

**No. 08-16075**

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

**STATE OF ARIZONA *ex rel.*  
TERRY GODDARD, the Attorney  
General; THE CIVIL RIGHTS  
DIVISION OF THE ARIZONA  
DEPARTMENT OF LAW,**

**Plaintiff-Appellant,  
&**

**FREDERICK LINDSTROM, by and  
through his parent and legal  
guardian, RACHEL LINDSTROM;  
LARRY WANGER,**

**Plaintiffs-Intervenors-Appellants,  
v.**

**HARKINS AMUSEMENT  
ENTERPRISES, INC., *et al.*,**

**Defendants-Appellees.**

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

No. CV-07-703-PHX-ROS

**BRIEF OF AMICUS CURIAE NATIONAL DISABILITY RIGHTS  
NETWORK, IN SUPPORT OF APPELLANTS AND URGING REVERSAL**

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## **CERTIFICATE OF AGREED FILING**

The undersigned informs the court that, pursuant to FED. R. APP. P. 29(a), all parties to this case have consented to the filing of this Amicus Brief.

## **STATEMENT OF IDENTITY AND INTEREST**

The National Disability Rights Network (NDRN) is the membership association of protection and advocacy (“P&A”) agencies that are located in all 50 states, the District of Columbia, the Native American community, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. The P&A network is the largest provider of legally based advocacy services to people with disabilities in the United States. Through training and technical assistance and legal support, NDRN works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

## **FACTUAL STATEMENT AND PROCEDURAL HISTORY**

Amicus adopts the Appellant's factual statement and recitation of the procedural history.

## **SUMMARY OF THE ARGUMENT**

The goal of the Americans with Disabilities Act (ADA) is to end discrimination against people with disabilities, and to ensure their inclusion in everyday life activities. Unlike other civil rights laws, the ADA recognizes that acts of discrimination by private businesses against people with disabilities extend beyond an outright refusal to allow entry. Under the ADA, even unintentional barriers to access constitute discrimination. Moreover, the ADA mandates both physical *and communication* access. To meet this central tenet of communication access, businesses are required to provide auxiliary aids and services to people with visual or hearing disabilities. This communication-access requirement is supported by strong practical and policy considerations, as well as by the statutory text, enforcing regulations, agency guidance, and legislative history.

The Trial Court seemed to acknowledge this mandate for communication access by stating that “public accommodations [are required] to ensure that persons with disabilities have access to the services they provide (utilizing auxiliary aids and services if necessary).” 548 F. Supp. 2d at 731. However, it asserted that

captioning and descriptive services (and by logical extension, other auxiliary aids and services, such as sign-language interpreters) by their very nature modify not just the means of delivering services, but the content of the services themselves. *Id.* Finding that the ADA “does not require public accommodations to alter or modify the content of their services,” and concluding that captioning and narrations are impermissible “alterations,” the Trial Court granted summary judgment. *Id.*

The Trial Court’s decision is wrong as a matter of language and logic. It reads out of the ADA the very communication access that the statute requires. Despite clear statutory and regulatory language requiring communication access, the Trial Court’s analysis calls into doubt whether any place of public accommodation, not just movie theaters, would ever have to obey the ADA’s auxiliary aids and services requirement in ensuring communication access for people with visual or hearing disabilities.

Although there may be some support for the proposition that *goods in inventory* need not be modified in order to provide effective communication, there is no support for this proposition in the context of *services*. Indeed, such modifications in a public accommodation’s standard method of delivering services is expressly required by the obligation to provide auxiliary aids and services, subject only to the defenses of fundamental alteration or undue burden.

As this brief demonstrates, communication access, made possible through auxiliary aids and services, is too important to allow illogical, extra-statutory, and judicially-created obstacles to block the ADA's protections for people with hearing and visual impairments.

## **ARGUMENT**

### **1. The purpose of the ADA is to integrate people with disabilities into daily life to the maximum possible extent.**

In passing the ADA, Congress recognized that:

- society historically segregated individuals with disabilities, and this continues to be a serious and pervasive social problem;
- discrimination persists in such critical areas as public accommodations, communication, and recreation;
- individuals with disabilities continually encounter various forms of discrimination, including the discriminatory effects of communication barriers; the failure to make modifications to existing facilities and practices; and relegation to lesser services, programs, activities, benefits, or other opportunities; and
- the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity and full participation.

