

No. 67613-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE WASHINGTON STATE COMMUNICATIONS ACCESS
PROJECT,

Respondent

v.

REGAL CINEMAS, INC., *et al.*,

Appellants

Appeal From The Superior Court For King County
Hon. Regina S. Cahan

BRIEF OF APPELLANTS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants and Appellants Regal Cinemas, Inc. (“Regal”), Cinemark Holdings, Inc. (“Cinemark”), and American Multi-Cinema, Inc. (“AMC”) own and operate movie theaters in King County, Washington. This case arises under the Washington Law Against Discrimination (“WLAD”). When it filed this lawsuit, Plaintiff, The Washington State Communications Access Project (“Wash-CAP”), alleged that Defendants violated the WLAD by failing to exhibit a sufficient number of captioned movies for the benefit of Wash-CAP’s hearing-disabled members. Wash-CAP sued Regal, Cinemark, and AMC even though each of them already voluntarily exhibited captioned movies at their King County theaters, and no requirement to exhibit captioned movies exists in the plain language of the WLAD or its implementing regulations.

At the time this lawsuit was filed, the entire movie industry was preparing to complete a seismic conversion from traditional 35 mm film to digital cinema. New digital captioning technologies were being designed, developed, and demonstrated. During the lawsuit, Regal and Cinemark executed plans to convert their movie theaters in King County and across the nation to digital cinema, pair digital conversion with these new digital captioning technologies, and exhibit captioned movies in every movie auditorium. While AMC had not yet completed its digital conversions in

King County, and thus was not yet in a position to exhibit movies using digital captioning equipment, it continued to voluntarily exhibit captioned movies in King County during digital conversion using a combination of existing 35 mm captioning equipment and new 35 mm encoding devices. It also committed to significantly increase the amount of captioned movie exhibitions it would provide after completing its future digital conversion plans.

Fully aware of these developments, Wash-CAP continued to prosecute its lawsuit. By time of trial, however, Wash-CAP had changed positions on several issues. It no longer alleged that Regal, Cinemark, or AMC violated the WLAD, or that its members had been injured by any violations of the WLAD. It took the position that all alleged pre-digital violations of the WLAD had become moot and disclaimed any intent to adjudicate them. As to Regal's and Cinemark's post-digital captioned movie exhibitions, Wash-CAP conceded that they had "fulfill[ed] their WLAD obligations," "done everything reasonably possible under the present circumstances," and that its claims for injunctive relief against them were also moot. As to AMC, Wash-CAP took the position that "the only remaining issue before the [trial court] is determining what is reasonably possible in the circumstances – after digital conversion – for AMC to do," thus squarely targeting AMC's future plans. Finally, it

asked the trial court to enter a general declaration “to the effect that the WLAD requires movie exhibitors to take steps reasonably possible in the circumstances to make their movie soundtracks understandable to people with hearing loss.”

In its final order, the trial court found that “[Wash-CAP] did not seek any finding that any Defendant engaged in discriminatory practices,” and made no finding that any Defendant violated the WLAD. However, overruling multiple objections, the trial court interpreted the WLAD to require movie exhibitors to exhibit captioned movies to the extent that it is reasonably possible to do so, purported to issue declaratory relief that applied to all Defendants and injunctive relief that would apply to AMC in the future, deemed Wash-CAP to be the prevailing party, and awarded Wash-CAP over \$400,000 in attorney’s fees.

The upshot of the trial court’s judgment is an unprecedented expansion of the WLAD’s scope, the unlawful creation of a contingent legal obligation to exhibit captioned movies, and the award of substantial attorney’s fees to a plaintiff that failed to establish that the new legal obligation was actually violated, all in disregard of fundamental equity, due process, and fair notice considerations. For these many separate and independent reasons, this Court should reverse the trial court’s judgment, and remand with instructions to enter judgment in favor of Defendants.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered the September 6, 2011 Final Judgment for Plaintiff and against Defendants, awarding declaratory relief against Regal, Cinemark, and AMC, injunctive relief against AMC, and attorney's fees and costs against Regal, Cinemark, and AMC.

2. The trial court erred when it entered the September 6, 2011 Order granting attorney's fees to Plaintiff and against Defendants.

3. The trial court erred when it entered the July 22, 2011 Findings of Fact, Conclusions of Law, and Final Order for Plaintiff and against Defendants, awarding declaratory relief against Regal, Cinemark, and AMC, and injunctive relief against AMC, and deeming Plaintiff a prevailing party for purposes of awarding attorney's fees.

4. The trial court erred when it entered the February 24, 2011 Order denying Cinemark's motion to dismiss moot claims.

5. The trial court erred when it entered the May 4, 2010 Order granting partial summary judgment for Plaintiff and against Defendants, and denying Defendants' motion for partial summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court erred by ruling as a matter of law that the WLAD regulates the accessibility of the goods and services provided by places of public accommodation, as opposed to the places of public

accommodation themselves. (Assignments of Error 1, 3, and 5).

2. The trial court erred by ruling as a matter of law that the WLAD requires Defendants to provide the excess service of captioned movie exhibitions for hearing-disabled patrons. (Assignments of Error 1, 3, and 5).

3. The trial court erred by interpreting unconstitutionally vague provisions of the WLAD and its implementing regulations to create a legal requirement to exhibit captioned movies, and violated Defendants' fair notice and due process rights by subjecting Defendants to liabilities arising from the newly created obligations. (Assignments of Error 1, 3, and 5).

4. The trial court unlawfully circumvented the rulemaking requirements in Washington's Administrative Procedures Act ("APA") to facilitate establishing and applying new judicially-created obligations to exhibit captioned movies. (Assignments of Error 1, 3, and 5).

5. The trial court erred by summarily dismissing defenses that it was unreasonable for Defendants to invest in older 35 mm captioning equipment before digital conversion, or to provide new digital captioning equipment earlier than Regal or Cinemark did, or than AMC is doing. The trial court should have entered affirmative findings for Defendants on these issues. (Assignments of Error 1 and 3).

6. The trial court erred by refusing to dismiss all claims against Regal and Cinemark after they equipped all of their King County theaters with digital captioning technology, actions that Wash-CAP conceded at trial were sufficient to “fulfill [Regal’s and Cinemark’s] legal obligations.” (Assignments of Error 1, 3, and 4).

7. The trial court erred, after Wash-CAP abandoned all claims against AMC at trial except for claims concerning AMC’s future digital captioning plans, by refusing to dismiss those remaining claims as unripe and proceeding to adjudicate the alleged unlawfulness of future, undecided plans that presented no immediate risk of harm to Wash-CAP and did not meet constitutional prerequisites for judicial review. (Assignments of Error 1 and 3).

8. The trial court erred by awarding Wash-CAP declaratory relief under the WLAD, which does not provide for declaratory relief, and rejecting well-settled precedent recognizing that the Uniform Declaratory Judgments Act (“UDJA”) is the sole method for securing declaratory relief under Washington law. (Assignments of Error 1, 2, and 3).

9. The trial court erred by finding Wash-CAP to be a prevailing party under the WLAD because Wash-CAP allegedly secured declaratory relief against Defendants, and then awarding Wash-CAP more than \$400,000 in attorney’s fees under the WLAD. Even assuming that

Wash-CAP secured proper declaratory relief, which Defendants dispute, the trial court should not have awarded attorney's fees because (i) Wash-CAP failed to seek or secure findings that the WLAD was violated or that its members were injured, and (ii) the UDJA does not permit a plaintiff that secures declaratory relief to recover attorney's fees. (Assignments of Error 1, 2, and 3).

10. The trial court abused its discretion by failing to reduce the amount of attorney's fees it awarded to reflect that Wash-CAP secured substantially less relief than it initially sought, and to eliminate fees sought for work advancing claims that Wash-CAP either abandoned at trial or later conceded had become moot. The trial court then compounded these errors by awarding Wash-CAP additional fees pursuant to a 150 percent multiplier. (Assignments of Error 1 and 2).

IV. STATEMENT OF THE CASE

In February 2009, Wash-CAP sued every major movie exhibitor in King County, Washington, alleging that they violated the WLAD by failing to exhibit what Wash-CAP deemed to be a sufficient number of captioned movies. CP 57. The claims asserted in the lawsuit were not traditional accessibility challenges to places of public accommodation. Wash-CAP admitted that its members are not excluded, denied goods or services, or treated differently than anyone else who attends movies. CP

873. Wash-CAP further admitted that its members have no complaints about their ability to purchase movie tickets, buy concessions, or attend movie exhibitions. *Id.* Wash-CAP alleged, however, that Defendants are required to exhibit movies with captions in order to make the movie soundtracks “understandable” to hearing-disabled patrons, and that failing to exhibit captioned movies every time a captioned movie can be exhibited violates the WLAD. CP 83-84.

Wash-CAP sought general declaratory relief, injunctive relief under the WLAD and the Consumer Protection Act, and attorney’s fees and costs of court. CP 82-89.¹

Defendants denied Wash-CAP’s allegations. Prior to the filing of the lawsuit, they already were voluntarily exhibiting “some pre-announced screenings of captioned versions of feature films” for their significantly hard of hearing and deaf patrons, as Congress requested when it enacted the ADA. CP 878-84, 887, 890-91; House Report No. 101-485(II), at 108, 1990 U.S.S.C.A.N. 303, 391. These captioned movie screenings were provided in King County and across the country in a variety of captioning formats, including open-captions using special captioned prints acquired from third-party InSight/Tripod, open-captions using the DTS-CSS

¹ Wash-CAP originally sued six movie theater exhibitors. Wash-CAP subsequently dismissed claims against Kirkland Parkplace Cinemas LLC and Silver Cinemas Acquisition Co., LLP, settled its claims against Lincoln Square Cinemas, and proceeded to litigate against Regal, Cinemark, and AMC. CP 836, 1663-64.

Cinema Subtitling System, and closed-captions using the Rear Window Captioning System. CP 878-84, 887, 890-91.²

At the time Wash-CAP filed its lawsuit, Regal, Cinemark, and AMC were exhibiting movies in King County and across the country using traditional 35 mm film, but along with the entire movie industry, were preparing to complete a seismic technological shift from traditional 35 mm film to digital cinema. CP 477. Long-awaited financing required for digital conversion was being finalized after years of delay due to the economic recession. CP 881, 885-86, 892. New captioning technologies compatible with digital cinema were being designed, demonstrated, and tested. CP 881-82, 885-86, 892-93. New digital captioning standards were being created that would provide, for the first time, some assurance of technological continuity that movie theaters could rely upon. *Id.* And, with extensive publicity, the U.S. Department of Justice commenced a rulemaking initiative that promised – finally – to yield clear, prospective notice of a new captioned movie exhibition requirement. CP 854; 73 Fed.

