

ORAL ARGUMENT REQUESTED

Hearing Date: April 16, 2010

Judge Regina Cahan

COPY

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

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

No. 09-2-06322-2-SEA

Plaintiff,)

vs.)

PLAINTIFF'S RESPONSE
TO DEFENDANT'S
MOTION FOR
SUMMARY JUDGMENT

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 Theatres,)
a Delaware Limited Partnership,)

LINCOLN SQUARE CINEMAS, LLC,)
a Delaware limited liability company,)

and KIRKLAND PARKPLACE)
CINEMAS LLC, a Washington)
limited liability company,)

Defendants)

I.

INTRODUCTION

Defendants' Motion for Summary Judgment is a pastiche of implausible premises, unsubstantiated and highly questionable authorities, erroneous claims about due process, ill-taken pleas for a different forum, illogical arguments about economics and wild speculation about consequences. The arguments should be wholly rejected.

Defendants' fundamental premise is that they are not in the business of exhibiting movies, but are, in fact, in the specialty business of exhibiting non-captioned movies, and that Washington's Law against Discrimination does not regulate the services they elect to offer. While the Washington State Legislature may not have intended to regulate the composition of ordinary goods sold at retail, neither did it intend to nullify the Washington Law against Discrimination by permitting a business to define its service as inaccessible by choice, and therefore exempt from the WLAD.

Second, Defendants argue that federal court interpretations of the Americans with Disabilities Act (ADA) support their position. The relevance of this argument is marginal at best. Moreover, Defendants mis-state the law under ADA by relying on *dicta* from a number of federal cases all dealing with the terms of insurance policies, by citing procedurally and factually distinguishable movie-captioning cases, and by omitting any discussion of an on-point movie-captioning case that supports our position. Defendants also fail to tell the Court that when the one federal movie-captioning case that actually does support their position was appealed, the federal Department of Justice filed an *amicus* brief opposing the theaters' position, and the Ninth Circuit panel that heard the case didn't simply question but in fact ridiculed their argument.

1 Third, Defendants assert that we are asking the Court to regulate their choice of goods or
2 services. We are not. Defendants can show whatever movies they choose. We are only asking
3 that when the movies they choose to show are available with captions, the captions be used.

4 Fourth, Defendants argue that the WLAD and its implementing regulations are void for
5 vagueness, despite the remarkable simplicity and clarity of the language used. And even though
6 Plaintiff seeks only prospective relief, and despite the total absence of any detrimental reliance or
7 prejudice, Defendants argue that their due-process rights would be violated by an order that they
8 make their services accessible.
9

10 Fifth, Defendants argue that the Court should defer to the supposed rule-making expertise
11 of the Human Rights Commission. But this case presents pure questions of law that the Court is
12 uniquely able to resolve, and the HRC has neither the resources nor the inclination to address the
13 questions presented.
14

15 Finally, Defendants trot out the predictable “slippery slopes” and “parade of horrors” to
16 argue that this Court should refrain from ruling. They claim that newer and better technology
17 may be developed, and assert that they should be immune from a risk faced by all businesses and
18 consumers, namely, the consequences of “guessing wrong” about future technology. Further,
19 they argue that the Court should stay its hand because the ruling may not satisfy people who are
20 not parties to this case, and because the consequences of a ruling may not be entirely predictable.
21 But that argument applies to many cases. Courts are in the business of resolving the issues
22 actually presented, and if a decision raises new questions, those are addressed in subsequent
23 cases – that is how the common law has long developed.
24

25 For all of the foregoing reasons, as articulated more fully in this brief, the Defendants’
26 Motion for Summary Judgment must be denied.
27

1 II.

2 ARGUMENTS

3 A. Defendants Cannot Avoid the Operation of the Law against Discrimination
4 by Characterizing Their Services as 'Non-Captioned Movies' Rather than
5 Simply as 'Movies.'

6 The real gist of Defendants' argument comes not in any affirmative statement or citation
7 of authority, but rather, comes in the way they attempt to frame the issue. According to
8 Defendants, the issue is:

9 Whether ... hearing-disabled movie patrons are treated differently than the general
10 public *when Defendants exhibit non-captioned films* that all patrons can attend
11 on the same terms and conditions.

12 (Defendant's Motion for Summary Judgment at 2-3, emphasis supplied). Defendants then argue
13 that because they make their non-captioned movies as accessible to Plaintiff's members as to the
14 general public – a fact we do not dispute – and because neither state nor federal disability law
15 regulates the “products or services” offered by a business, they have no liability.

16 Defendants' argument – indeed, their entire case – hangs by one slender thread, namely,
17 that they are not in the business of showing *movies*, but rather, are in the particular business of
18 showing *non-captioned* movies. When that thread is cut, as it must be, the entire argument fails.

19 Defendants' fundamental error lies in defining their service not by *what service* they
20 provide to the end user, but rather, by *the manner in which that service is provided*. Defendants
21 show movies – entertainment with both visual and aural elements. Captioning does not change
22 the content of that entertainment – the visual and aural elements remain the same. All captioning
23 does is deliver a portion of the aural information – the words being spoken or sung – in a visual
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1 rather than an aural mode. And as we will see, making a “reasonable accommodation” is all
2 about altering the mode by which a service is delivered.¹

3 1. The Applicable State Regulations Require the Mode of Service
4 Delivery to Be Adjusted as a Reasonable Accommodation.