42 U.S.C. § 12101(a)(2), (3), (5), and (8). As reflected above, the failure to provide auxiliary aids creates discriminatory barriers as surely as ill will. As this Court has observed,

Many barriers to full participation of the disabled work their discriminatory effects due to the auxiliary aids upon which the disabled rely, and not due solely to the disabling impairment. In this instance, it is not the disease which renders the disabled incapable of accessing services, it is the reliance on a particular type of auxiliary aid which does so.

*Crowder v. Kitagawa*, 81 F.3d 1480, 1484 n.1 (9th Cir. 1996).

The ADA sent a “simple yet long overdue message” that people with disabilities “are entitled to legal protections that ensure them equal opportunity and access to the mainstream of American life.”<sup>1</sup> Moreover, Congress stated that the purpose of the ADA was to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [and to] provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities...” 42 U.S.C. § 12101(b)(1) and (2).

In the Title III context, the Supreme Court has observed that the statutory protections are broadly construed.

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<sup>1</sup> Preamble, *ADA Handbook* (DOJ and EEOC, Oct. 1991), available online at <http://www.jan.wvu.edu/media/adahandbook/handbook.html>.

In the ADA, Congress provided that broad mandate. See 42 U.S.C. § 12101(b). In fact, one of the Act's "most impressive strengths" has been identified as its "comprehensive character," and accordingly the Act has been described as 'a milestone on the path to a more decent, tolerant, progressive society,' *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (KENNEDY, J., concurring). To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III).

*PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (interpreting an analogous provision in Title III) (footnotes and citations omitted). *See also Fortnyne v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1080 (9th Cir. 2004) (describing the broad mandates and goals of Title III); *Barden v. City of Sacramento*, 292 F.3d 1073, 1077 (9th Cir. 2002) (Title II case) ("the ADA must be construed broadly in order to effectively implement the ADA's fundamental purpose of provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.") (internal quotes omitted).

The analysis in the instant case must therefore be consistent with that broad interpretation and the above-described Congressional purposes. It must also be mindful of the findings that the ADA was designed to address. However, as shown below, the Trial Court's analysis reflects the exact opposite, leading to a narrow interpretation that discounts the very means necessary to overcome the barriers the ADA was supposed to eliminate.

**2. The ADA not only mandates physical access, but also communication access.**

The most common perception of disability access has to do with physical barriers. Physical access is an easy concept to visualize and to understand. Communication access is perhaps not as obvious or as easy to understand. But the ADA was written to provide both forms of access, so that people with all types of disabilities would be fully integrated into our national society.

The ADA is designed to remove societal barriers—both visible and invisible—for people with disabilities. Title III mandates that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation....” 42 U.S.C. § 12182(a). Communication access, via auxiliary aids and services, is a key part of the ADA’s disability access mandate. 42 U.S.C. § 12182(b)(2)(A)(iii). In fact, all three substantive titles of the Act require such auxiliary aids and services.<sup>2</sup> The Title III

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<sup>2</sup> Under Title I, auxiliary aids and services are subsumed in the accommodation obligation, 42 U.S.C. § 12112(b)(5)(A), as accommodations are defined to include, for example, qualified readers and interpreters. 42 U.S.C. § 12111(9)(B). *See also* 29 C.F.R. § 1630.11 (requiring alternate testing formats). Under Title II, a “qualified individual with a disability” requires consideration of necessary auxiliary aids and services. 42 U.S.C. § 12131(2). *See also* 28 C.F.R. § 35.160(b).

regulations promulgated by the Department of Justice<sup>3</sup> also explicitly require communication access via auxiliary aids and services. 28 C.F.R. § 36.303.<sup>4</sup>

**3. The obligation to provide auxiliary aids and services is a critically important component of the ADA's goals.**

As discussed in part 1 above, the purpose of the ADA is to integrate people with disabilities into daily life to maximum extent. Congress recognized that the lack of communication access was an insurmountable obstacle to that goal.