² Defendants also devoted extensive time and effort researching and testing captioning technologies and equipment, communicating with major deaf advocacy groups about captioning preferences, lobbying movie studios to create captioned movies, engaging manufacturers to develop captioning systems, working with trade associations to ensure that movie exhibitors understood issues related to captioning technologies, and taking other actions to advance movie captioning and increase the number of captioned movie exhibitions. *See id.* Regal even held two national captioning symposiums, in February 2007 and November 2010, to demonstrate captioning systems for representatives of deaf and hard of hearing communities, advocacy groups, and others to test different captioning systems and exchange feedback with them. CP 882.

Reg. 34531 (June 17, 2008).³

Mindful of these changing industry dynamics, Regal, Cinemark, and AMC already had established plans prior to this lawsuit to convert their theaters in King County and across the nation to digital cinema and pair digital conversion with newly developed digital closed-captioning technology. CP 881-82, 885-86, 890-91.⁴ Regal, Cinemark, and AMC maintained these commitments after the lawsuit was filed and even met and informed Wash-CAP's Counsel of their plans after receiving notice of the lawsuit. CP 883. When Wash-CAP chose to litigate, rather than stay the case pending voluntary implementations of digital captioning, Regal, Cinemark, and AMC proceeded to advance their respective captioning plans while defending the lawsuit. CP 883-84, 886-87, 893-94.

Regal completed converting all of its movie screens in King County to digital cinema in February of 2011, pursuant to national digital conversion and digital captioning plans it developed in 2007. CP 881-83.

³ The new legal standard proposed by the DOJ applied prospectively and contained a sliding compliance schedule whereby the percentage of movie screens offering closed captioning would increase on a yearly basis, beginning with 10 percent in the first year its final rule became effective, until a 50 percent mark was reached over five years. *See id.*

⁴ Digital conversion allowed movie exhibitors to execute longstanding plans to obtain and implement new digital-compatible captioning technology and equipment that complies with the new digital captioning standards that the movie studios have agreed to follow, minimizing technology investment risks, and maximizing the chance that more captioned movies will be available for exhibition. CP 882, 886, 892. Digital conversion also allowed movie exhibitors to new digital captioning technology and equipment, much of which would not be available in King County had Defendants committed prematurely to 35 mm captioning technologies. CP 883, 886-87, 893.

By that time, Regal already had tested what it believed to be the most viable digital captioning products based on feedback received from deaf and hard of hearing advocates during its November 2010 captioning symposium. CP 882-83. Regal ultimately selected a mix of digital closed-captioning equipment from third-party vendors USL, Doremi, and Sony. CP 883. All of Regal's movie theaters in King County were equipped with digital captioning equipment in February and March of 2011, and Regal has exhibited digital closed-caption movies in King County since that time. *Id.*

Cinemark completed converting all of its movie screens in King County to digital cinema in May of 2010, pursuant to national digital conversion and digital captioning plans it developed in 2006. CP 886. Closed-captioning equipment compatible with the digital projectors used by Cinemark first became available for testing in November 2010. *Id.* Cinemark researched and tested digital captioning prototypes from Doremi and USL, and ultimately selected Doremi's CaptiView Closed Caption Viewing System. *Id.* All of Cinemark's movie theaters in Washington were equipped with Doremi digital captioning equipment in November of 2010, Cinemark made the equipment available to the public in December of 2010, and has exhibited digital closed-caption movies in King County since that time. CP 887.

As of May of 2011, when the trial of the underlying lawsuit commenced, AMC had not yet completed the digital conversion of its movie theaters in King County – most of its theaters were not scheduled to be converted until the end of 2011 – and thus AMC was not yet in a position to exhibit movies using new digital captioning equipment. CP 860, 876.⁵ AMC, however, began testing digital closed-captioning products from USL, Doremi, and Sony. CP 893. AMC also began to develop future plans, after testing was completed and the captioning technology it selected was made available for purchase at a commercially reasonable price, to begin equipping a reasonable number of its theaters with digital captioning equipment on a rolling basis as they were converted to digital cinema, and provide closed-captioning systems at a reasonable number of auditoriums at all of its theaters in King County. CP 893-94. At time of trial, AMC was still evaluating which digital captioning product or products to purchase and how many auditoriums to equip with digital captioning. *Id.*⁶

⁵ Pending the completion of its digital conversion, to minimize disruption of the closed-captioned movie exhibitions it was offering with 35 mm captioning equipment, AMC purchased new encoding devices that would enable its existing 35 mm equipment to be compatible with digital cinema in theaters where that equipment was located. CP 892-93. AMC purchased these devices in November 2010, within weeks of the date they became commercially available, for auditoriums that had been converted to digital projection and had been previously equipped with a 35 mm captioning system. *Id.*

⁶ While the specifics of AMC's future plans were not yet finalized, AMC pledged to significantly increase the amount of captioned movie exhibitions in King County, and as of May 2011, this included, at the least, plans to equip one to two auditoriums per

Fully aware of these developments, Wash-CAP continued to prosecute its lawsuit. On February 25, 2010, the parties filed cross-motions for summary judgment. CP 457, 490. On May 4, 2010, the trial court granted Wash-CAP's motion for partial summary judgment in part and denied Defendants' motion for summary judgment, announcing that it interpreted the WLAD to require movie exhibitors to take steps "reasonably possible in the circumstances" to make movie soundtracks "understandable" to patrons with hearing loss, which "might" require captioning or "other technology" to be determined at trial. CP 636-38.

On January 25, 2011, after equipping all of its King County movie auditoriums with digital closed captioning equipment, Cinemark filed a motion to dismiss Wash-CAP's claims as moot. CP 639. Wash-CAP opposed Cinemark's motion, arguing that its claims for injunctive relief were still viable due to alleged problems with captioned movie training and publicity, and that its claims for declaratory relief were still viable due to the possibility that Cinemark could decide in the future to discontinue

multiplex (depending on multiplex size) with new digital compatible closed-captioning equipment, plus meet any additional requirements established by federal or state agency rules. As a point of comparison, these amounts met and exceeded the amount of closed-captioned movie exhibitions AMC had previously agreed to provide to settle movie captioning disputes in Arizona (10% of auditoriums in new multiplexes), Massachusetts (one auditorium per multiplex with less than 10 auditoriums and two auditoriums per multiplex with 10 or more auditoriums), New Jersey (one auditorium per multiplex with less than 15 auditoriums and two auditoriums per multiplex with 15 or more auditoriums), New York (one of eight auditoriums in one multiplex), Pennsylvania (one of 14 auditoriums in one multiplex), and Ontario, Canada (one auditorium per multiplex). CP 893-94.

providing the new captioning equipment it had purchased and installed in King County. CP 689-95. On February 24, 2011, the trial court denied Cinemark's motion. CP 837-38.

The parties agreed to proceed to trial on written submissions, and filed opening trial briefs on April 26, 2011. By time of trial, however, Wash-CAP had changed positions on several important issues. Wash-CAP no longer claimed that Regal, Cinemark, or AMC violated the WLAD, or that its members had been injured by any WLAD violations. It took the position that any alleged pre-digital violations of the WLAD were moot and disclaimed any intent to adjudicate them. CP 1167-70. It no longer claimed that any Defendant violated the WLAD after digital conversion, either. As to Regal and Cinemark, Wash-CAP conceded that they had "fulfill[ed] their WLAD obligations," had "done everything reasonably possible under the present circumstances," and that its claims for injunctive relief against them were moot. CP 1167-69. Wash-CAP also abandoned all Consumer Protection Act claims against all Defendants.

The only claims Wash-CAP continued to pursue at trial were claims for declaratory relief against Regal, Cinemark, and AMC, and a claim for injunctive relief against AMC, but it changed positions on these as well. Wash-CAP no longer sought a declaration "that each defendant

has violated [the] WLAD,” as it had pleaded; rather, it sought a general finding of law “to the effect that the WLAD requires movie exhibitors to take steps reasonably possible in the circumstances to people with hearing loss, including [Wash-CAP]’s members.” CP 88, 1183. The claim for injunctive relief against AMC was limited to defining “what is reasonably possible for AMC to do” in the future, and how many movie auditoriums AMC would be required to equip for digital captioning in the future, after AMC completed digital conversion and finalized its plans for digital captioning in King County. CP 1178-79, 1183-84.

On July 22, 2011, the trial court issued findings of fact, conclusions of law, and a final order. CP 1516-27. While the trial court specifically found that “[Wash-CAP] did not seek any finding that any Defendant engaged in discriminatory practices” (CP 1517), and thus made no finding that any Defendant violated the WLAD, the trial court made several rulings adverse to Defendants. As Wash-CAP requested, the trial court issued a general declaration of law that the WLAD requires movie exhibitors to exhibit captioned movies to the extent reasonably possible economically to provide them. CP 1524-25. In so doing, the trial court overruled timely objections that the WLAD did not regulate goods and services, that agency rulemaking was required to create new accessibility obligations, and that applying the new captioning requirement against

Defendants violated their due process and fair notice rights. *Id.*

As to Regal and Cinemark, the trial court found that because they equipped their King County multiplexes to provide captioned movie exhibitions, they “fulfilled their present legal obligations under WLAD,” and dismissed Wash-CAP’s claims for injunctive relief against them as moot. CP 1521-24, 1526. However, the trial court declined to dismiss Wash-CAP’s claims for declaratory relief against Regal and Cinemark as moot and issued a declaratory order, overruling timely objections that (i) the form of declaratory relief was inappropriate, and (ii) declaratory relief was being sought under a statute that does not authorize it. The trial court then deemed Wash-CAP a prevailing party under the WLAD due to obtaining that declaratory order. CP 1518, 1523, 1526.

As to AMC, despite undisputed record evidence showing that AMC had not yet converted all of its movie theaters to digital projection or finalized plans to equip its auditoriums to exhibit captioned movies following digital conversion, and without making any finding that Wash-CAP was suffering any present injury from AMC’s future plans, the trial court rejected arguments that Wash-CAP’s claims against AMC were unripe for adjudication. CP 1520, 1522-23. The trial court thereafter issued an order granting declaratory and injunctive relief against AMC, overruling all objections, and deeming Wash-CAP a prevailing party

under the WLAD. CP 1526.