5 Defendants are quite right when they argue that state law and the applicable regulations
6 do not require changes in the *content* of the goods or services being provided. But the
7 regulations do require changes to the *mode by which those services are delivered*. The pertinent
8 regulation states as follows:

9
10 **Reasonable accommodation.** The law protects against discrimination because of
11 the presence of a disability. It does not prohibit treating disabled persons more
12 favorably than non-disabled persons in circumstances where same service will
defeat the purpose of the law against discrimination.

13 For example, this would be true if persons in wheelchairs and nondisabled
14 persons are equally entitled to use the stairway to reach the second floor of a
15 store. In such circumstances, the operator of the place of public accommodation
should use the next best solution: Reasonable accommodation.

16 A reasonable accommodation would be to permit the shopper in the wheelchair to
17 use an elevator to reach the second floor, even though the public in general is not
18 permitted to use the elevator. ... [A]nother reasonable accommodation would be to
19 bring the merchandise requested by the customer to the first floor. Reasonable
accommodations may also include, but are not limited to, providing sign language
interpreters and making printed materials available in alternate formats.

20 WAC 162-26-060.

21 As that regulation shows, “reasonable accommodation” is all about changing the mode of
22 delivery to make the underlying service available to people with disabilities. Where a stairway
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24
25 ¹ Defendants cannot avoid this outcome by characterizing their movies as “goods.” The “goods”
26 Defendants receive are cans of film, many if not most of which come with CD-ROMs containing
27 captions. The theaters then perform the *service* of placing the film into a projector and displaying
28 it. This case deals with the many instances in which Defendants chose to essentially throw the
caption disc away rather than putting that disc into the appropriate equipment and displaying the
captions.

1 doesn't permit a person in a wheelchair to enjoy a retail establishment, a reasonable
2 accommodation is to change the mode of delivery by making the service available by elevator.
3 Where aural delivery of information doesn't suffice, a reasonable accommodation is to provide
4 sign-language interpreters. And where visual delivery fails, a reasonable accommodation is to
5 provide the material in a different format.
6

7 Installing and using the equipment to show captioned movies is the equivalent for a
8 hearing-impaired person of an elevator for a mobility-impaired person. Captioning is not a
9 different service, but simply a different mode by which the service can be made available.
10

11 2. Contrary to Defendants' Arguments, Washington Case Law
12 Also Squarely Declares That the Mode of Service Deliver May
13 Need to Be Altered to Accommodate People with Disabilities.

14 Defendants' argument is also inconsistent with controlling Washington case law. Again,
15 that is so because in the case they do cite, Defendants ignore the critical distinction between the
16 service being provided and the mode in which the service is provided. They then compound that
17 problem by failing to cite a case that does explicitly draw that distinction.

18 Defendants rely on *Fell v. Spokane Transit Auth.*, 128 Wash.2d 618, 911 P.2d 1319
19 (1996) for the proposition that WLAD does not entitle the disabled to services in excess of those
20 offered to the general public. But that statement, while perhaps true in the abstract, begs the
21 critical question of whether a business's services are defined by *what* is offered, or by the mode
22 in which it is offered.

23 On its facts, *Fell* reached an unexceptional outcome. In that case, the question was
24 whether a transit system must offer paratransit service in areas where it did not offer any regular
25 "walk-on" transit service. Declaring "comparability" of treatment to be the touchstone of non-
26 discrimination, the Supreme Court said WLAD did not entitle disabled riders to services in areas
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1 where the general public was not served simply because it was financially possible for the
2 business to provide those services.² In other words, a claimant cannot make out a WLAD
3 violation simply by claiming that the requested service is “reasonably possible.” The claimant
4 must also show that the service as presented does not treat disabled people comparably to the
5 general public.³ But nothing in *Fell* can be read to suggest that paratransit service itself, which
6 merely altered the mode of providing service, was in excess of the service being provided to the
7 public – where Spokane Transit offered “walk-on” service to the general public, it had to offer
8 paratransit service to disabled individuals.
9

10 This critical distinction between the service itself and the mode of delivery was
11 dispositive in the case of *Negron v. Snoqualmie Valley Hospital*, 86 Wash.App. 578, 936 P.2d
12 55 (1997), a case that Defendants do not cite. There, a hospital failed to furnish sign-language
13 interpreters for a deaf patient. The hospital argued, among other things, that its service was
14 medical care, that the patient recovered, and that therefore, the patient had no cause of action.
15 Here is how the appellate court characterized the situation:
16
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18 *Fell* establishes for places of public accommodation a “test of comparable
19 treatment”. “Comparable” does not mean identical. ... [P]laces of public
20 accommodation may be required to reasonably accommodate disabled patrons in

21 ² *Fell* was a 5-4 decision in which the dissent sharply criticized the majority for ignoring state
22 law and deciding the case under the federal ADA. In light of the State Legislature’s overruling of
23 the *McClarty v. Totem Electric* case, discussed *infra*, in which the Washington Supreme Court
24 ignored state law and incorporated ADA definitions and case law, it is questionable whether
25 some of the reasoning contained in *Fell* retains much viability. Even before the Legislature’s
26 action, Judge Pechman declared *Fell* inapplicable to a WLAD case, stating that it was decided
27 under ADA. *Allen v. Educational Community Credit Union*, 2006 WL 1495775 (W.D. Wash.,
28 May 24, 2006).

³ Our case would be analogous to *Fell* if one of our members in an isolated area without movie
service tried to require a Defendant to offer captioned movies in that area simply because the
Defendant could afford to do so. We do not make such a claim.

1 order to provide them with treatment comparable to the treatment received by
2 non-disabled persons.

