD strongly requests
7 that all movies be shown via open captions at all times and at all movie theaters” and “none of
8 our members approves of rear window captioning [because] it is extremely uncomfortable and
9 makes a movie experience a lot less enjoyable – a lot”); Amy Gross, *All Dressed Up . . . With
10 Someplace to Go!*, September 28, 2009, [http://www.nvrc.org/content.aspx?page=34017§ion
11 =7](http://www.nvrc.org/content.aspx?page=34017§ion=7) (“RWC does have its drawbacks . . . patrons complain that they need to hunker down to read
12 the panel, while constantly looking back up at the movie screen, creating neck and eye strain, . . .
13 [and] [u]nfortunately, for patrons who don’t want to draw attention to their hearing loss, the
14 RWC equipment does just that”); *see also* note 8, *supra*.¹⁰

15 DTS-CSS open-captioning, a screen-based open-captioning technology, presents its own
16 unique problems, the most obvious being that projecting captions directly on the movie as it
17 plays to the audience alters the artistic and proprietary content of the underlying movie.¹¹ *See*
18 Nancy Linke-Ellis, *Everything you wanted to know about movie and live theater captioning*, at 2
19 (2009), http://www.hearingloss.org/Community/docs/6-25-2009_Nanci_Linke-Ellis.pdf (“In the
20

21 ¹⁰ Perhaps not surprisingly, when the Access Board considered (and declined to adopt) a federal captioning
22 requirement in 2004, it found that the hearing-disabled community “stated a strong preference for open captioning
23 over closed captioning.” *See Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and
24 Facilities*, 69 Fed. Reg. 44084, 44138 (2004). For additional discussions, *see Open captioning: Why we need it*,
25 February 15, 2008, <http://www.banjosworld.com/2008/02/open-captioning-why-we-need-it.html> (RWC has a “bad
26 reputation” among deaf moviegoers); AllDeaf.com, [http://www.alldeaf.com/captioning-sign-language-interpreter/
27 58364-rear-window-cc-movie-theater.html](http://www.alldeaf.com/captioning-sign-language-interpreter/58364-rear-window-cc-movie-theater.html) (various comments); National Center for Accessible Media, *What
People Are Saying About The Rear Window Captioning System*, <http://ncam.wgbh.org/mopix/people.html> (listing
support for RWC); *Captions: Rear Window vs Open*, July 22, 2007, <http://www.ythree.com/?p=141> (blog postings,
including: “Let us make attempts to close RWC business!!!! We do not like RWC”).

¹¹ Both the Commission and the DOJ recognize the defense of fundamental alteration. *See, e.g.*, Washington State
Human Rights Commission, *Guide to Disability and Washington State Nondiscrimination Laws* at 8 (WLAD
fundamental alteration); 42 U.S.C. § 12182(b)(2)(A)(ii)-(iii) (ADA fundamental alteration); 28 U.S.C. §§ 36.302(a),
36.303(a) (2000) (same).

1 eyes of a motion picture studio, asking them to put captions on their films is equal to placing dots
2 on the famous painting ‘The Mona Lisa’ in order to make it accessible to someone who is Blind.
3 . . . you can’t alter someone else’s work of art without their express permission”). Moreover, the
4 exhibition of open-captioned films to the general public is often perceived as a degradation of
5 their movie viewing experience.¹² A mandatory captioning requirement also could create First
6 Amendment problems. *See, e.g.*, Comments of the Motion Picture Association of America, Inc.
7 and the Independent Film & Television Alliance Concerning Proposed Rules on Revised
8 Regulations for Nondiscrimination on the Basis of Disability by Public Accommodations and in
9 Commercial Facilities, [http://www.regulations.gov/search/Regs/home.html#documentDetail?R=](http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064807075e1)
10 [09000064807075e1](http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064807075e1), at 28-29 (August 18, 2008) (analyzing First Amendment “tensions” arising
11 from “compulsory captioning requirements”).

12 Fourth, new developments, including that the movie and movie exhibitor industries are
13 currently transitioning from traditional film from traditional film and projector technology to
14 digital cinema (which has already started in King County), and that new captioning technologies
15 for digital cinemas are already being developed, greatly exacerbate the existing practical
16 difficulties that a judicially-created mandatory captioning requirement would create.¹³ The
17 industry’s technology is fundamentally changing, the “Betamax” risks of guessing wrong have
18 never been greater, and it is certainly possible, if not likely, that the current captioning
19 technologies will be overtaken by better, cheaper, or more desirable products once digital cinema
20

21 ¹² *See, e.g.*, Comments of the Motion Picture Association of America, Inc. and the Independent Film & Television
22 Alliance Concerning Proposed Rules on Revised Regulations for Nondiscrimination on the Basis of Disability by
23 Public Accommodations and in Commercial Facilities, at 10 (August 18, 2008) (“captioning proves distracting to
24 theater patrons not requiring captions and interferes with the optimum presentation of film for those patrons”);
25 Comments of the United Drive-In Theatre Owners Association to the DOJ, [http://www.regulations.gov/search/Regs/](http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064806bcda)
26 [home.html#documentDetail? R=09000064806bcda](http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064806bcda) (August 18, 2008) (“While we would be delighted to
27 accommodate all potential customers, we believe that open captioning on demand (captioning that the entire
audience can view) degrades the movie experience.”).