On September 6, 2011, following supplemental attorney's fees briefing, the trial court entered an order awarding Wash-CAP attorney's fees exceeding \$400,000. CP 1724. In making this award, the trial court rejected arguments (i) that Wash-CAP's failure to seek or secure a finding that any of its members were injured by alleged violations of the WLAD, or that Defendants violated the WLAD, precluded an award of attorney's fees, (ii) that the UDJA does not permit an award of attorney's fees to a party who prevails on a declaratory judgment claim, (iii) that a reduction of the attorney's fees sought by Wash-CAP was warranted because Wash-CAP secured relief that was substantially less than the relief originally sought when it filed the lawsuit, (iv) that a reduction of the attorney's fees sought by Wash-CAP was warranted to account for the fact that Regal and Cinemark successfully executed digital captioning plans that predated the filing of the lawsuit, and (v) that Wash-CAP was not entitled to an attorney's fees multiplier.

On September 6, 2011, the trial court entered final judgment for Wash-CAP and against Defendants. CP 1731.

V. ARGUMENT

A. **The Trial Court Erred By Ruling As A Matter Of Law That The WLAD Regulates The Accessibility Of Goods And Services Provided By Places Of Public Accommodation, As Opposed To The Accessibility Of Places Of Public Accommodation Themselves.**⁷

The WLAD regulates places of public accommodation by providing access to them and the goods and services they regularly make available to the general public. That statute generally provides that persons with disabilities shall have the “right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any [place of public accommodation].” RCW 49.60.030(1)(b). It then defines “full enjoyment” of a place of public accommodation to include:

the right to purchase any service, commodity, or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities, or privileges of any place of [public accommodation], without acts directly or indirectly causing persons . . . with any sensory or physical disability . . . to be treated as not welcome, accepted, desired, or solicited.

RCW 49.60.030(14). The WLAD’s implementing regulations explain that it is an unfair practice to fail to reasonably accommodate the known limitations of a person with a disability (WAC 162-26-080), providing:

The law protects against discrimination because of the “presence”

⁷ The trial court made this ruling as a matter of law when ruling on cross-motions for summary judgment. CP 637. The standard of review on appeal is *de novo* review. See *Certain Underwriters at Lloyds’s London v. Travelers Prop. Cas. Co. of Am.*, 161 Wn. App. 265, 276 (2011).

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

WAC 162-26-060(2). This example is telling. On one hand, it plainly requires the store to provide wheelchair-using patrons with access to the goods and services it regularly provides (including those located on the second floor of the store), but on the other hand, it does not purport to require the store to provide special goods and services specially designed for wheelchair-using patrons. Similarly, while the same regulation indicates that “making printed materials available in alternate formats” (*see id.*) may be a reasonable accommodation (for example, requiring a bookstore to provide Brailled signage showing entrances and exits), it does not purport to require the bookstore to sell Brailled books specially made for blind patrons.⁸

⁸ Federal accessibility regulations recognize similar limitations. *See, e.g.*, 28 C.F.R. § 36.307(a), (c) (a place of public accommodation is not required to provide “accessible or special goods that are designed for, or facilitate use by, individuals with disabilities” such as “Brailled versions of books,” “closed-captioned video tapes,” and “special foods to meet particular dietary needs”).

The conclusion that the WLAD regulates places of public accommodation, not goods and services themselves, is consistent with analogous federal law under Title III of the Americans with Disabilities Act. The Fifth, Sixth, Seventh, and Ninth Circuits have each recognized that Title III requires access to places of public accommodation and the right to use and enjoy goods and services as they are regularly provided to the general public, but does not regulate the content of those goods and services, and does not require the provision of special goods that are specifically designed for persons with disabilities. *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1119 (9th Cir. 2000); *McNeil v. Time Ins. Co.*, 205 F.3d 179, 186-87 (5th Cir. 2000); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); *accord Lenox v. Healthwise of Ky., Ltd.*, 149 F.3d 453, 457 (6th Cir. 1998) (affirming summary judgment on a claim deemed “equivalent to construing Title III to compel a video store to stock closed captioned video tapes because ordinary tapes are worth less to a deaf person than to one with normal hearing”).⁹

This substantial and fully developed body of law discussing Title III’s scope and purpose is valuable guidance that supports reversing the

⁹ Washington courts regularly look to federal law, such as the Americans with Disabilities Act, when construing the WLAD. *See Davis v. Microsoft Corp.*, 149 Wn.2d 521, 544 (2003).

trial court's expansive application of the WLAD claim in this lawsuit. For example, in *Weyer*, the Ninth Circuit summarized the "ordinary meaning" of Title III's nondiscrimination provisions, stating as follows:

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

Weyer, 198 F.3d at 1115. The Ninth Circuit then affirmed the granting of summary judgment for the defendant, concluding that "there is no discrimination under the Act where disabled individuals are given the same opportunity as everyone else" and are not "treat[ed] any differently because of [their] disability." *Id.* at 1116.

In *Doe*, the Seventh Circuit focused on the economic costs to businesses and burdens on the judiciary that would result from expansively interpreting Title III to regulate the content of goods and services, as the trial court held the WLAD does in this case:

The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons. Had Congress purposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts, we think it would have made its intention clearer and would at least have imposed some standards. It is hardly a feasible judicial function to decide . . . how many Braille books the . . . bookstore chains should stock in each of their stores.

Doe, 179 F.3d at 560.¹⁰ See also *McNeil*, 205 F.3d at 186-88 (criticizing a similar attempt to expand the scope of federal accessibility protections to cover goods and services as “plainly unrealistic,” stating “we decline[] to dictate to every business in the country what types of goods and services may be offered”).

Both the Southern District of Texas and the District of Oregon have independently recognized that Title III regulates access to movie theaters but does not extend to regulating movie exhibitions themselves. See *Todd v. American Multi-Cinema, Inc.*, No. Civ.A. H-02-1944, 2004 WL 1764686, at *4 (S.D. Tex. Aug. 5, 2004) (granting summary judgment for the defendants and noting “[t]he plaintiff does not allege that the defendants are denying the hearing impaired physical access to the movies they show,” but rather access to captioned movies that Title III does not require); *Cornilles v. Regal Cinemas, Inc.*, No. Civ. 00-173-AS, 2002 WL 31440885, at *7 (D. Or. Jan. 3, 2002), *findings adopted in part and recommendation adopted*, 2002 WL 31469787, at *1-2 (D. Or. Mar. 19, 2002) (“Title III does not require defendants to provide ‘additional access’

¹⁰ The *Doe* court discussed several other examples of what it described as “cases of refusing to configure a service to make it as valuable to a disabled as to a non-disabled customer,” including a furniture store’s decision not to stock wheelchairs and “a movie theater’s refusal to provide a running translation into sign language of the movie’s soundtrack,” concluding that “[a] furniture store that does not stock wheelchairs knows that it is making its services less valuable to disabled than to non-disabled people, but the ADA has not been understood to require furniture stores to stock wheelchairs.” *Id.* (emphasis added).

to Plaintiffs to accommodate their disability[;] . . . Plaintiffs are merely entitled to use Defendants’ theaters to the same extent as hearing individuals. They may buy a ticket for a film shown by Defendants and sit in the same theater to watch the same movie shown to hearing individuals.”); *but see Ball v. AMC Entertainment, Inc.*, 246 F. Supp. 2d 17, 24 (D.D.C. 2003) (denying summary judgment and stating “neither the ADA nor the DOJ implementing regulations explicitly forbid requiring movie theaters to exhibit closed captioned films”).¹¹

The trial court erred by ruling as a matter of law that the WLAD regulates the accessibility of goods and services provided by places of public accommodation – here, movie exhibitions – as opposed to regulating accessibility to the movie theaters themselves.¹² Had the Washington Legislature or the Washington State Human Rights Commission intended to impose such an enormous compliance burden on Washington businesses and the Washington judiciary, they surely would

¹¹ In *Arizona v. Harkins Amusement Enter., Inc.*, 603 F.3d 666, 674 (9th Cir. 2010), the Ninth Circuit held, as a matter of first impression, that closed-captioned movie exhibitions may be required under Title III’s auxiliary aid provision, subject to undue burden and fundamental alteration defenses. *Harkins* is not instructive here because the WLAD has no “auxiliary aid” provision.

¹² The trial court’s conclusion that “‘same service’ does not allow Plaintiff’s members to fully enjoy the movies” illustrates the trial court’s error. The analysis should have focused on whether there was a “same service” barrier that prevents access to the movie exhibitions regularly provided by Defendants – for example, the absence of box office signage for a deaf patron – not on the content of the movie exhibitions themselves. *See* WAC 162-26-060(2).

have made their intentions clearer and provided clear guidance.¹³ This Court should reign in the trial court's unprecedented expansion of the WLAD, and reverse the trial court's judgment.

B. The Trial Court Erred By Ruling As A Matter Of Law That The WLAD Requires Defendants To Provide The Excess Service Of Captioned Movie Exhibitions For Hearing-Disabled Patrons.¹⁴

The purposes of the WLAD are best satisfied when disabled persons are treated as if they were not disabled, *i.e.*, when the public entity provides the "same service" to the disabled as it provides to the nondisabled. WAC 162-26-060(1). The "same service" is "everything available to persons from a place of public accommodation" "without regard to the existence of a disability." WAC 162-26-040(2). Likewise, while places of public accommodation must also make "reasonable accommodation to the known physical, sensory, or mental limitations of a person with a disability," a "reasonable accommodation" is an "action, reasonably possible in the circumstances, to make the *regular* services of a

¹³ The goods and services subject to the trial court's expansive interpretation of the WLAD are not limited to movie captioning, and would empower lawsuits to require bookstores to stock Brailled books and sell them to blind patrons (*Weyer, McNeil, and Doe*), restaurants to provide special menu options for diabetic patrons (*McNeil*), video stores to stock closed-captioned videotapes for deaf patrons (*Parker and Lenox*), and movie theaters to provide a running translation into sign language of the movie's soundtrack for deaf patrons (*Doe*), among other things.

¹⁴ The trial court's ruling that Defendants are required by the WLAD to offer captioning is a question of statutory construction that is reviewed *de novo*. See *Calhoun v. State*, 146 Wn. App. 877, 885 (2008).

place of public accommodation accessible to persons who otherwise could not use or fully enjoy the services because of the person's sensory, mental, or physical disability." WAC 162-26-080(1), (2) (emphasis added).