In the hearings before Congress regarding the ADA, “[s]everal witnesses addressed the obvious question: ‘Why don’t people with disabilities frequent places of public accommodations and stores as often as other Americans?’” One reason given was the existence of communication barriers. H.R. Rep. No. 101-485, pt. II, at 35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 316–317. “Additional areas of discrimination that witnesses identified include[d ... ] a failure to provide auxiliary aids and services.” *Id.* at 36, 1990 U.S.C.C.A.N. at 318. Gregory Hlibok, President of the Student Body Government at Gallaudet University, “described some of the obstacles to daily living faced by hearing impaired people:”

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<sup>3</sup> The Department of Justice is the agency given Congressional authority to write regulations under Title III, 42 U.S.C. § 12186(b), and to enforce it, 42 U.S.C. § 12188(b).

<sup>4</sup> See also the Department of Justice’s Technical Assistance Manual to Title III, at III-4.3100.

Many of us confront discrimination every day. We have experienced the disappointment of being turned down for a job or promotion because we were told the communication barriers were too great. My own deaf brother was told he had to pay for his own interpreter on his job. We have tried to call the police for help using our telecommunications devices for the deaf, but the police hang up on us, because they had no TDD's. I remember when I was fifteen I left school without money to take the bus home. I had no way to call my parents or the police. I had to walk the 3 miles home in the snow. (Testimony before House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, S.Hrng. 100-926, September 27, 1988, p. 80.)

“Mr. Hlibok concluded that accessible communications systems are necessary for deaf and hearing impaired people to participate equally and effectively in society.”

*Id.* at 39, 1990 U.S.C.C.A.N. at 321. Another witness explained:

Discrimination produces fear and reluctance to participate on the part of people with disabilities. Fear of mistreatment and discrimination, and the existence of ... communication barriers, are critical reasons why individuals with disabilities do not participate to the same extent as nondisabled people in public accommodations ...

*Id.* at 42, 1990 U.S.C.C.A.N. at 324.

Although Congress patterned the ADA's general prohibitions against discrimination on other civil rights laws, it also recognized that more was required in the disability context:

In order not to discriminate against people with disabilities, however, certain steps must often be taken as well in order to ensure that an opportunity for individuals with disabilities to participate in the goods or services is effective and meaningful. Thus, section 302(b)(2)

includes specific prohibitions against discrimination, which refer to such requirements as providing auxiliary aids ...

*Id.* at 104, 1990 U.S.C.C.A.N. at 387. As the Department of Justice recognizes, “[i]mplicit in this duty to provide auxiliary aids and services is the underlying obligation of a public accommodation to communicate effectively with its customers, clients, patients, or participants who have disabilities affecting hearing, vision, or speech.” 28 C.F.R. Pt. 36 App. B, § 36.303. Congress, too, has explicitly recognized the value of requiring such auxiliary aids and services.

Apart from the economic benefits to individuals with disabilities and to the nation that this legislation is expected to bring about, its non-economic improvements in the quality of life of millions of Americans are no less important. The deaf person who can, because of the mandated nationwide TDD hookup, now spontaneously communicate with hearing friends in or out of their state ... [T]he value of such benefits to individuals who seek to live a full life, free from arbitrary, confining, and humiliating treatment, cannot be calculated. The commitment to promote greater dignity and an improved quality of life for people with disabilities evinced in the provisions of the Act provide further powerful justification for its enactment.

H.R. Rep. No. 101-485, pt. II, at 47, 1990 U.S.C.C.A.N. at 329.<sup>5</sup>

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<sup>5</sup> Congressional recognition of the need for auxiliary and services is also evident from the fact that it is statutorily required in a variety of circumstances outside of the ADA context. For example, Congress has recognized that providing auxiliary aids and services will help insure program access, and the “equal, effective, and meaningful participation by individuals with disabilities in workforce investment activities.” 29 U.S.C. § 721(a)(11)(A)(i)(II). Congress also requires program recipients for national service programs to provide auxiliary aids and services (as defined in the ADA) to participant with disabilities, 42 U.S.C. § 12594(f), and

It is simply not enough to let people with disabilities inside the door, if they cannot access the services once there. *See Armstrong v. Davis*, 275 F.3d 849, 857–858 (9th Cir. 2001) (Title II case) (“Even if disabled prisoners or parolees made it to the hearing, a variety of barriers made participation extremely difficult and access to the facilities impractical.”).