3 Treatment received in a hospital generally includes not only medical intervention,
4 but also the opportunity to explain symptoms, ask questions, and understand the
5 treatment being performed including options, if any. A reasonable
6 accommodation to a deaf patient is one that allows a comparable opportunity,
7 reasonable under the circumstances.

8 *Negron v. Snoqualmie Valley Hospital*, 86 Wash.App. 578, 936 P.2d 55, 58-59.

9 Crucially, the *Negron* court analyzed the “regular services” from the perspective not of
10 the business, but of the patron. The test for comparability is not whether the business offers the
11 same mode of service to the disabled and the non-disabled, but rather, whether the disabled
12 person receives a comparable benefit – not simply medical care, but also the opportunity to
13 interact with the medical staff. When it was reasonably possible to alter the mode in which
14 services were delivered, and thereby provide a hearing-impaired patron with a comparable
15 opportunity to enjoy the same benefits as the general public, then that action was required as a
16 reasonable accommodation under WLAD.

17 3. Defendants’ Interpretation of ‘Regular Service’ Would Effectively
18 Nullify Any Requirement to Make ‘Reasonable Accommodations,’
19 and Undercut the Mandate to Interpret WLAD Liberally.

20 Defendants are making the classic “argument that proves too much” for a number of
21 reasons. First and most obviously, if Defendants are able to define their “services” in terms of the
22 mode of delivery, then the entire structure of WLAD collapses. Transit services become “walk-
23 on” transit services, negating any requirement to accommodate individuals with mobility
24 impairments. Bank ATMs become “visually operated terminals,” negating any requirement to
25 offer Braille keypads. School classrooms become “places of aural instruction,” negating any
26 requirement to furnish lecture materials to the hearing-disabled in written form. The regulatory
27 requirement contained at WAC 162-26-070(6) and 162-26-080(1) that “reasonable
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1 accommodation” must be offered when “same service” doesn’t yield “full enjoyment” of the
2 business’s offerings simply evaporates.

3 It is an elementary proposition of law that “language within a statute must be read in
4 context with the entire statute and construed in a manner consistent with the general purposes of
5 the statute,” *Nationwide Papers, Inc. v. Northwest Egg Sales, Inc.*, 69 Wash.2d 72, 76, 416 P.2d
6 687 (1966). Yet Defendants invite this Court to ignore the overall purpose of the WLAD when
7 they argue that their “services” should be described not in terms of *what* is being offered, but in
8 terms of *how* the offerings are presented. The Court should reject that invitation.

9
10 Second, Defendants also ignore the mandate contained in RCW 49.60.020 to the effect
11 that the WLAD must be construed “liberally.” If the mandate for liberal construction means
12 anything, it means that this Court must reject a construction of the law that may be
13 grammatically possible, but that sharply limits the rights and remedies of the people to be
14 protected by the WLAD, and prefer a reasonable construction that affirms those rights.

15
16 For the foregoing reasons, Defendants’ argument that its services are “non-captioned
17 movies” cannot stand. Allowing a business to define its services by the mode of presentation
18 would render the WLAD meaningless by permitting a business to say, in effect, “we choose to
19 offer our services in a manner that is inaccessible, and we’re entitled to do that.” Such a position
20 ignores applicable regulations and misconstrues the relevant case law.

21
22 The only sensible and workable interpretation of WLAD is to declare that business
23 “services” are defined by what it offers, and not by the mode of delivery, and that when it is
24 reasonably possible to deliver those services in a way that makes the services accessible – and
25 specifically that makes aural information “understandable” – then that must be done.
26
27
28

1 Here, movie captioning is not a mere possibility, it is a reality. Defendants Regal, AMC
2 and Cinemark all display captioned movies on occasion. So it is obviously “reasonably possible”
3 in *some* circumstances for defendants to display captioned movies. The critical question in this
4 case is why captioning is not reasonably possible in most if not all circumstances.

5
6 B. Neither the Federal ADA nor Cases Construing It Are Relevant, But Even If They
7 Were, They Do Not Lend Much Support to Defendants.

8 Defendants try to bolster their narrow and erroneous interpretation of the WLAD by
9 claiming that the court should be guided by case law interpreting the “analogous” federal
10 Americans with Disabilities Act, 42 U.S.C. § 12101 *et. seq.*, and further arguing that those cases
11 support its position. We disagree on both counts for three reasons. First, Defendants misstate the
12 relationship between state and federal disability law, and argue for a level of deference to or
13 reliance on federal law that the Washington Legislature has specifically rejected. Second,
14 Defendants proffer a highly selective and incomplete palate of federal-law cases. Third, the
15 federal Department of Justice – the agency charged with interpreting ADA – has specifically
16 renounced the position Defendants are taking.

17
18 1. This Court Must Recognize That the State WLAD is a Separate and
19 Independent Source of Rights.

20 Although a stated purpose of the Americans with Disabilities Act is to provide a “clear
21 and comprehensive national mandate for the elimination of discrimination against individuals
22 with disabilities,” a critical and often-overlooked aspect of ADA is that it is specifically intended
23 to be a floor rather than a ceiling. The federal statute states as follows:
24

25 Nothing in this chapter shall be construed to invalidate or limit the remedies,
26 rights, and procedures of any Federal law or law of any State or political
27 subdivision of any State or jurisdiction that provides greater or equal protection
28 for the rights of individuals with disabilities than are afforded by this chapter.