In *Fell v. Spokane Transit Authority*, 128 Wn.2d 618, 637 (1996), the Washington Supreme Court held that to establish a *prima facie* case of disability discrimination under the WLAD, a plaintiff must show, among other things, that he received treatment that was not comparable to the level of designated services provided to individuals without disabilities by or at the place of public accommodation. When the plaintiff in *Fell* sought paratransit services beyond those offered to the general public, the Court held that "services to disabled people *in excess* of the services [] provide[d] to the nondisabled," are not required under the WLAD. *Id.* at 631 (emphasis in original). The Court made clear that the WLAD was not an "entitlement" statute and expressly distinguished between providing access to goods and services provided to all patrons, which the law requires, and providing additional "services to disabled people *in excess* of the services [] provide[d] to the nondisabled," which the law does not require. *Id.*

Here, Wash-CAP admits that Regal, Cinemark, and AMC did not treat Wash-CAP's members differently than the general public when they exhibited movies that all patrons attend on the same terms and conditions

as everyone else. CP 873. The trial court thus correctly found that “Defendants provide the same service to [Wash-CAP]’s members as they provide to other patrons.” CP 1523. However, the trial court erred by failing to realize that a mandatory requirement to exhibit captioned movies is precisely the type of *excess* service “entitlement” that Washington Supreme Court precedent prohibits. *Fell*, 128 Wn.2d at 631. The Court should follow *Fell*, and reverse the trial court’s judgment.

C. The Trial Court Erred By Interpreting Vague Provisions Of The WLAD And Its Implementing Regulations To Create A New Accessibility Obligation And Then Subjecting Defendants To Liabilities Arising From The Newly Created Obligation.¹⁵

Neither the WLAD nor its implementing regulations contain a captioned movie exhibition requirement. By interpreting the WLAD’s “vague standards” (as the Washington Supreme Court characterized them in *Fell*, 128 Wn.2d at 628), and which even Wash-CAP concedes are “a bit roundabout” (CP 504), to create a new captioned movie exhibition requirement, and then subjecting Defendants to liabilities for failing to comply with that requirement, the trial court violated Defendants’ due process and fair notice rights.

“Due process requires that the government provide citizens and

¹⁵ Statutory interpretation is a question of law that is reviewed *de novo*. *Post v. City of Tacoma*, 167 Wn.2d 300, 308 (2009). The applicability of the constitutional due process guarantee is a question of law subject to *de novo* review. *Wash. Indep. Tel. Ass’n v. Wash. Util. & Transp. Comm’n*, 149 Wn.2d 17, 24 (2003).

other actors with sufficient notice as to what behavior complies with the law.” *United States v. AMC Entm’t, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008). Moreover, “if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The Washington Supreme Court similarly has recognized that a Washington “statute is void for vagueness under the Fourteenth Amendment if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.” *State v. White*, 97 Wn.2d 92, 98-99 (1982), *overruled on other grounds by State v. Corrillo*, 89 Wn. App. 1014 (1998).

The fair notice doctrine requires that Defendants receive clear, prospective instruction on what they must do to comply with the law before being subjected to liabilities under the law. *See AMC Entm’t, Inc.*, 549 F.3d at 770; *accord Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995) (interpretation must be “ascertainably certain” from the regulation’s plain language); *see also Alaska Prof’l Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (“Those regulated by an administrative agency are entitled to know the rules by which the game will be played.”). It is not lawful for an agency to “promulgate mush” that is only given concrete form through subsequent “interpretations.” *See*

Paralyzed Veterans of Am. v. D.C. Arena, L.P., 117 F.3d 579, 584 (D.C. Cir. 1997).¹⁶

In the present case, there is no evidence that, prior to this lawsuit, Defendants had notice that the WLAD may require captioned movie exhibitions. The fact that Wash-CAP sued every major movie exhibitor in King County to enforce its “interpretation” that captioning is required to comply with the WLAD’s “understandability” requirement illustrates the problem. Moreover, at trial, when asked to identify when Defendants received fair notice of the legal obligation, Wash-CAP replied “there really is no doubt” and pointed to “May 4, 2010 – the date [the trial court] so ordered.” CP 1170. That cannot be. The due process clause guarantees individuals the right to fair notice of legal requirements prior to being sued, when they are “free to steer between lawful and unlawful conduct,” not after they are sued and their allegedly unlawful behavior is already being adjudicated. *See AMC Entm’t*, 549 F.3d at 768, 770. Because that did not happen here, the Court should reverse the trial court’s judgment.

¹⁶ The fact that the trial court’s rulings are predicated upon expansive interpretations of generalized WLAD terms like “understandable” and “full enjoyment” exacerbates due process and fair notice problems. This point has been recognized numerous times under federal law. *See, e.g., Caruso v. Blockbuster-Sony Music Entm’t Ctr.*, 968 F. Supp. 210, 216 (D.N.J. 1997) (“Congress did not intend for defendants to be responsible, in the absence of applicable regulations, for determining whether a design provides ‘full and equal enjoyment’ for the disabled”), *aff’d in part, rev’d in part on other grounds*, 193 F.3d 730 (3d Cir. 1999).

D. The Trial Court Erred When It Circumvented Washington APA Rulemaking Requirements To Create New Accessibility Obligations.¹⁷

When the WLAD was enacted, the Washington Legislature tasked the Washington State Human Rights Commission with the duty to “adopt, amend, and rescind suitable rules to carry out the provisions of [the WLAD],” as well as enforce those rules. RCW 49.60.120(3), WAC 162-04-020(5); *see also Doe v. Boeing Co.*, 121 Wn.2d 8, 14 (1993). The Commission thereafter adopted rules for public accommodations that “flesh out” the general accessibility requirements in the WLAD. *See* WAC 162-26, *et seq.* While the Commission may change or amend the substantive regulations governing the WLAD through the rulemaking process set forth in the APA, to provide fair notice to the regulated public and comply with due process, “formal rulemaking procedures, which include notice, public hearing and comment, agency adoption, public filing, and opportunity for petitions for adoption, amendment, and repeal” must be followed. *Wash. Educ. Ass’n v. Wash. State Pub. Disclosure Comm’n*, 150 Wn.2d 612, 619 (2003); *see also* RCW 34.05.320(1) (explaining rulemaking procedures).

In the specific context of movie captioning, the District of Oregon

¹⁷ Questions of law related to the APA are reviewed *de novo*. *Lenca v. Employment Sec. Dep’t*, 148 Wn. App. 565, 575 (2009).

recognized the importance of formal rulemaking when assessing a claim under federal law seeking mandatory closed-captioning of movies:

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

Cornilles, 2002 WL 31440885, at *7. Six years later, in its Notice of Proposed Rulemaking, the DOJ acknowledged that movie captioning regulations could not be considered until it assessed the impending transition to digital cinema, the availability of different captioning technology depending on whether theater owners use digital projectors or not, and “the potential cost to exhibit captioned movies.” 73 Fed. Reg. 34531. This analysis is consistent with what the APA requires.

In the general context of Title III litigation, several federal courts have explained why legislative rulemaking through advanced notice and specific instruction – not litigation – is the proper lawful mechanism for promulgating new accessibility obligations under Title III. *See Caruso*, 968 F. Supp. at 216 (“If the law is to impose certain requirements to assist those with disabilities and to impose an obligation to make expensive

retrofits if that law is violated, it is essential that those requirements be clearly articulated in the regulations.”), *aff’d in relevant part*, 193 F.3d 730 (3d Cir. 1999). These courts have chastised plaintiffs for sidestepping legislative rulemaking and pursuing judicially-created relief through litigation, as it is inefficient, miscalculated, time-consuming, and costly. *Id.*; see also *United States v. Hoyts Cinemas Corp.*, 256 F. Supp. 2d 73, 92-93 & n.16 (D. Mass. 2003) (“[b]ut for the [plaintiff’s] obduracy, it appears possible to have resolved this dispute via rulemaking settlement”), *vacated*, 380 F.3d 558, 575 (1st Cir. 2004); *Oregon Paralyzed Veterans of Am. v. Regal, Inc.*, 142 F. Supp. 2d 1293, 1297 n.2 (D. Or. 2001), *rev’d*, 339 F.3d 1126 (9th Cir. 2003) (“[V]ague standards cited in the record cry out for a detailed methodology that would be best developed and imposed through notice and comment rulemaking.”).

These holdings are instructive. It is hardly a feasible judicial function for the trial court to determine whether movies Defendants exhibit must be captioned to be made understandable to hearing-disabled patrons, how “understandable” may fairly be measured, or how many captioned movie exhibitions should be provided. See *Hector v. Dep’t of Agric.*, 82 F.3d 165 (7th Cir. 1997) (courts should not set numerical standards through “interpretations” that should be established through rulemaking); *Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698,

746 (D. Or. 1997) (“[C]ourts are ill-equipped to . . . make what amount to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable.”).¹⁸

The trial court’s decision to “interpret” into existence a new mandatory movie captioning accessibility obligation, set compliance standards, and adjudicate whether Defendants would be required to comply with that obligation, when the obligation had not been subjected to proper APA rulemaking procedures, was error. The trial court should have declined to assume the quasi-legislative duty to interpret whether and what quantity of movie captioning is required by a vague regulation that does not even mention movie captioning, particularly once Wash-CAP abandoned its claims that the WLAD had been violated at trial, and focused solely on attempts to secure a new legal requirement to exhibit captioned movies. It did not. It sidestepped rulemaking to create new law. This Court should correct that erroneous decision and reverse the

¹⁸ *Hector* analyzed the due process problems presented by judicial attempts to set numerical accessibility standards that should lawfully be established by legislative or agency rulemaking, and ultimately concluded that courts could not set such standards. The *Hector* problem was presented here when Plaintiff sought to adjudicate how many of AMC’s movie theaters would need to be equipped for digital captioning to comply with its newly created movie captioning requirement. Just as *Hector* recognized that quantifying a vague and general requirement of “structurally sound” to mean “eight-foot fences” would require notice and comment rulemaking to be effective (82 F.3d at 169-72), this Court should recognize that quantifying “understandable” and “reasonably possible under the circumstances” requirements to mean equipping a specific number of movie theaters with captioning equipment would require notice and comment rulemaking to be effective.

trial court's judgment.

E. The Trial Court Erred By Summarily Dismissing Defenses At Trial That Defendants Voluntarily Provided Captioned Movie Exhibitions To Their Hearing-Disabled Patrons That Were “Reasonably Possible In The Circumstances.”¹⁹

To prove a claim for disability discrimination under the WLAD, a plaintiff must prove that a place of public accommodation “failed or refused to make reasonable accommodations” that were “reasonably possible in the circumstances.” *See* WAC 162-26-040(2); WAC 162-26-080(1)-(2); *see also Fell*, 128 Wn.2d at 642.²⁰ In the present case, not only did Wash-CAP fail to make this required showing at trial, the trial court summarily dismissed defenses that Defendants voluntarily provided captioned movie exhibitions to their hearing-disabled patrons before and after digital conversion that were “reasonably possible.”

At trial, Defendants established that, before digital conversion, they exhibited captioned movies for the benefit of their hearing-disabled patrons in King County using literally every 35-mm captioning technology that existed at the time. CP 849-52, 878-84, 887, 890-91. Wash-CAP presented no evidence of pre-digital accessibility violations, rather, it took

¹⁹ The trial court summarily dismissed these defenses at trial without making any fact findings on them. The standard of review for rulings made as a matter of law is *de novo* review. *See Certain Underwriters at Lloyds's London*, 161 Wn. App. at 276.