**4. Auxiliary aids and services include captioning, audio description, and interpreters.**

In light of the overall goal of integration, the breadth of the statute, the variety of disabilities that are covered, and the importance of communication access, it is no surprise that auxiliary aids and services are very broadly defined. The statute defines them as including: qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of

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gives priority funding to those who demonstrate success in placing individuals with disabilities who require auxiliary aids and services. 42 U.S.C. § 12581(d)(5)(B)(i)(II).

It is also a key feature of the enforcing regulations under § 504 of the Rehabilitation Act of 1973. *See, e.g.*, 45 C.F.R. § 84.44(d). “The Rehabilitation Act regulations issued by the Department of Health, Education, and Welfare (HEW) in 1977, which appear without change in the current regulations issued by the Department of Health and Human Services [45 C.F.R. Pt. 84], ... are of particular significance because at the time they were issued, HEW was the agency responsible for coordinating the implementation and enforcement of § 504 of the Rehabilitation Act ....” *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 194–195 (2002).

making visually delivered materials available to individuals with visual impairments; the acquisition or modification of equipment or devices; and other similar services and actions. 42 U.S.C. § 12102(1).

The Title III regulations add the following to this general list: notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, audio recordings, Brailled materials, and large print materials. 28 C.F.R. § 36.303(b).<sup>6</sup>

Other guidance reflects that auxiliary aids and services for blind persons may also include providing shopping assistance, guides, or audio description services,<sup>7</sup> and for people who are deaf or hard of hearing may include passing

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<sup>6</sup> The Department of Justice supplemented the statutory list with “examples from regulations implementing section 504 in federally conducted programs.” 28 C.F.R. Pt. 36 App. B, § 36.303. The expanded list is fully consistent with the legislative history. H.R. Rep. No. 101-485, pt. II, at 107, 1990 U.S.C.C.A.N. at 390; H.R. Rep. No. 101-485, pt. III, at 59 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 482. It is also consistent with the Department of Justice’s Technical Assistance Manual. III-4.3200 (Illustrations 1 and 2); III-4.3600 (Illustration).

<sup>7</sup> H.R. Rep. No. 101-485, pt. II, at 107, 1990 U.S.C.C.A.N. at 390; H.R. Rep. No. 101-485, pt. III, at 59 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 482; 28 C.F.R. Pt. 36 App. B, § 36.303; Technical Assistance Manual, III-4.3200 (Illustrations 1 and 2); III-4.3600 (Illustration).

notes or providing a written transcription.<sup>8</sup> The DOJ's enforcement actions are also consistent.<sup>9</sup>

Simply put, under the ADA, “[a]uxiliary aids and services include a wide range of services and devices for ensuring effective communication.” 28 C.F.R. Pt, 36 App. B, § 36.303. This court has recognized as much. *See, e.g., Armstrong v. Davis*, 275 F.3d 849, 857 n.11 (9th Cir. 2001) (Title II case) (“[T]here are numerous examples of the BPT’s failure to provide such auxiliary aids and services...[T]he BPT failed to provide effective American Sign Language interpretation services to hearing impaired prisoners and parolees, failed to provide Braille materials, large print materials, audio tapes or qualified readers for visually impaired prisoners and parolees, failed to provide qualified readers for learning

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<sup>8</sup> H.R. Rep. No. 101-485, pt. III, at 59 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 482; Technical Assistance Manual, III–4.3200 (Illustrations 1 and 2); III–4.3600 (Illustration).

<sup>9</sup> For example, the Department of Justice settlement agreements have required that hotels provide TTYs, TV caption decoders, portable visual alarms, and communication devices for persons who with hearing or speech impairments, and information in alternate formats for persons with visual disabilities. *U.S.A. v. Kimpton Hotel & Restaurant Group* (July 17, 2008), <http://www.ada.gov/musehotelnyc.htm>; *U.S.A. v. Marriott Marquis* (July 10, 2008), <http://www.ada.gov/hmctimes.htm>. They have also required health and educational facilities, and private law offices, to provide sign-language interpreters. *Settlement Agreement: Clifford Law Office* (May 29, 2008), <http://www.ada.gov/hearn.htm>; *Sylvan Learning Centers* (Sep. 27, 2007), <http://www.ada.gov/sylvanlearn.htm>; and *Methodist Healthcare* (Sep. 24, 2007), <http://www.ada.gov/methhosp.html>.

disabled prisoners and parolees, and failed to provide trained staff capable of effectively communicating with mentally retarded or learning disabled prisoners and parolees.”).