42 U.S.C. §12201(b).

1 Despite that clear disclaimer of pre-emptive intent, Washington's courts have sometimes
2 sidestepped the question of whether the WLAD does indeed provide greater protection to
3 persons with disabilities, and lapsed into over-reliance on federal cases decided under ADA.
4 While that approach manifested itself in the *Fell* case, it reached its peak in the 2006 case of
5 *McClarty v. Totem Electric*, 157 Wash.2d 214, 137 P.3d 844 (Wash., 2006). There, the
6 Washington Supreme Court, trying to grapple with the WLAD definition of "disability,"
7 abandoned both its own prior interpretations and the regulations adopted by the state Human
8 Rights Commission, and instead adopted the ADA definition and, by implication, the
9 interpretations of that definition articulated by federal courts.
10

11 The Washington Legislature acted swiftly to overrule the *Totem Electric* decision,
12 specifically and by name. It defined "disability" broadly, and criticized the Supreme Court for
13 failing to give independent weight to WLAD, saying:
14

15 The legislature finds that the supreme court, in its opinion in *McClarty v. Totem*
16 *Electric*, 157 Wash.2d 214, 137 P.3d 844 (2006) failed to recognize that the Law
17 Against Discrimination affords to state residents protections that are wholly
18 independent of those afforded by the federal Americans with Disabilities Act of
19 1990, and that the law against discrimination has provided such protections for
20 many years prior to passage of the federal act.
21 LAWS OF 2007, ch. 317, § 1.

22 quoted in *Burchfiel v. Boeing Corp.* 149 Wash.App. 468, 205 P.3d 145 (Wash.App. Div. 3,
23 2009).

24 As the Legislature and the courts have noted, even though ADA and WLAD may address
25 the same general subject, there are important and potentially controlling differences. First, the
26 federal ADA is often construed narrowly, *Toyota Mfg. Co. v. Williams*, 534 U.S. 184, 198, 188
27 S.Ct. 681, 691 151 L.Ed.2d 615 (2002)("[T]hese terms need to be interpreted strictly to create a
28 demanding standard for qualifying as disabled"), while WLAD is construed broadly. *Marquis v.*

1 *City of Spokane*, 130 Wash.2d 97, 108, 922 P.2d 43 (“a statutory mandate of liberal construction
2 requires that we view with caution any construction that would narrow the coverage of the law”).

3 Second, neither ADA nor its implementing regulations contains any language remotely
4 equivalent to the WLAD regulatory definition of “accessible” as being “understandable” – a
5 regulation that plainly requires not just physical access but aural access as well. Third, the
6 legislative history of ADA contains a statement to the effect that it does not require theaters to
7 show open-captioned movies, a provision that has at least influenced most if not all of the cases
8 on which Defendants rely, *see, e.g., Arizona v. Harkins Amusement Enter., Inc.*, 548 F.Supp.2d
9 723, 731 (D. Ariz. 2008)(attached to Defendant’s brief as Tab 1). That bit of legislative history is
10 totally absent from the WLAD.
11

12
13 The *Marquis* case is instructive on the interplay between the WLAD and “analogous”
14 federal law. The question presented there was whether an independent contractor could maintain
15 an action for discrimination under the provisions of the WLAD that prevent discrimination in
16 employment. Cases interpreting the federal analog to the WLAD – Title VII of the Civil Rights
17 Act – said “no,” that federal law was meant to protect employees, not independent contractors, a
18 conclusion based, in part, on the legislative history of Title VII.
19

20 After examining both the state and federal statutes, the Washington Supreme Court
21 declared that despite the similarity of purpose, case law interpreting Title VII was not useful in
22 interpreting the WLAD. It said:

23 While Title VII of the Civil Rights Act of 1964 is similar to RCW 49.60.180, the
24 provision delineating unfair practices in employment, there is no provision
25 in the federal law which sets forth the equivalent of the broad language of RCW
26 49.60.030(1) [the general anti-discrimination provision of WLAD] and there is no
27 statutory provision requiring liberal construction in order to accomplish the
28 purposes of the act. Federal cases interpreting Title VII are thus not helpful in
determining the scope of RCW 49.60.030(1).

1 *Marquis v. City of Spokane*, 130 Wash.2d 97, 110-11, 922 P.3d 43, 50. The same considerations
2 apply here. The Court must not permit the stated similarity of purpose to obscure the significant
3 and controlling differences between WLAD and ADA, and it should therefore be extremely
4 cautious about looking to ADA case law for guidance here.⁴

5
6 2. The Cases Holding that ADA Does Not Regulate the Content of Goods or
7 Services All Arose in a Unique and Inapplicable Fact Situation.

8 The cases Defendants cite for the proposition that the ADA does not regulate the content
9 of good and services must be viewed with a jaundiced eye. Every one of those cases involves a
10 challenge to provisions of an insurance policy that the plaintiff claimed discriminated against
11 people with disabilities in general, or against people with specific disabilities. In some of those
12 cases, notably *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000), the
13 outcome was based at least in part on a statutory safe-harbor provision of ADA that specifically
14 permits insurance companies to draw distinctions based on accepted underwriting principles. 42
15 U.S.C. § 12201(c). Plainly, no such “safe harbor” pertains to this case.
16

17 Moreover, each of those insurance-policy cases is distinguishable because the challenges
18 went directly to the nature of the goods and services themselves, not to the mode in which the
19 goods or services were offered. That is not our case. We are not asserting that Defendants must
20 show only captioned movies, or alter their selection of movies in any way. Rather, we are
21 arguing that to the extent reasonably possible, Defendants must present in captioned form those
22 movies that they do show and for which captions are available.
23

24 One of the analogies used in those cases is particularly instructive. The courts pointed out
25 that under ADA regulations issued by the Department of Justice, a bookstore need not stock
26

27 ⁴ All of the cases Defendants cite for the proposition that ADA case law is instructive in
28 interpreting WLAD pre-date the Legislative overruling of *McClarty*.