²⁰ This test is therefore similar to the “undue burden” standard utilized under federal law. 42 U.S.C. § 12182 (b)(2)(A)(iii); Technical Assistance Manual III-4-3600; 28 C.F.R. § 36.303 (a).

the position that “[w]hat may have been ‘reasonably possible’ for Defendants to do prior to digital conversion is moot,” and disclaimed any intent to adjudicate “the question of past violations.” CP 1167-69.²¹

At trial, Defendants also established that, after digital conversion, Regal and Cinemark exhibited captioned movies for the benefit of their hearing-disabled patrons in King County using new digital captioning equipment. CP 858-61. Defendants further established that, while AMC had not yet completed its digital conversions in King County, and thus was not yet in a position to exhibit movies using digital captioning equipment, it was continuing to exhibit captioned movies during digital conversion, and had committed to significantly increase the amount of captioned movie exhibitions it would provide in King County after digital conversion. CP 893-94. Wash-CAP presented no evidence of post-digital accessibility violations, rather, as to Regal and Cinemark, it conceded that they had “fulfill[ed] their WLAD obligations” and “done everything reasonably possible.” CP 1167-69. As to AMC, Wash-CAP made no attempt to prove that what AMC was currently doing was unlawful, rather, it took the position that “the only remaining issue before the [trial court] is

²¹ Anticipating that Plaintiff would argue that Defendants should have made additional investments to equip more auditoriums with the older 35-mm captioning technologies pending digital conversion, Defendants further established that investing in 35 mm captioning at that time was unreasonable. CP 852-58. Plaintiff did not dispute these facts at trial and did not oppose this argument, either.

determining what is reasonably possible in the circumstances – after digital conversion – for AMC to do.” CP 1060-61.

Based on these factual showings, Defendants asked the Court to enter findings they took all required “reasonably possible” actions before and after digital conversion. CP 847. Notwithstanding Wash-CAP’s failure to meaningfully oppose these defenses, dispute the evidence supporting them, or seek any finding that Defendants violated the law, the trial court declined. This, too, was reversible error.²²

F. The Trial Court Erred By Refusing To Dismiss All Claims Against Cinemark And Regal As Moot.

The existence of a live case or controversy is a legal predicate to a trial court’s jurisdiction that must exist at all stages of the litigation. *See To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411 (2001) (justiciable controversy requires (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and

²² The trial court later compounded this error by awarding Wash-CAP over \$400,000 in attorney’s fees for work performed during the pre- and post-digital time periods that would have been covered by the requested findings. *See V(1), infra*.

conclusive); *accord DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). A claim becomes moot when it loses its character as a present, live controversy. *See To-Ro Trade Shows*, 144 Wn.2d at 411; *Orwick v. City of Seattle*, 103 Wn.2d 249, 253 (1984); *Eugster v. City of Spokane*, 110 Wn. App. 212, 228-29 (2002).

In the analogous context of federal accessibility claims, it is well established that, when a defendant takes actions that remediate a plaintiff's accessibility claims, the claims become moot and must thereafter be dismissed. *See, e.g., Kemper v. Sacramento Radiology Med. Group*, No. 2:06-CV-585-GEB-DAD, 2007 WL 2481938, at *2-*5 (E.D. Cal. Aug. 29, 2007) (where all alleged accessibility violations were "fixed or otherwise in compliance," claims were moot, and lawsuit was dismissed); *Hubbard v. 7-Eleven, Inc.*, 433 F. Supp. 2d 1134, 1145 (S.D. Cal. 2006) (remediating the alleged barrier renders the issue moot); *Harris v. Chico Nissan, Inc.*, No. Civ. S-04-1149 WBS-PAN, 2005 WL 3287236, at *1 (E.D. Cal. Dec. 1, 2005) (same); *Pickern v. Best Western Timber Cove Lodge Marina Resort*, 194 F. Supp. 2d 1128, 1130, 1133 (E.D. Cal. 2002) (same).

The same principles apply just as strongly to declaratory relief. Absent "an actual, present and existing dispute," as distinguished from a "possible, dormant, hypothetical, speculative, or moot disagreement,"

claims for declaratory relief are not justiciable. *To-Ro Trade Shows*, 144 Wn.2d at 415; *accord Orwick*, 103 Wn.2d at 253-54; *Eugster*, 110 Wn. App. at 228-29; *see also Port of Seattle v. Wash. Utils. & Transp. Com'n*, 92 Wn.2d 789, 806, 597 P.2d 383 (1979) (declaratory judgment that “appear[ed] to be founded on a hypothetical factual situation” was inappropriate).

Here, prior to the trial court’s final judgment, Wash-CAP’s claims for injunctive relief against Regal and Cinemark became moot when each took all necessary steps to equip all of their first-run movie auditoriums in King County with digital captioning technology. CP 878-79. Wash-CAP admitted this at trial, and the trial court dismissed those claims. CP 1169. The trial court erred, however, when it refused to dismiss Wash-CAP’s claims for declaratory relief against Regal and Cinemark on the ground that they had become moot as well. As to these two Defendants, there was no case or controversy remaining to adjudicate. Wash-CAP’s lone argument against dismissal was that declaratory relief was important “in and of itself,” to ensure that Regal and Cinemark would continue to exhibit captioned movies after the lawsuit was over. However, Wash-CAP submitted no evidence to credit a “possible, hypothetical, and speculative” allegation that Regal and Cinemark “might simply abandon the [closed-captioning] equipment” they had purchased, installed, tested,

and provided for their hearing-disabled patrons in King County. CP 691. Ultimately, the trial court made no findings to explain why the declaratory relief claim was still viable, declined to dismiss all claims against Regal and Cinemark, and entered what it deemed to be declaratory relief against Regal and Cinemark. This was reversible error.

G. The Trial Court Erred By Adjudicating Unripe Claims As To AMC Concerning The Alleged Unlawfulness Of Its Future, Undecided Plans.

Prior to trial, Wash-CAP abandoned its claims that AMC violated the WLAD prior to digital conversion, conceding that “the only remaining issue before [the trial court] is determining what is reasonably possible in the circumstances – after digital conversion – for AMC to do.” CP 1060-61; *see also* CP 1141-42 (“We know that AMC is going to convert its King County theaters to digital projection, and we ask only that the Court direct that *when it does so*, all movies equipped with captions be shown in captioned form.”). At trial, AMC presented undisputed evidence that it had not yet (i) completed the digital conversion of its movie theaters in King County, (ii) selected the digital captioning equipment it planned to pair with its digitally-converted theaters, or (iii) made a final decision regarding the amount of movie theaters it would equip with the new captioning equipment. CP 876, 893-94. It moved to dismiss Wash-CAP’s remaining claims on the ground that whether AMC may or may not violate

the WLAD when its future plans were completed was not ripe for decision. CP 1461-64.

Under Washington law, “[d]eciding whether a case presents a cause of action ripe for judicial determination requires an evaluation of ‘the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” *First Covenant Church v. City of Seattle*, 114 Wn.2d 392, 399 (1990) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)). The ripeness doctrine seeks “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Abbott Labs.*, 387 U.S. at 148.

The critical question concerning fitness for review is “whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all.” *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 536 (1st Cir. 1995). The hardship prong evaluates “the extent to which withholding judgment will impose hardship – an inquiry that typically turns upon whether the challenged action creates a ‘direct and immediate’ dilemma for the parties” (*Abbott Labs.*, 387 U.S. at 152), and encompasses the question of whether the plaintiff is suffering any present injury from a future contemplated event. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 143 n.29 (1974).

The First Circuit’s decision in *McInnis-Misenor v. Maine Med.*

Ctr., 319 F.3d 63 (1st Cir. 2003), is directly on point and highly instructive. In *McInnis-Misenor*, a disabled plaintiff who used a wheelchair for mobility sued a hospital that did not have wheelchair-accessible bathrooms because she planned on becoming pregnant and delivering a baby at the hospital. In affirming the dismissal of the plaintiff's claim on lack of ripeness grounds, the First Circuit reasoned as follows:

- The fact that the legal issues presented were clear was not enough for a justiciable case. If a plaintiff's claim depends on future events that may never come to pass, or that may not occur in the form forecasted, then the claim is unripe. *Id.* at 72.
- The plaintiff's claim involved a threat of future injury, and whether that future injury may occur depended on a chain of contingencies. One of the contingencies was whether the defendant would in the future have the wheelchair-accessible bathrooms that the plaintiff sought. Thus, "the case that [plaintiff] argues is, at this stage, largely hypothetical, and such cases are seldom fit for judicial review." *Id.* at 73.
- The plaintiff's showing of hardship was weak – a proper hardship analysis focuses on "direct and immediate" harm and is unconcerned with wholly contingent harm. Moreover, because the legal issues presented were not complicated, there was every reason to believe that if the future injury occurred, then litigation and implementation of any decision could be accomplished promptly. *Id.*

The analysis here is very similar. Like *McInnis-Misenor*, Wash-CAP's "only remaining" complaint depended on future events that may never come to pass, or that may not occur in the form forecasted. AMC was not

going to complete converting its King County movie theaters to digital cinema until well after the trial court entered its final order, and had not yet made final decisions on the type or amount of digital-compatible captioning equipment it would purchase and install in those theaters. CP 893-94. Whether the future injury that Wash-CAP sought to remediate may occur depends on a chain of contingencies that had not yet been decided, and thus, as in *McInnis-Misenor*, the future injury was largely hypothetical.

The fact that the only remaining claim against AMC involved uncertain and contingent events that may not occur as anticipated or may not occur at all warranted a ruling that Wash-CAP's claim against AMC was unripe. Moreover, Wash-CAP made no showing of "direct and immediate" harm, nor any showing that Wash-CAP's members were suffering any present injury from the future contemplated event. Rather than dismiss, however, the trial court chose to enter an improper advisory opinion. *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815 (1973) (claim was not ripe and entering a ruling would "step[] into the prohibited area of advisory opinions"); accord *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990) ("If a claim is unripe, courts lack subject matter jurisdiction and the complaint must be dismissed.").

Even worse, the trial court issued its advisory opinion in the context of an injunction, thus violating well-established legal requirements that injunctive relief can only issue upon a showing that (i) a well-grounded fear of immediate invasion of a legal right exists, and (ii) the acts complained of either result in or will result in actual and substantial injury. *See Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792 (1982). AMC's undecided future plans did not present an immediate invasion of a legal right, and any future injury was speculative and hypothetical. The trial court's failure to dismiss AMC from this lawsuit on ripeness grounds was reversible error.