The list of auxiliary aids and services is a long one, but any such list is illustrative only. It “is not meant to be exhaustive; rather, it is intended to provide general guidance about the nature of the obligation.” H.R. Rep. No. 101-485, pt. II, at 107, 1990 U.S.C.C.A.N. at 390. *See also* 28 C.F.R. Pt. 36 App. B, § 36.303. As the DOJ has pointed out, “[i]t is not possible to provide an exhaustive list, and such an attempt would omit new devices that will become available with emerging technology.” 28 C.F.R. Pt. 36 App. B, § 36.303. The enforcing agency’s focus on including emerging technologies in the auxiliary-aid requirement is one that is mirrored by Congress.

The Committee wishes to make it clear that technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.

Indeed, the Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times. This is a period of tremendous change and growth involving technology assistance and the Committee wishes to encourage this process. (See, for example, the enactment in 1988 of P.L. 100-407, the Technology Related Assistance for Individuals with Disabilities Act).

Information exchange is one of the areas where there are still substantial barriers, but where great strides are being made.

H.R. Rep. No. 101-485, pt. II, at 108, 1990 U.S.C.C.A.N. at 391.

Furthermore, Congress intended that public accommodations not only consider new technologies, but also the needs and desires of people with disabilities. “The Committee expects that the public accommodation will consult with the individual with a disability before providing a particular auxiliary aid or service.” *Id.* at 107, 1990 U.S.C.C.A.N. at 390.

**5. The Trial Court reads much of the communication access provisions and definitions out of the statute.**

The Trial Court held that “[p]ersons with sensory disabilities are not ‘excluded, denied services, segregated or otherwise treated differently than other individuals’ because they are offered the same form of services as other members of the public.” 548 F. Supp. 2d at 729. Under such a crabbed view, equal access is achieved so long as a person who is deaf or blind is able to buy a ticket, enter the theater, and sit down, notwithstanding the fact that such people could not enjoy the services fully or equally. *Id.*

This view is wrong, and would in no way afford the full and equal enjoyment of a public accommodation’s goods or services. Communication access requires more than that, as is clear from the case law and the agency guidance.

Communication access may require, for example, large-print menus, or having someone read them to the customer, *Camarillo v. Carrols Corp.*, 518 F.3d 153 (2d Cir. 2008), or the captioning of aural information, *Feldman v. Pro Football, Inc.*, \_\_\_ F. Supp. 2d \_\_\_, 2008 WL 4416668 (D. Md. Mar. 30, 2008). These cases are instructive.

In *Camarillo*, the Second Circuit held that a restaurant failed to provide communication access to a blind patron who was unable to read the menus without auxiliary aids and services. Although the trial court denied the plaintiff's claims on the basis that the plaintiff could get in the door, i.e., "was always permitted to eat at defendants' establishments," 518 F.3d at 154, the appellate court rejected this narrow interpretation. It held that as a result of the defendants' failure to provide appropriate auxiliary aids and services to ensure effective communication, the plaintiff "[could not] experience 'full and equal enjoyment' of defendants' services if she [was] unable to access the list of the services available to her." *Id.* at 157.<sup>10</sup>

In *Feldman*, deaf football fans could not hear the stadium's announcements, and requested captioning on the scoreboard and on the concourse TVs. The court

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<sup>10</sup> *Camarillo* also alleged that "when she has asked for employees to read her the menu items, she has been made fun of, stared at, and forced to wait until other customers behind her in line were served, and the employees have often read her only part of the menus." 518 F.3d at 154. This illustrates a key component to the ADA, that people with disabilities are not to be treated as second-class citizens by being forced to rely on the mercy or charitable inclination of others for assistance.

rejected the argument that the ADA only required the auxiliary aid of assistive listening devices. Instead, the court held that “assistive listening devices are useless to these [deaf] Plaintiffs. Thus, these devices cannot possibly ensure effective communication with Plaintiffs.” 2008 WL 4416668, at \*10. Based on the plain language of the statute, the court held:

Title III requires Defendants to provide “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations” available at FedExField. Defendants provide more than a football game; they also provide public address announcements, advertisements, music, and other aural information to hearing fans at FedExField. Presumably Defendants provide this aural information to hearing fans for a reason. This aural information is a good, service, facility, privilege, advantage, or accommodation.