1 Braille books, but that if the store special-orders books as part of its regular menu of services, it
2 must special-order Braille as well as print books. Here, theaters special-order all of their movies
3 – none are kept in stock. Under the DOJ regulations, they must order captioned as well as non-
4 captioned movies, and in fact, they generally do that. So the Defendants' position is really not
5 that of a bookstore that doesn't order Braille books or have them in stock, but rather, is that of a
6 bookstore that orders and in fact has an ample supply of Braille books, but simply refuses to sell
7 them. A refusal to sell merchandise usable by the blind that is actually on hand would
8 unquestionably be a violation of both ADA and WLAD. We submit that a refusal to show
9 movies that are actually on hand in a mode accessible to the hearing-impaired is equally a
10 violation.
11

12
13 3. The Movie Captioning Cases Defendants Cite Are Mostly Inapposite, and
14 Both the Factually Similar Case and the General Direction of Recent
15 Authority is Running Against Them.

16 Defendants claim that both federal cases involving the specific question of captioned
17 movies, and the interpretations from the Department of Justice, support their claim that movie
18 captioning is not required under ADA. But that characterization of case law and agency opinion
19 is highly selective, at best.

20 Two of the cases Defendants cite – *Cornilles v. Regal Cinemas, Inc.*, No. Civ. OO-173-
21 AS, 2002 WL 31440885 (D. Or. Jan. 3 2002), and *Todd v. American Multi-Cinema, Inc.*, No.
22 Civ.A.H-02-1944, 2004 WL 1764686 (S.D. Tex., Aug. 5, 2004) – are sharply distinguishable
23 from our case. In both of those cases, plaintiffs asked for nationwide class certification, and
24 asked that *all* movie screens be equipped to show captioned films. In both of those cases,
25 Defendants produced un rebutted evidence to the effect that the total cost of complying would
26 exceed their net worth, and the courts ruled that as a matter of law, those global requests would
27

1 constitute an undue burden. While both cases did opine that ADA requires only *physical* access
2 to the non-captioned movies being shown,⁵ that observation *dicta* in both cases, and cannot be
3 reconciled with the Washington regulation that equates “accessible” to “understandable,” thus
4 requiring aural as well as physical access.

5 Defendants wholly ignore the leading case of *Ball v. American Multi-Cinemas Inc.*, 246
6 F.Supp.2d 17 (D.D.C. 2003), a case very much like ours. In *Ball*, the plaintiffs were not asking
7 that all screens be equipped to show captioned movies, only that “a fair number” of them be
8 equipped. Likewise, we acknowledge that financial constraints are a limiting factor, and are
9 asking only that Defendants offer captioned movies to the extent it is reasonably possible for
10 them to do so. Also, the plaintiffs there, like here, were not asking that the theaters change their
11 mix of movies being offered, only that they show those movies actually available with captions
12 in captioned form.

13
14
15 The *Ball* court held that ADA does require closed-captioned movies,⁶ and reserved for
16 trial the question what level of captioning could be undertaken without becoming an undue
17 burden. That ruling – the precise relief we are requesting in our cross-motion – prompted a
18 settlement.
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22 ⁵ In *Cornilles*, the statements regarding both physical access and the laundry-list of alleged
23 “practical problems,” which Defendants quote in their brief, were actually made in the
24 Magistrate’s recommendation. Those portions of the recommendation were rejected by the
25 Judge, who adopted only the undue-burden rationale. *Cornilles v. Regal Cinemas, Inc.*, 2002 WL
26 31469787 (D.Or. March 19, 2002). In that sense, Defendants are citing a legal analysis that has
27 been overruled.

28 ⁶ The *Ball* plaintiffs did ask that Regal Cinemas be directed to show closed-captioned rather than
open-captioned movies. The court rejected that request, saying that while ADA may not *require*
open-captioned movies, open-captioning was an effective and therefore acceptable
accommodation. We believe that either open-captioning or closed-captioning is acceptable.

1 The final movie-captioning case cited by Defendants is *Arizona v. Harkins Amusement*
2 *Enter., Inc.*, 548 F.Supp.2d 723, 731 (D. Ariz. 2008), in which an Arizona judge did accept the
3 argument Defendants make here, namely, that a movie theater's "product" is non-captioned
4 movies, and thus not regulated by ADA. Defendants fail to point out that the *Harkins* case has
5 been appealed – the first ADA movie-captioning case to reach the federal appellate level. While
6 no decision has yet been reached, the auguries are not favorable for the theater defendants.
7

8 First, the federal Department of Justice, which is charged with interpreting and
9 implementing the portion of ADA dealing with public accommodations, filed an *amicus* appeal
10 brief on the side of the plaintiffs in that case, urging reversal, and taking the position that ADA
11 can and does require closed-captioned movies. (A copy of that brief is attached hereto as Exhibit
12 A). Second, the appellate panel sharply questioned – indeed, "ridiculed" is not too strong a word
13 – the assertion that a theater can define non-captioned movies as its "service."⁷
14

15 Despite similar purposes, WLAD is so different from ADA, particularly with respect to
16 the requirement that public accommodations make their services "understandable," that ADA
17 case-law is at best only marginally relevant. But even then, both the better-reasoned and most
18 closely applicable case – the *Ball* case – and the federal Department of Justice take the position
19 that captioning is required to the extent that doing so is reasonably possible. This Court would
20 be in good company if it so rule not only by denying Defendants' Motion for Summary
21 Judgment, but also by granting Plaintiff's Motion for Partial Summary Judgment.
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26 ⁷ The Ninth Circuit makes audio recordings of oral arguments available on line. The *Harkins*
27 argument can be accessed at
28 http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004752.