H. The Trial Court Erred By Awarding Declaratory Relief For Wash-CAP And Against Defendants Under The WLAD, As Opposed To The UDJA.²³

Wash-CAP had no viable claim for declaratory relief under the WLAD, and it was error for the trial court to award such relief. The plain language of the WLAD does not authorize granting declaratory relief. *See* RCW 49.60.030 (recognizing the right to file a civil action in a court of competent jurisdiction seeking “to enjoin further violations” or “to recover the actual damages sustained by the person”). The trial court erred when it ruled to the contrary, interpreting a single vague reference in the WLAD

²³ Appellate courts review orders for declaratory relief *de novo*. *See Vehicle/Vessel LLC v. Whitman County*, 122 Wn. App. 770, 777 (2004).

permitting remedies authorized by the Civil Rights Act of 1964 to authorize granting declaratory relief. No authority exists to support the trial court's ruling.

The Civil Rights Act of 1964 provides no remedy applicable to this case. That Act protects against violations of law due to “race, color, religion, or national origin in employment practices.” *See* 42 U.S.C. §§ 2000e-5(g)(2)(B); 2000e-2(m). Its protections do not extend to persons with disabilities or to rights that places of public accommodation owe to their disabled patrons. Those rights are protected under federal law by Title III of the ADA – which the WLAD does not mention – not the Civil Rights Act of 1964. Since the Civil Rights Act of 1964 does not authorize either a protection or a remedy applicable to persons with disabilities, the fact that the WLAD permits a court to award remedies authorized by the Civil Rights Act of 1964 is immaterial.

Even assuming that the Civil Rights Act of 1964 somehow applied to persons with disabilities, that legislation does not authorize “declaratory relief,” rather, it expressly contemplates injunctive relief, which it defines as “an application for a permanent or temporary injunction, restraining order, or other order.” *See* 42 U.S.C. § 2000a-3(a).

An “other order” is not an order for declaratory relief. In the analogous context of federal accessibility law, the United States Supreme

Court has “construed § 2000a-3(a) as limiting the private right of action to one for an injunction and reasonable attorney fees, despite the inclusion of the expansive phrase ‘or other order.’” *Morrison v. Unum Life Ins. Co. of America*, No. 06-2400, 2008 WL 4224807, at *3 (W.D. La. Sept. 10, 2008) (citing *Newman v. Piggie Park Ent., Inc.*, 390 U.S. 400, 401-02 (1968)); accord *Stringfellow v. Southfork Bay Dev. Group, LLC*, No. 4:08-CV-00575 SWW, 2010 WL 1416516, at *1 (E.D. Ark. April 8, 2010) (noting that Title III borrows the remedies and procedures set forth in the Civil Rights Act of 1964 and concluding “[t]hus, [plaintiff’s] remedy under Title III is expressly limited to injunctive relief”); *United States v. York Obstetrics & Gynecology, P.A.*, No. 00-8-P-DMC, 2000 WL 1221625, at *6 (D. Me. Aug. 25, 2000) (plaintiff not entitled to declaratory relief under the ADA because, among other things, “42 U.S.C. § 12188, which establishes the relief available to individuals under the ADA, and 42 U.S.C. § 2000a-3(a), which is incorporated in section 12188 by reference, do not mention declaratory relief”).

Moreover, Washington law provides a clear methodology for asserting claims for declaratory relief under the Uniform Declaratory Judgments Act, RCW 7.24.101, that preempts and trumps the trial court’s flawed interpretation that the WLAD authorizes declaratory relief. If declaratory relief was to be awarded at all in this case, then it should have

been awarded under the UDJA, not the WLAD, as the UDJA establishes the sole cause of action by which a declaratory judgment may be sought under Washington law. *See* RCW 7.24.146 (UDJA “shall apply to all actions and proceedings now pending in the courts of record of the state of Washington seeking [declaratory] relief” and “the respective courts of record in said actions shall have jurisdiction and power to proceed in said actions and to declare the rights, status and other legal relations sought to have been declared in said pending actions and proceedings *in accordance with the provisions of said chapter*”) (emphasis added); *Pasado’s Safe Haven v. State*, 162 Wn. App. 746, 752 (2011) (UDJA is the “sole method” for securing declaratory judgments under Washington law).²⁴

The trial court’s decisions to award declaratory relief under the WLAD, and reject application of the UDJA, were reversible error.

I. The Trial Court Erred By Awarding Attorney’s Fees.²⁵

1. Wash-CAP Was Not Entitled To An Award Of Attorney’s Fees Under The WLAD Because It Failed To Seek Or Secure Predicate Findings That The Statute Was Violated Or That Its Members Were Injured.

The WLAD expressly provides that plaintiffs who are “injured by any act in violation of this chapter” may seek to recover reasonable

²⁴ Moreover, had declaratory relief been awarded under the UDJA, attorney’s fees could not have been awarded against Defendants. *See* V(2), *infra*.

²⁵ Whether to award costs and attorney’s fees is a legal issue reviewed *de novo*. *Sanders v. State*, 169 Wn.2d 827, 866-67 (2010).

attorney's fees. RCW 49.60.030(2). Securing a final order recognizing an actual statutory violation of the WLAD is a prerequisite to an award of fees under the WLAD. *See Dezell v. Day Island Yacht Club*, 796 F.2d 324, 329 (9th Cir. 1986) (where plaintiff "was not injured by a violation of the [WLAD] . . . it may not recover attorney's fees"). This requirement is consistent with the Washington Supreme Court's determination that, when a plaintiff seeks attorney's fees for a statutory claim, plaintiff must show an actual violation of the statute to be awarded fees, not merely establish a general duty to comply with some provision of the statute. *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 152 (2010). Here, Wash-CAP failed to meet this mandatory requirement. *See* CP 1517, 1526-27. Because Wash-CAP failed to prove a WLAD violation or a WLAD injury, the trial court erred in awarding attorney's fees under the WLAD.

2. Wash-CAP Was Not Entitled To An Award Of Attorney's Fees For Securing Declaratory Relief Because The UDJA Does Not Permit An Award Of Attorney's Fees To A Party Who Prevails On A Declaratory Judgment Claim.

It is well-established that the UDJA allows a prevailing party to recover costs, but not attorney's fees. *See* RCW 7.24.100 ("In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just."); *accord Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 540-541 (1978) (UDJA does not permit

recovery of attorney's fees); *Am. States Ins. Co. v. Hurd Bros.*, 8 Wn. App. 867 (1973) (same). The trial court erred in allowing Wash-CAP to circumvent a barrier to attorney's fees established by a clear legislative enactment and more than thirty years of judicial precedent, including Washington Supreme Court precedent, that expressly governs declaratory relief under Washington law.

3. The Trial Court Abused Its Discretion By Awarding Excessive Fees And Compounded That Error By Granting An Unwarranted Fees Multiplier.

In situations where plaintiffs are only partially successful because they achieve some, but not all, of the relief initially sought, the "most critical factor" in determining the amount of an attorney's fee award is the overall results achieved. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). The Washington Supreme Court has similarly directed lower courts to "discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." *Pham v. Seattle City Light*, 159 Wn.2d 527, 538-40 (2007).

Applying these standards, the attorney's fees awarded by the trial court was grossly excessive and an abuse of discretion. The trial court's award of \$404,322.76 in attorney's fees rested on the premise that Wash-CAP was the "prevailing party" on all claims and therefore entitled to an award for all work performed in the case. CP 1724-29. However, Wash-

CAP clearly did not prevail on the majority of its claims. When the lawsuit was originally filed, Wash-CAP sought rulings that six Defendants had violated the WLAD by failing to exhibit a sufficient number of 35 mm-compatible captioned movies prior to digital conversion, and injunctive relief requiring all Defendants to exhibit captioned movies and comply with the WLAD. CP 87-88. Wash-CAP's pre-complaint investigation, complaint drafting, written discovery, and summary judgment motion practice all focused on advancing this initial theory. Wash-CAP completely abandoned this theory at trial.

Moreover, the relief ordered by the trial court was extremely limited – a general declaration as to what the WLAD requires as to movie theaters, and a limited, prospective injunctive relief order addressing future captioning plans for AMC. CP 1526. Wash-CAP thus completely dismissed three of six Defendants, secured limited recovery on four of eighteen claims, and neither sought nor secured findings that any Defendant violated the WLAD. Accordingly, the relief obtained was significantly different than, and at most a small subset of, the relief that Wash-CAP originally sought.

And while Wash-CAP claims to have secured “unprecedented” success through this litigation, Wash-CAP chose to proceed with litigation despite knowing that Defendants would provide digital captioning after

digital conversion was completed. Wash-CAP cannot reasonably claim credit for digital captioning exhibitions that were planned regardless of the litigation, and as to Regal and Cinemark, that were provided several months prior to trial and judgment. *See Pham*, 159 Wn.2d at 538-40 (recognizing that a plaintiff's hours request should be discounted for hours spent on "duplicated or wasted efforts").

While Defendants refused to capitulate to what they believe in good faith to be unreasonable claims and attorney's fees demands, nothing about Wash-CAP's claims, Defendants' opposition, or the limited success Wash-CAP achieved justified the substantial fees awarded to Wash-CAP, or a multiplier to a lodestar figure that was more than reasonable.²⁶ The trial court's fee award was excessive, an abuse of discretion, and should be reversed.

VI. CONCLUSION

For these reasons, Defendants request that this Court, reverse the trial court's judgment, and remand with instructions that judgment be entered in favor of Defendants.

²⁶ The general presumption is "that the lodestar [figure] represents a reasonable fee" (*Pham*, 159 Wn.2d at 542), and a court should deviate from the lodestar figure only on rare "occasion[s]", and even then, only when "the lodestar figure does not adequately account for the high risk nature of a case." *Id.* at 542; *accord Sanders*, 169 Wn.2d at 142 (adjustments to the lodestar made in "rare" cases).

DATED this 13th day of January, 2012.

Respectfully Submitted By:

DAVIS WRIGHT TREMAINE LLP



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on behalf of
Roger Leishman

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Attorneys for Appellants

CERTIFICATE OF SERVICE

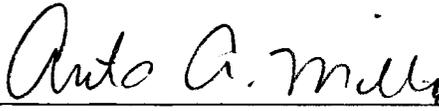
I hereby certify that I caused the document to which this certificate is attached to be delivered to the following as indicated:

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Attorney for Plaintiff-Respondent

Declared under penalty of perjury under the laws of the State of Washington dated at Seattle, Washington this 13th day of January, 2012.



Anita A. Miller

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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APPENDIX

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FILED
KING COUNTY, WASHINGTON

MAY 04 2010

SUPERIOR COURT CLERK
GARY POVICK
DEPUTY

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

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

Plaintiff,

vs.