¹³ Digital cinema refers to the process under which movie studios will project movies using digital files that are
“distributed to theaters via satellite, physical media, or fiber optic networks, where the movie is stored by a
computer/server and transmitted to a digital projector for each screening of the movie.” *See, e.g.*; Texas Instruments
DLP, *What Is Digital Cinema*, <http://www.dlp.com/cinema/what.aspx>; Digital Cinema, [http://en.wikipedia.org/wiki/](http://en.wikipedia.org/wiki/Digital_cinema)
[Digital cinema](http://en.wikipedia.org/wiki/Digital_cinema) (discussing the development and costs associated digital cinema generally).

1 is standardized.¹⁴

2 V. CONCLUSION

3 A multitude of unique legal and factual problems render Plaintiff’s attempt to impose a
4 new accessibility standard through litigation “interpretation” inappropriate. Clear legislative or
5 regulatory guidance is needed to resolve these problems. It is hardly a feasible judicial function
6 for the Court to be required to determine whether the movies Defendants exhibit must be
7 captioned to be made “understandable” to hearing-disabled patrons, or how “understandability”
8 may be measured. The Court should not be required to risk setting industry captioning standards
9 prematurely where, as here, “captive purchaser” problems and “Betamax” risks are presented,
10 the current captioning options are subject to extreme disagreement between members of the
11 disabled community, and the industry is in the middle of a revolutionary transition to digital
12 cinema. The Court should not be required to make a decision that could affect so many who are
13 not participating in this case, either. The superiority of a legislative or agency rulemaking
14 resolution where notice is provided to the public, all affected persons are given the opportunity to
15 be heard, and movie theater exhibitors are provided with clear notice of new accessibility
16 obligations prospectively, before they are mandated by law and before lawsuits for
17 noncompliance can be filed, are obvious.

18
19
20 ¹⁴ Many industry commentators predict that new digital captioning technologies are imminent. *See, e.g.*, National
21 Center for Accessible Media, *Frequently Asked Questions: Captioning and Description in Digital Cinema*,
22 http://ncam.wgbh.org/invent_build/movies/access-to-digital-cinema/frequently-asked-questions-cap (stating
23 “currently, Rear Window is the only closed captioning system on the market,” but acknowledging “[a]dditional
24 technologies to display closed captions for movie patrons will likely be introduced to the market”); Michael
25 Karagosian, *Update on Digital Cinema Support for Those with Disabilities: February 2010*, [http://www.mkpe.com/
26 publications/d-cinema/misc/disabilities_update.php](http://www.mkpe.com/publications/d-cinema/misc/disabilities_update.php) (reporting that “closed caption technology for digital cinema is
27 rapidly moving forward” and “wide-spread use of [the SMPTE protocols] will allow multiple closed caption systems
to emerge”); Amy Gross, *All Dressed Up . . . With Someplace to Go!*, September 28, 2009, [http://www.nvrc.org/
content.aspx?page=34017 §ion=7](http://www.nvrc.org/content.aspx?page=34017§ion=7) (discussing a “wearable captioning system” in which hearing-disabled
patrons use an iPhone application to deliver captions to a pair of clear glasses the patron wears that is being used at
Mystic Aquarium in Mystic, Conn.”). At least two companies (USL and Intelligent Access) are already announcing
plans to demonstrate closed caption glasses to display closed caption text in front of the wearer’s eyes while
watching movies using technology based upon SMPTE’s draft digital cinema standards. *See, e.g.*, USL Closed
Captioning System, <http://www.uslinc.com/images/products/download/CCS-OneSheet.pdf> and Intelligent Access
Home Page, <http://www.intelligentaccesssystems.com/>.

1 DATED this 25th day of February, 2010.

2 Respectfully submitted,

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CERTIFICATE OF SERVICE

1
2 The undersigned hereby certifies under penalty of perjury under the laws of the State of
3 Washington that, on February 24, 2010, they caused to be served on the person(s) listed below in
4 the manner shown:

5 **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

6 **VIA E-MAIL**

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15 DATED: February 24, 2010

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/s/ M. Brett Burns

M. Brett Burns