1 C. Plaintiff Is Not Asking the Court to Regulate the Content of Goods or Services,
2 Nor for an Unprecedented Expansion of the WLAD.

3 The foregoing discussions essentially deal with another of the red-herring arguments
4 Defendants raise, namely, that a ruling for Plaintiff would constitute a regulation of goods and
5 services rather than of places. That is quite simply not so. If we were asking for a ruling
6 requiring Defendants to show only those movies that are available in captioned form, that
7 argument might have some resonance. But we are not. All we want is for the Defendants to be
8 required to actually employ the captions that come with many of the movies they already show.⁸
9

10 Defendants also suggest that we are asking for an unprecedented expansion of WLAD
11 that could impose limitless liabilities on them. Again, that is not the case. We are asking the
12 Court to determine initially that Defendants must show captioned movies to the extent it is
13 reasonably possible in the circumstances for them to do so, recognizing that the answer is likely
14 to be different for each of the Defendants. We will then either resolve that issue through
15 negotiations, or conduct the necessary discovery and ask the Court to make that determination.
16 The regulation limiting Defendants' obligations to what it is reasonably possible for each of them
17 to do, when applied by the Court, protects Defendants from unlimited and ruinous liability.
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22 ⁸ According to information appearing on Defendant Regal's website, at least 14 of the 23 movies
23 it was showing at its King County multiplexes on a recent typical week were available with open
24 captions. According to information appearing on the website of the company that actually
25 prepares the closed captions, 14 of the 15 movies AMC was showing at its King County
26 multiplexes during that same week were available with closed captions. The various proprietary
27 and non-proprietary websites further indicate that 12 of the 13 movies Cinemark was showing at
28 its Century Federal Way complex were available in captioned form, as were 11 of the 13 movies
being shown at Lincoln Square, and six of the eleven movies Defendant Silver Cinemas was
showing at its Metro multiplex. *See* Plaintiff's Motion for Partial Summary Judgment, additional
undisputed facts 21-36.

1 D. The WLAD and Its Regulations Are Not Void for Vagueness, and a Prospective
2 Requirement to Show Captioned Movies Would Not Deprive Defendants of Their
3 Due-Process Rights.

4 Defendants next argue that WLAD is impermissibly vague, and that enforcement of it
5 would therefore violate their due-process rights, is equally unavailing. While a statute must be
6 specific enough that persons of “ordinary intelligence” can understand what conduct is required
7 and what is prohibited, a defendant’s self-serving protestations that they “can’t understand what
8 is required” is far from sufficient to render the statute unenforceable. That argument was rejected
9 in two controlling.

10 The first challenge arose in the case of *Chicago, M., St. P. & P. R. Co. v. Washington*
11 *State Human Rights Comm.*, 87 Wash.2d 802, 557 P.2d 307 (1977), in which an employer
12 claimed that the WLAD’s mandate against discrimination on the basis of “handicap” was
13 impermissibly vague because “handicap” was not defined in the statute. The Supreme Court
14 rejected that argument. It looked to the dictionary definition of “handicap” as a condition that
15 prevents normal functioning in some way,” and concluded:
16

17
18 It is obvious that ‘handicap’ has a well understood, common meaning. Men of
19 ordinary intelligence undoubtedly can understand what constitutes a
20 ‘handicap’ within the context of RCW 49.60.180(1), and, consequently, the
21 statute is not void for vagueness.

22 87 Wash.2d 802, 805-06, 557 P.2d 307, 310. Similarly, in *Voris v. Washington State Human*
23 *Rights Com'n*, 704 P.2d 632, 636, 41 Wash.App. 283, 289 (Wash.App.1985), the court rejected
24 the argument that the prohibition against discrimination in “real estate transactions” was
25 unconstitutionally vague.

26 As those cases point out, the standard is not whether the language of a statute is capable
27 of being *misunderstood* by a self-serving party, but rather, whether the statute is capable of
28 being *understood* by an individual of ordinary intelligence. Moreover, the test is not whether

1 confusion is possible in some circumstances, but rather, whether impermissible uncertainty arises
2 in the particular case under consideration.

3 Here, the term being objected to is the regulatory requirement that services be made
4 “understandable” as that requirement is applied to the movies that Defendants show. Merriam-
5 Webster’s on-line dictionary defines “understand” as “to grasp the meaning of,” and
6 “understandable” as the adjectival form. As the parties have stipulated, many of Plaintiff’s
7 members cannot “discern the meaning of” dialogue in a non-captioned movie, but can read and
8 therefore grasp the meaning of a captioned movie. (Stipulated Facts 2 and 3). Plainly, captioned
9 movies are “understandable,” non-captioned movies are not.⁹ There is nothing even arguably
10 incomprehensible about the application of that regulatory language to the facts of this case.
11

12 Moreover, the equitable considerations that animate the “void for vagueness” doctrine
13 simply do not apply here. Unlike the cases cited by Defendants, our case does not involve
14 possible criminal liability, nor is this a situation in which a regulator may arbitrarily apply a
15 standard so vague that the decision is unreviewable by a court. Nor has there been any
16 detrimental reliance on the absence of a ruling mandating captioning. Defendants are not
17 disadvantaged by being ordered to implement captioning now rather than years ago.
18

19
20 E. This Case Involves a Strict Application of Commonly Used Language to
21 Undisputed Facts, and Is Therefore a Matter for the Court, Not for a Regulatory
22 Agency.