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

Defendants.

09-2-06322-2 SEA
NO. ~~08-2-27208-7 SEA~~

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT, AND DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

THIS MATTER came before the Court on Plaintiff's Motion for Partial Summary Judgment, and Defendants' Motion for Summary Judgment. The Court heard oral arguments and considered the following:

- 1) Plaintiff's Motion for Partial Summary Judgment against Defendants' Regal, AMC, Cinemark, Silver Cinemas, and Lincoln Square, and exhibits thereto;

ORDER GRANTING IN PART AND DENYING IN
PART PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT, AND DENYING
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT - PAGE 1 OF 4

Judge Regina S. Cahan
King County Superior Court
516 Third Avenue
Seattle, WA 98104

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Page 635

- 1 2) Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment;
- 2 3) Defendants' Motion for Summary Judgment, and exhibits thereto;
- 3 4) Plaintiff's Response to Defendants' Motion for Summary Judgment;
- 4 5) Plaintiff's Post Hearing Brief concerning Agency Rulemaking and Due Process;
- 5 6) Plaintiff's Submission of Supplemental Authority.

6 No replies were filed by stipulation of the parties.

7
8 The Court being fully advised, now therefore, it is hereby ORDERED, ADJUDGED
9 AND DECREED that Plaintiff's Motion for Partial Summary Judgment is GRANTED in part
10 and DENIED in part. The Defendants' Motion for Summary Judgment is DENIED.

11 **FINDINGS OF FACT:**

12 The Court enters the following FINDINGS OF FACT that were stipulated to by the
13 parties:

- 14 1) Plaintiff Washington State Communication Access Project (Wash-CAP) is a
15 Washington non-profit corporation whose stated purpose is" to enable those with
16 hearing losses to enjoy public places and participate in public life as fully as those
17 without hearing losses to the extent such full participation is technologically and
18 economically possible."
19
- 20 2) Most of Wash-CAP's members have hearing losses of significant magnitude that they
21 are unable to discern some or all movie spoken content when they attend movie
22 exhibitions at a movie theatre even with the use of an Assistive Listening Device.
23
- 24 3) Defendants Regal Cinema, Inc., AMC Entertainment, Inc., Cinemark Holdings, Inc.,
25 Silver Cinemas Acquisition Co., LLP, and Lincoln Square Cinemas, LLC own and
26

ORDER GRANTING IN PART AND DENYING IN
PART PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT, AND DENYING
DEFENDANTS' MOTON FOR SUMMARY
JUDGMENT -- PAGE 2 OF 4

Judge Regina S. Caham
King County Superior Court
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Seattle, WA 98104

1 operate movie theaters in King County, WA and elsewhere either directly or through
2 wholly-owned subsidiaries.

- 3 4) Defendants are public accommodations engaged primarily in the business of exhibiting
4 motion pictures and selling concession items. No defendant excludes, denies services,
5 segregates or otherwise treats differently any Wash-CAP's members desiring to attend
6 a theatrical showing or purchase concession items on the same terms on for the same
7 cost as the general public.
8

9 **CONCLUSIONS OF LAW:**

- 10 1) Defendant movie theaters are "places of public accommodation" within the meaning of
11 RCW 49.60. et seq.
12
13 2) Hearing loss is a sensory disability within the meaning of RCW 49.60. et seq.
14
15 3) Defendants provide the same service to Plaintiff's members and other patrons with
16 hearing loss as they provide to patrons without hearing loss. However, providing
17 Plaintiff's members with the same service as is provided to non-disabled patrons does
18 not permit Plaintiff's members to fully enjoy the movies shown at defendant theaters.
19
20 4) Because providing "same service" to Plaintiff's members does not allow them to fully
21 enjoy the services provided by defendant theaters, Defendants are required by
22 Washington law and regulations to offer "reasonable accommodations" instead of
23 "same service."
24
25 5) "Reasonable accommodations" mean actions, reasonably possible in the circumstances,
26 to make a business' services "accessible", which is defined by regulation as being
"usable or understandable."

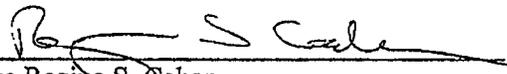
ORDER GRANTING IN PART AND DENYING IN
PART PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT, AND DENYING
DEFENDANTS' MOTON FOR SUMMARY
JUDGMENT -- PAGE 3 OF 4

Judge Regina S. Cahan
King County Superior Court
516 Third Avenue
Seattle, WA 98104

1 6) Public accommodations such as movie theaters are required to make "reasonable
2 accommodations" to the extent it is reasonably possible in the circumstances for them
3 to do so.

4 7) Trial in this matter is limited to the question of what is a "reasonable accommodation"
5 for each Defendant. (Open and closed captioning was discussed in depth during oral
6 argument and in the briefing. Although captioning might be a viable option to allow
7 plaintiffs to understand a movie, there may be other technology that would also serve
8 the same purpose. The determination of which, if any, type of accommodation would
9 be reasonable for each defendant is for the fact-finder at trial to decide.)
10

11
12 DATED this 4th day of May, 2010.
13

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16 Judge Regina S. Cahan
17 King County Superior Court
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ORDER GRANTING IN PART AND DENYING IN
PART PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT, AND DENYING
DEFENDANTS' MOTON FOR SUMMARY
JUDGMENT - PAGE 4 OF 4

Judge Regina S. Cahan
King County Superior Court
516 Third Avenue
Seattle, WA 98104

FILED
KING COUNTY, WASHINGTON

The Honorable Mariane Spearman

Hearing Date: February 18, 2011

FEB 24 2011

Hearing Time: 11 a.m.

SUPERIOR COURT CLERK
BY TERESA JACKSON
DEPUTY

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

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

Plaintiff,)

vs.)

REGAL CINEMAS, INC.,)
a subsidiary of Regal Entertainment)
Group, a Delaware Corporation,)
AMC ENTERTAINMENT, INC.,)
a/k/a **AMERICAN**)
MULTI-CINEMA, INC.,)
a Delaware Corporation,)
CINEMARK HOLDINGS, INC.,)
a Delaware Corporation,)
SILVER CINEMAS ACQUISITION)
CO., LLP., d/b/a Landmark 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)

No. 09-2-06322-2-SEA

~~PROPOSED~~ ORDER
DENYING
DEFENDANT CINEMARK'S
MOTION TO DISMISS MOOT
CLAIMS AND FOR INTERIM
PROTECTION FROM
DISCOVERY

~~PROPOSED~~ ORDER DENYING DEFENDANT CINEMARK'S
MOTION TO DISMISS MOOT CLAIMS AND
FOR INTERIM PROTECTION FROM DISCOVERY

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Based on the pleadings on file and attached exhibits, and on the oral arguments of counsel, Defendant Cinemark's Motion to Dismiss Moot Claims is hereby DENIED. Cinemark has responded to the requested discovery, and its Motion for Interim Protection from Discovery is therefore moot, and for that reason is also hereby DENIED.



Superior Court Judge

Judge Regina Cahan

Proposed by:

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Attorney for Plaintiff

[PROPOSED] ORDER DENYING DEFENDANT CINEMARK'S
MOTION TO DISMISS MOOT CLAIMS AND
FOR INTERIM PROTECTION FROM DISCOVERY
Page 2 of 3

THE HONORABLE JUDGE REGINA CAHAN
FILED
KING COUNTY, WASHINGTON

JUL 22 2011

SUPERIOR COURT CLERK

BY *Jan [Signature]*

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

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

Plaintiff,

vs.

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

Defendants.

No. 09-2-06322-2 SEA

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL ORDER**

In February 2009, Plaintiff filed the present case. Plaintiff asserted claims under RCW 49.60, Washington Law against Discrimination ("WLAD"), asking defendants to purchase, install, and operate the necessary equipment to show movies in captioned form. Plaintiff claimed that captioning would be a reasonable accommodation that would enable patrons with substantial hearing losses to understand movie soundtracks by reading the dialogue and other information delivered aurally.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND FINAL ORDER - Page 1 of 12

ORIGINAL
Page 1516

Judge Regina S. Cahan
King County Superior Court
Maleng Regional Justice Center
401 Fourth Ave N
Kent, WA 98032

1 Plaintiff sought: (1) declaratory relief; (2) injunctive relief; and (3) reasonable attorney's
2 fees and court costs. Plaintiff did not seek monetary damage or any findings that any defendant
3 engaged in discriminatory practices.

4 On May 4, 2010, this Court granted in part and denied in part plaintiff's motion for
5 partial summary judgment and denied Defendants' motion for summary judgment. The Court
6 ruled that the WLAD required defendants to take those steps "reasonably possible in the
7 circumstances" to make movie soundtracks understandable to patrons with hearing loss, which
8 would include but not be limited to, captioning. Trial would be limited to determining what
9 accommodation, if any, would be reasonable for each defendant to provide.

10 Following the Court's ruling, Defendant Cinemark installed enough equipment at its
11 Federal Way theater complex to display captions for every showing of every movie for which
12 captions are provided by the studios. Thereafter, Defendant Cinemark moved to dismiss the case
13 against it as moot. On February 24, 2011, the Court denied Cinemark's Motion to Dismiss as
14 Moot based on Plaintiff's request for declaratory relief.

15 The parties¹ agreed to proceed to trial on written submissions against Defendants
16 Cinemark Holdings, Inc. ("Cinemark"), Regal Cinemas, Inc. ("Regal"), and AMC
17 Entertainment, Inc ("AMC").²

18 In the spring of 2011, the parties filed their written submissions and the Court held oral
19 argument on May 20, 2011. Plaintiff requested the following: (1) a declaratory ruling as part of
20 a final judgment; (2) injunctive relief against AMC; and (3) a prevailing party determination.
21 Plaintiff also filed a Motion for Summary Judgment against AMC requesting injunctive relief
22 stating that based on undisputed facts, it is reasonably possible for AMC to provide the necessary
23 equipment to display captions for every movie for which captions have been provided.³

24 Defendants filed a Trial Brief requesting that all claims be dismissed. Cinemark renewed
25 its Motion to Dismiss as Moot, and Regal joined that Motion. (Regal had also equipped all their

26 ¹ Plaintiff dismissed claims without prejudice against Defendants Kirkland Parkplace Cinemas, LLC. and Silver
27 Cinemas Acquisition Co., LLP, d/b/a Landmark Theatres and dismissed claims with prejudice against Lincoln
28 Square Cinemas.

² Defendants had also filed a Motion to Stay to allow for the completion of digital conversion and to install closed-
captioning equipment. At oral argument on February 18, 2011, the parties acknowledged that the Court could make
its decision based on the commitment of the parties even though the plans had not yet been completed. On February
24, 2011, the Court denied the Defendants' Request for a Stay.