*Id.* The court went on to hold that, without the appropriate auxiliary aid or service, deaf plaintiffs, although they could attend, “would not have equal access to [the] information [that defendants provide.]” *Id.*

The DOJ clearly understands that communications access means more than getting in the door; it certainly requires more of businesses in its Title III settlements.<sup>11</sup>

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<sup>11</sup> See , e.g., *Settlement Agreement between the United States of America and the International Spy Museum*, DJ No. 202-16-130 (June 3, 2008), <http://www.ada.gov/spymuseum.htm> (museum agreed to provide, among other things, the auxiliary aids and services of audio narration and captioning for its patrons with visual and hearing disabilities).

In the above examples, all affected complainants were people with sensory disabilities who were offered the same type or form of services that others received from the place of public accommodation. Yet that was not sufficient to remove the communication barriers that existed. The Supreme Court has made the same point under Title I of the ADA. In *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002), the business argued that the ADA “seeks only ‘equal’ treatment for those with disabilities.” The court rejected this argument because meeting the requirements of the ADA may mean:

that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal. The Act requires preferences in the form of “reasonable accommodations” that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy. By definition any special “accommodation” requires the employer to treat an employee with a disability differently, *i.e.*, preferentially.

(emphasis in original).

Title III therefore requires the provision of auxiliary aid or service that would enable person with communication disabilities to enjoy or understand the movie or other services. 42 U.S.C. § 12182(b)(2)(A)(iii). Without the auxiliary aid or service to view or hear the movie, the mere fact that people with communication disabilities can physically enter a theater does not make the theater accessible with respect to them. *See, e.g., Camarillo, supra*, 518 F.3d at 157.

**6. The Trial Court improperly characterizes the inherent nature of auxiliary aids and services as “alterations.”**

In spite of the explicit requirement that places of public accommodations provide auxiliary aids and services, including captioning and descriptive narrations, the Trial Court held that such captioning and narration necessarily “alter” the contents of the services Defendants provide. 548 F. Supp. 2d at 729 and 730. Based on that finding, the lower court concluded that Appellants cannot expect Appellees to “alter” the contents of their services to provide them access. *Id.*

Captioning and narration are simply methods of conveying inaccessible programs or services through accessible means for people with visual or hearing disabilities. Although the Trial Court explicitly spoke only to captioning and descriptive narrations, its flawed theory (that such auxiliary aids somehow “alter” the contents of the information communicated) could also apply to all other auxiliary aids and services. By their very nature, auxiliary aids and services must change information from its original format into another form to be useful to the person with a sensory disability. An auxiliary aid or service that does not transform aural elements to something of a visual nature fails to be an auxiliary aid or service for a deaf person. An auxiliary aid or service that does not change visual elements into something aural may be useless for a blind person.

Ironically, the Trial Court acknowledges that auxiliary aids and services must be provided when necessary for a person with a communication disability to access the services of a place of public accommodation. It adds an exception, however, that swallows the rule and renders it impotent:

Section 12182(b)(2)(A)(iii) requires public accommodations to ensure that persons with disabilities have access to the services they provide (utilizing auxiliary aids and services if necessary), but does not require public accommodations to alter or modify the content of their services.

548 F. Supp. 2d at 731. The two statements—acknowledging that auxiliary aids and services are required, yet declaring that public accommodations do not have to “alter” or modify the contents of their services by providing such services—simply cannot co-exist.

The Trial Court’s analysis (that caption or description changes content) would mean, for example, that having a sign-language interpreter at the front of the room somehow changes the content of a lecture or presentation. Under that reasoning, a doctor in his office would never have to provide a sign language interpreter, because that would be viewed as changing spoken language into a visual medium, which is not how the doctor presents his services of explaining a diagnosis to a patient. Book readers would never be provided for blind people because they change visual text into an auditory format. The plaintiff in *Feldman*

would not receive his stadium captioning because it would “alter” the contents of stadium broadcasts. The plaintiff in *Camarillo* would not be entitled to have someone verbally narrate the menu to her because the very act of transforming the written text on the menu into spoken language would “alter” the contents of the defendants’ service.