23 Defendants also ask the Court to dismiss the case and direct Plaintiff to resort to rule-
24 making by the Human Relations Commission. Without using the term, Defendants are invoking

25 ⁹ Defendants argue that “understandability” can’t be measured, noting that not all hearing-
26 impaired people can read fast enough to follow real-time captioning. In addition to being
27 insufferably condescending, this argument overlooks the fact that illiteracy is not a disability,
28 and it is highly doubtful that a hearing-impaired individual could claim discrimination based on
disability because they couldn’t read captions. But that is another case for another day.

1 the doctrine of primary jurisdiction, which holds that when both a court and an administrative
2 agency have jurisdiction, a court should consider whether it ought to stay its hand in deference to
3 the agency. Washington has a well-developed body of case law concerning primary jurisdiction,
4 none of which Defendants cite, that shows deferral to the HRC is not appropriate.
5

6 While always discretionary, a court may defer to an agency's jurisdiction when 1) the
7 agency has the authority to resolve the issue; 2) the agency has special competence to make it
8 better able than the court to do so, and 3) the issues involve a pervasive regulatory scheme so
9 that a danger exists that judicial action would conflict with that scheme. *In re Real Estate*
10 *Brokerage Antitrust Litigation*, 9 Wash.2d 297, 302-03, 622 P.2d 1185 (1980). However, the
11 invocation of the doctrine is strictly limited to resolving factual questions. Where the facts are
12 stipulated, and the only question is how the law applies to those facts, deferral to an agency is
13 never appropriate because "interpretation of a statute is solely a question of law and within the
14 conventional competence of the court." *State ex. rel. Graham v. Northshore School Dist. No.*
15 *417*, 99 Wash.2d 232, 242, 662 P.2d 38, 44 (1983).
16
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18 Here, none of the predicates for primary jurisdiction exist. While the HRC may have the
19 statutory authority to promulgate regulations implementing WLAD, it has not actually
20 implemented any regulations concerning disability since 1999. (*See* footnotes to regulations at
21 WAC 162-26).¹⁰ Given the current budgetary crisis, HRC is not going to be able now to
22
23

24 ¹⁰ The federal Department of Justice has an enormous capacity to develop rules for implementing
25 ADA, but the Washington Legislature, while giving HRC the statutory authority to promulgate
26 regulations, has not provided the budget. Because of that, DOJ has developed a pervasive
27 regulatory scheme to implement ADA. However, even then, no fewer than four federal courts
28 have gone ahead and interpreted the application of ADA to the question of movie captioning.

1 undertake a rulemaking for the first time in a decade. What you see now is what you get – a
2 skeletal regulatory scheme to be fleshed out by judicial action.

3 Moreover, this is a pure case of applying undisputed facts to a statutory and regulatory
4 scheme. While Defendants dispute the practicability of using “understandable” as an appropriate
5 measure of compliance with WLAD, they do not suggest that the term as used in the regulations
6 has any meaning other than the ordinary meaning of the word. Applying ordinary, non-technical
7 language to a set of facts has long been acknowledged to be the exclusive province of the courts.
8 *American Legion Post No. 32 v. City of Walla Walla*, 116 Wash.2d 1, 6, 802 P.2d 784, 786
9 (1991)(noting that deferral to a regulatory agency may be appropriate where a critical term is
10 used in a technical sense).
11

12 Finally, Defendants fail to note the mandatory language of the WLAD, which states that
13 “any person deeming himself or herself injured by any act in violation of this chapter *shall* have
14 a civil action in a court of competent jurisdiction to enjoin further violations.” RCW
15 49.60.030(2)(emphasis added). That plain language gives anyone believing themselves to be
16 victims of impermissible discrimination a right to sue. While we have found no case law dealing
17 with the issue, nor do Defendants cite any cases, we question whether, in light of that apparently
18 plain statutory entitlement, a court can ever apply the doctrine of primary jurisdiction in a
19 WLAD case.
20
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22 F. The ‘Practical Difficulties’ Defendants Cite Are Imaginary, Speculative, or Apply
23 in Virtually All Cases, and Should Not Deter the Court From Ruling in This Case.

24 Finally, the plethora of so-called “practical difficulties” the Defendants cite are either
25 untrue, irrelevant, or are the matters that will be resolved when at a later stage in the proceedings.
26

27 Defendants first cite the possible costs of \$11,000 to \$20,000 per auditorium. We
28 acknowledge that costs are a legitimate consideration when it comes to ascertaining how much

1 captioning it is “reasonably possible in the circumstances” for the Defendants to offer. But unlike
2 the cases Defendants cite, in which plaintiffs asked the court to order that every auditorium in the
3 country be equipped to show captioned films, we are asking only that Defendants do what is
4 “reasonably possible” as determined by this Court after trial on the merits.