The Trial Court’s reasoning leads to a result that is antithetical to both Congressional intent and explicit statutory language. If Congress believed, as the Trial Court did, that the provision of an auxiliary aid or service that changes information from one format to another would always be an impermissible alteration of the contents of a place of public accommodation’s services, it would not have imposed an auxiliary aids and services requirement that is clearly contrary.

If the lower court’s decision is upheld, then captioning, narration, or any other auxiliary aid or service would not be available because they would be considered an alteration. Consequently, the decision below would rewrite the ADA to eliminate the requirement for any place of public accommodation to provide any form of auxiliary aid or service, based on the proposition that the auxiliary aid and service “alters” the content of the services provided.

The ADA must be read in such a way as to attribute meaning to every provision,<sup>12</sup> and a narrow construction of the ADA should be rejected when “inconsistent with the literal text of the statute as well as its expansive purpose.” *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 680 (2001) (interpreting an analogous provision in Title III).

As the Supreme Court has observed, “Title III is a broad remedial statute designed to protect persons with disabilities in a variety of activities and settings.” *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 145 (2005) (J. Ginsburg, concurring in part). “To hold there is no Title III protection for disabled persons who seek to use the amenities of [certain public accommodations] would be a harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled.” *Id.*, 545 U.S. at 132 (J. Kennedy). The Supreme Court has also recognized, in interpreting Title III, that implying limitations to the statutory language “would be inconsistent with the literal text of the statute as well as its expansive purpose.” *PGA Tour, Inc. v. Martin*, 532 U.S. at 679, 680.

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<sup>12</sup> It is an “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986). See also *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988).

**7. Appellees are limited to proving that they are entitled to the defenses Congress provided—undue burden or fundamental alteration.**

The Trial Court improperly attempts to expand the available defenses by creating definitional obstacles that are contrary to the statute. The only valid defenses that Appellees can raise in this case are the ones Congress supplied, and which the Trial Court conspicuously failed to address—the determination of whether providing the requested auxiliary aids or services would be a fundamental alteration or undue burden. As the court below failed to address this defense, *amicus* likewise does not address it in any detail. However, a discussion as to how auxiliary aids and services, in general, should be considered during a fundamental alteration analysis is appropriate.

Rather than centering solely on the inherent nature of a given auxiliary aid or service, the analysis should consider the auxiliary aid or service's effect on the nature of the services or goods provided by the place of public accommodation.

For example, in *Tugg v. Towey*, 864 F. Supp. 1201 (S.D. Fla. 1994), the court rejected the theory that the provision of mental health counselors with sign language ability and training in the needs of the deaf would create a fundamental alteration. Instead, the court held that:

[t]he nature of the service is mental health counseling. The relief sought by the [deaf] Plaintiffs simply sets forth specific qualifications

for individuals providing that service and does not fundamentally alter the nature of the service provided.

*Id.* at 1210. The court did not define the state’s usual service as providing “non-signing mental health counselors,” and then look at whether that would be “altered” (i.e., into the service of providing “signing mental health counselors”). Instead, the court accurately identified the nature of the service provided—mental health counseling—and then determined whether it would be fundamentally altered if signing mental health counselors were provided. *Id.* As mental health counseling would continue to be provided with a signing counselor, the court did not find the provision of such to be a fundamental alteration of the nature of the services the defendant provided. *Id.*

In *PGA Tour Inc., v. Martin*, 532 U.S. 661 (2001), the business “asserted that the condition of walking is a substantive rule of competition [in the golf tournament], and that waiving it as to any individual for any reason would fundamentally alter the nature of the competition.” *Id.* at 670. The Supreme Court ultimately found that “the use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shotmaking.” *Id.* at 683. “The walking rule . . . is not an essential attribute of the game itself.” *Id.* at 685. The high court concluded that the

plaintiff's use of a golf cart to accommodate his disability did not fundamentally alter the nature of the tours and services that defendants provided.