5 In a sense, the cost of installing captioning equipment is analogous to a claim for
6 damages. CR 56 specifically permits a Plaintiff to seek partial summary judgment on the issue of
7 liability, with damages to be determined at trial, and that is what Plaintiff in this case is doing.
8 Defendants, in essence, are arguing that because *damages* might be excessive, they should be
9 entitled to summary judgment on the issue of *liability*. The self-evident absurdity of that
10 argument requires no further response.
11

12 Defendants then argue, but cite no authority whatsoever, that because they have no
13 control over what movies are captioned, they shouldn’t be made to buy equipment to display
14 such movies. Their claim, evidently, is that they may spend money to display movies that don’t
15 exist, which again seems to go not to whether they are obliged to display captioned movies, but
16 rather goes to the amount of money it is reasonable in the circumstances for them to spend.
17

18 Again, this argument seems to infer that captioned movies are relatively rare. That claim
19 might have had some plausibility at one time, when captions had to be burned onto a separate
20 film print, and captioned movies were therefore relatively rare. But as we demonstrated in our
21 statement of supplemental undisputed facts, the vast majority of the movies these Defendants
22 actually show at their King County multiplexes do come with captions.
23

24 Defendants then argue that at present, there are only two manufacturers of captioning
25 equipment, and plead that they should not be forced into a market with so few alternatives. This
26 argument is not so different from the proverbial situation of Lizzie Borden pleading for mercy
27

1 because she is an orphan. These Defendants, which include the three largest movie chains in the
2 country, steadfastly and consistently deny that they have any obligation whatsoever to show
3 captioned movies. It should hardly surprise them that few manufacturers are entering a field
4 where the customers loudly and persistently disclaim any obligation or intention to buy
5 captioning equipment.
6

7 What would happen, though, if the theaters were told that they did have to display
8 captioned movies? Plainly, that would create demand – involuntary demand, perhaps, but
9 demand nonetheless. And elementary economics teaches that when demand exists, supply will be
10 generated to satisfy it. If Defendants want more options, all they need to do is promise (or be
11 ordered) to purchase such equipment when it becomes available.
12

13 Defendants also try to construct a cogent and legally cognizable argument out of a great
14 deal of utter hearsay tending to show that not everyone likes any one method of captioning.
15 (Citing anonymous on-line blog postings, *see* Defendants' Motion for Summary Judgment at p.
16 16 & f.n.10, does seem to stretch doctrines of hearsay and judicial notice well beyond their outer
17 limits). We will stipulate that not everyone likes open captioning, and not everyone likes closed
18 captioning. But the gist of this argument is that because Defendants may not be able to satisfy
19 100% of the people 100% of the time, they should be permitted to continue doing nothing.
20

21 Defendants need to deal with this case, as it actually exists. Plaintiff is asking that
22 Defendants provide captioned movies to the extent it is reasonably possible for them to do so.
23 We are not specifying the format in which the captions should be presented, and recognize that
24 the existing formats have pluses and minuses. Currently, both forms of captioning are supported
25 – indeed, we understand that the same CD-ROM disc can drive either open or closed captions. If
26 consumers demonstrate a preference for one form of captioning to the degree that the other form
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28

1 fades out – the “Betamax” phenomenon – then the purchasers who “guess wrong” will adjust.
2 That happens. The free market produces winners and losers, and there is no legal or equitable
3 basis for insulating these Defendants from the operation of the marketplace by shutting
4 Plaintiff’s members out of the marketplace altogether.

5
6 Finally, Defendants trot out the argument that the digital revolution is “just around the
7 corner,” and that no one should be required to purchase outmoded equipment. It should be noted
8 initially that the theaters made that same argument in the 2002 *Cornilles* case. Moreover,
9 technology is always improving (so long as demand exists). The argument that no one should be
10 required to invest in technology when better and cheaper technology may soon be developed is
11 merely another argument that until perfection is achieved, Defendants should be free to do
12 absolutely nothing.

13
14 The catch-all “parade of horrors” defense is hardly new. Some 70 years ago, the
15 Washington Legislature passed a statute requiring that any dentist whose name was on a door
16 had to be physically present at that address. A dentist charged with violating that statute argued
17 that its enforcement would cause a myriad of unforeseen and unforeseeable problems – the same
18 argument that these Defendants make. Here is how the Supreme Court responded:

19
20 We deem it unnecessary and inappropriate, in deciding the question here
21 presented, to consider the possible application of the statute to the hypothetical
22 situations suggested by appellant. Questions arising concerning the
23 application of the statute to questions such as those suggested will be reserved for
24 future consideration, when actually presented for judicial determination.

25
26 *Campbell v. State*, 12 Wash.2d 459, 468-69, 152 P.2d 458 (1942).

27 We submit that the statement in the venerable *Campbell* case should apply here. We may
28 not be able today to envision and resolve every access issue that may arise. Yet that can’t be an
excuse for avoiding the issue that this case actually does present and that we actually can resolve.

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III.

SUMMARY AND CONCLUSION

This case is very simple. Defendants are in the business of showing movies. Plaintiff's members can't understand movie dialogue because of hearing losses, and therefore can't fully enjoy the movies. The Washington Law against Discrimination requires public businesses like theaters to take those steps reasonably possible in the circumstances to make their services accessible, defined as "usable or understandable." Captions convert the dialogue to readable form, thereby making the movies understandable and accessible. Most movies come with captions. All the theaters must do to show captioned movies is to install and use the necessary equipment.

The Court can and should deny Defendants' motion, grant Plaintiff's cross-motion, and rule that Defendants must make their theaters accessible by showing captioned movies to the extent that it is reasonably possible for each of them to do so, which will be determined at trial.

RESPECTFULLY SUBMITTED this 12th day of March, 2010.



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3 **CERTIFICATE OF SERVICE**

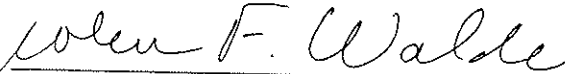
4 I hereby certify that on this 12th day of March, 2010, I caused to be served on the
5 person(s) listed below in the manner shown the foregoing PLAINTIFF'S RESPONSE TO
6 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT:

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