Although this Supreme Court decision dealt with a physical disability and the reasonable modifications requirement in 42 U.S.C. § 12182(b)(2)(A)(ii), the three-pronged test the Court employed is relevant to the instant case, namely, whether: 1) the requested auxiliary aid or service is *reasonable*; 2) whether it is *necessary* for the person with a sensory disability; and 3) whether it would *fundamentally alter the nature of the services* or goods provided by a place of public accommodation. The Supreme Court also held that this is an intensely factual analysis. *Id.*, 532 U.S. at 688, 690, 691.<sup>13</sup>

The Trial Court in the instant case, in deciding that captioning and narrations were impermissible “alterations” of the contents of the services Defendants

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<sup>13</sup> In fact, Supreme Court case law supports such an individualized assessment in determining virtually all aspects of the ADA that the Court has considered, including the definition of “disability,” *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999), who is a “qualified individual,” *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987) (decided under the Rehabilitation Act), what constitutes a reasonable “modification” to policies, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001), what constitutes a reasonable accommodation, *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 803 (1999) (noting that “the matter of ‘reasonable accommodation’ may turn on highly disputed workplace-specific matters”), and defensive matters such as “fundamental alteration,” *PGA Tour, Inc.*, *supra*, 532 U.S. at 688, and 690–691, “undue burden,” *Olmstead v. L. C. by Zimring*, 527 U.S. 581, 606 n.16 (1999) (decided under Title II, but also noting the individualized nature of “undue hardship”), and “direct threat.” *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999).

provide, failed to engage in factually-based analysis of any kind, and did not even approach the question of whether such “alterations” were fundamental. For these reasons, the trial court’s decision in this case must be overruled

## CONCLUSION

The Americans with Disabilities Act protects both people with physical disabilities and people with communication disabilities. The ADA ensures that people with communication disabilities are protected through its requirement to provide auxiliary aids and services. Without that additional requirement, the abilities of blind or deaf people to physically enter a movie theater would be meaningless because they were not also able to enjoy or understand the movie. Without enforcement of the auxiliary aid or service provision, there is no reason why a deaf or blind person would ever go to a movie theater for the purpose of enjoying a movie. The impact of this case is particularly striking in the context of movies, which Appellants’ brief confirms is a major industry, and which is extremely important both to society in general,<sup>14</sup> and to people with disabilities in particular.<sup>15</sup>

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<sup>14</sup> See, e.g., *Amato v. Wilentz*, 753 F. Supp. 543, 551 (D.N.J. 1990), *vacated on other grounds*, 952 F.2d 742 (3d Cir. 1991), describing the ever increasing importance of movies to American culture:

While the motion picture has always formed a vital part of the fabric of our society and our collective memories as Americans, its

Under the lower court's analysis, opportunities for meaningful participation during everyday life activities, such as going to the movies, would be drastically reduced for people with communication disabilities. People who are blind would not be able to independently operate an elevator without the benefit of brailled elevator buttons, or to withdraw cash without talking ATMs. Deaf students would not be able to sit in a classroom and derive any benefit from lectures without a sign language interpreter. There are countless other situations in which people would not be able to participate without appropriate auxiliary aids and services. These people would be left behind while everyone else went about their daily social and business activities. This contradicts the ADA's proclaimed intent, which was to bring all people with disabilities into the mainstream of everyday life activities.

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importance has consistently increased as the circulation of newspapers and other written materials has consistently declined. Film has in many ways, as never before, replaced the written work as a vehicle for the transmission of ideas, viewpoints and opinions. It is a vital medium that serves to stimulate important political and social debate. In support of this conclusion the court takes judicial notice of the controversy surrounding the release of Martin Scorsese's "Last Temptation of Christ" and Spike Lee's "Do The Right Thing." Both films ignited intense public debate concerning the role of religion and race in American life. As such, the court should carefully examine any activity that threatens to chill or impede the production of film and the free flow of ideas inherent in its creation and consequent to its showing.

<sup>15</sup> See *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448 (N.D. Cal. 1994), indicating that "movies are an important form of recreation" for people with disabilities.

This Court should reject the lower court's analysis out of recognition of the negative consequences it would cause, not only in the movie theater setting, but also in any other place of public accommodation. The decision below should be reversed.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on this 8th day of December, 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 are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. A true and correct copy of the foregoing document was served via Federal Express, for next day delivery to:

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,491 words, including the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14-point font.

/s/ Brian East  
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