³ At oral argument, Plaintiff acknowledged that this could be viewed as a trial submission given the procedural
posture of the case. Accordingly, the Court will decide all the issues as a stipulated trial.

1 theaters in King County to be able to display captions for every showing of every movie for
2 which captions are provided by the studios.) All Defendants renewed their arguments that any
3 captioning requirement must come from agency rule-making not a court of law; that the
4 imposition of any captioning requirement would be a denial of their due process rights; that the
5 Court erred when it ruled that WLAD imposed any captioning requirements; that the type of
6 declaratory relief requested is inappropriate for a declaratory judgment; and that Plaintiff is not
7 entitled to attorneys fees. New issues were raised in Defendant's reply brief or at oral argument
8 on May 20, 2011: (1) WLAD does not authorize declaratory relief; (2) numerical standards are
9 more appropriately determined by agency rule-making; and (3) the claim for injunctive relief
10 against AMC is not ripe. The parties agreed that instead of striking these arguments, it was best
11 to provide additional briefing and address them.

12 Plaintiff and Defendants have also filed evidentiary objections, and the Court has
13 addressed them by separate order.

14 The Court considered all submitted materials, including:

- 15 1) Defendants' Opening Trial Brief, dated April 26, 2011;
- 16 2) Appendix of Facts in Support of Defendants' Opening Trial Brief, and exhibits
17 thereto;
- 18 3) April 26, 2011 Declaration of M. Brett Burns in Support of Defendants' Trial
19 Brief, and exhibits thereto;
- 20 4) April 26, 2011 Declaration of Raymond Smith in Support of Defendants' Trial
21 Brief, and exhibits thereto;
- 22 5) Declaration of Phil Hacker, filed on April 26, 2011, in support of Defendants'
23 Trial Brief;
- 24 6) April 25, 2011 Declaration of Dan Huert in Support of Defendants' Trial Brief;
- 25 7) April 25, 2011 Declaration of George Mann in Support of Defendants' Trial
26 Brief;
- 27 8) April 26, 2011 Declaration of Deron Harrison in Support of Defendants' Trial
28 Brief, and exhibit thereto;
- 9) Plaintiff's Motion for Summary Judgment Against Defendant AMC, dated April
26, 2011, and exhibits thereto;
- 10) Defendants' Response to Plaintiff's Opening Trial Brief and Opposition to
Motion for Summary Judgment, dated May 11, 2011;

- 1 11) Plaintiff's Memorandum in Opposition to Defendants' Opening Trial Brief, dated
2 May 11, 2011;
- 3 12) Defendant' Reply Brief, dated May 16, 2011;
- 4 13) May 16, 2011 Declaration of Michael Brett Burns in Support of Defendants'
5 Reply Trial Brief, and exhibits thereto;
- 6 14) May 16, 2011 Supplemental Declaration of Raymond Smith in Support of
7 Defendants' Reply Brief, and exhibits thereto;
- 8 15) Plaintiff's Memorandum in Reply to Defendants' Response to Plaintiff's Opening
9 Brief and Opposition to Summary Judgment, dated May 16, 2011;
- 10 16) May 16, 2011 Declaration of John Waldo in Support of Plaintiff's Reply
11 Memorandum, and exhibits thereto;
- 12 17) Plaintiff's Citation of Authority Rebutting Argument First Raised in Defendants'
13 Reply Brief;
- 14 18) Plaintiff's Corrected Memorandum in Reply to Defendants' Opposition to
15 Summary Judgment;
- 16 19) Plaintiff's Post-Hearing Memorandum Addressing Defense Arguments raised
17 initially in Reply Brief or at Oral Argument, dated May 27, 2011; and
- 18 20) Defendants; Response to Plaintiff's Post-Hearing Memorandum, dated June 13,
19 2011.

20 After reviewing the facts and briefing submitted by the parties, and hearing arguments of
21 counsel, the Court DENIES Defendant's Motion to Dismiss and GRANTS final judgment for
22 Plaintiff.

23 FINDINGS OF FACT

24 1. Plaintiff Washington State Communication Access Project (Wash-CAP) is a
25 Washington non-profit corporation whose stated purpose is "to enable those with hearing losses
26 to enjoy public places and participate in public life as fully as those without hearing losses to
27 the extent such full participation is technologically and economically possible."

28 2. Most of Wash-CAP's members have hearing losses of a magnitude such that they
are unable to discern some or all spoken movie content when they attend movie exhibitions at a
movie theater even with the use of an Assistive Listening Device.

1 3. The same Wash-CAP members who are unable to discern some or all aural movie
2 content are literate and can read captions that display spoken content and other aural
3 information in visual text form.

4 4. Defendants Regal, Cinemark, and AMC own and/or operate movie theaters in
5 King County, Washington. These movie theaters are public accommodations engaged primarily
6 in the business of exhibiting motion picture and selling concession items. Defendants do not
7 exclude, deny services to, segregate or otherwise treat differently any Wash-CAP member, and
8 offer admissions and concessions for the same price and on the same terms as the general
9 public.

10 5. Movies are created by movie studios and made available to movie exhibitors.
11 Many but not all of the movies shown in King County by Regal, Cinemark, and AMC have
12 captions provided at no extra charge to the theaters. To display the captions, the theaters must
13 purchase, install and maintain certain equipment.

14 6. After the inception of this case, Defendants Regal, AMC, and Cinemark began
15 implementing the conversion of their King County multiplex theaters to digital projection.
16 Instead of using film, the visual and aural content of the movie is converted to digital
17 information, and is transmitted to theaters by computer disc or over the Internet. Regal and
18 Cinemark have completed that conversion at those King County theaters that are the subject of
19 this lawsuit, and AMC plans to do so (with the possible exception of the Factoria multiplex) by
20 the end of 2011.

21 7. Generally speaking, movie captions are exhibited in the form of "open-captions"
22 or "closed-captions." Open-captions are exhibited on the movie screen (conceptually similar to
23 foreign film subtitles) and are visible to the entire movie audience. Closed-captions, on the
24 other hand, are exhibited on seat-based or individual-based display devices used by specific
25 members of the audience, and are not visible to the entire movie audience.

26 8. When theaters have been converted to digital projection, as the defendants have in
27 this case, no special equipment is required to show open-captioned movies. Movie studios have
28 created open-captioned digital files for some, but not all, movies. Movie exhibitors that exhibit
29 films using digital cinema may obtain these digital open-captioned files and then exhibit them
30 using their digital projectors.

31 9. For theaters that have been converted to digital projection, there are currently
32 three technologies that exist to exhibit movies with closed-captions.

1 **WGBH's Rear Window Captioning System ("RWC"):** Movie exhibitors may
2 purchase and exhibit closed-captioned movies in 35 mm or digital cinema using RWC
3 equipment. When movies are exhibited using RWC, movie captions provided by the studios are
4 displayed on individual plexiglass reflectors affixed to cupholders in theater seats (the captions
5 are reflected from a light-emitting diode text panel or "datawall" mounted at the rear of the
6 movie theater) and are visible only to patrons who request and use the reflective panel. RWC
7 costs approximately \$9,000 for digital auditoriums plus approximately \$110 for each plexiglass
8 reflector. Reflectors are usable in any auditorium. There is an additional one-time licensing fee
9 of \$1,000 per auditorium.

10 **USL's Closed-Captioning System:** Movie exhibitors may purchase equipment called
11 the USL Closed-Captioning System and exhibit closed-captioned movies in digital cinema using
12 such equipment. When movies are exhibited using the USL Closed-Captioning System, movie
13 captions provided by the studios as part of the digital cinema file are displayed on LCD receivers
14 affixed to cupholders in theater seats or on receivers imbedded in special eyeglasses (the captions
15 are transmitted via an infrared emitter and encoder connected to the digital cinema server) and
16 are visible only to patrons who request and use the receivers. The USL Closed-Captioning
17 System costs approximately \$2,500 per movie auditorium with capacity of 250 or less and
18 \$4,000 for auditoriums seating more than 250. The viewing devices cost approximately \$450
19 each and can be used in any auditorium. Eyeglasses, available by third-party manufacturer Sony,
20 are expected to cost approximately \$1,485 per unit.

21 **Doremi's CaptiView Closed-Caption Viewing System:** Movie exhibitors may purchase
22 equipment called the Doremi CaptiView Closed-Caption Viewing System and exhibit closed-
23 captioned movies in digital cinema using such equipment. When movies are exhibited using the
24 Doremi CaptiView Closed-Caption Viewing System, movie captions provided by the studios are
25 displayed on LCD receivers affixed to cupholders in theater seats (the captions are transmitted
26 via wireless technology connected to the digital cinema server) and are visible only to patrons
27 who request and use the receivers. Doremi has not yet provided pricing information for the
28 CaptiView system when used with third-party digital projection systems.

10. After this Court's initial ruling that the WLAD required movie theaters to take
actions reasonably possible in the circumstances to make their movie soundtracks
understandable, and following their completion of digital conversion, Regal and Cinemark
equipped all of their multiplexes that are subject to this litigation with sufficient captioning

1 equipment to enable them to display captions for all showings of all movies for which captions
2 have been prepared.

3 11. Regal completed the conversion of all auditoriums in all of its King County first-
4 run multiplexes in February of 2011. Regal equipped all of those auditoriums to show closed-
5 captioned movies in February and March of 2011. Regal has made closed-captioned movies
6 available for all showings of all films for which captions have been provided since March of
7 2011. Regal has also continued to interact with deaf and hard of hearing guests, train its
8 managers and staff on captioned movie exhibitions, and advertise captioned movie show times
9 on its website.

10 12. Cinemark completed conversion of all auditoriums at its Federal Way multiplex
11 in May of 2010. It installed closed-captioning equipment in all of those auditoriums and trained
12 its personnel on captioning systems in November of 2010. It has made captioned movies
13 available for all showings of all films for which captions have been provided, interacted with
14 deaf and hard of hearing guests, and advertised its captioning show times for feature movies that
15 come with captioning content on its website and in local print advertising, from December 2010
16 to the present.

17 13. AMC has converted all auditoriums at its Southcenter 16 and its OakTree 6 to
18 digital projection. AMC's Pacific Place 11, Kent Station 14 and Woodinville 12 are scheduled
19 to be converted to digital projection by the end of 2011. AMC is engaged in lease negotiations
20 for its Factoria 8 multiplex, and has not yet determined whether it will convert those
21 auditoriums to digital projection.

22 14. AMC asserts that it is not yet in a position to ascertain what proportion of its
23 auditoriums will be equipped to show captions following digital conversion. It states that it
24 will, at a minimum, equip one or two auditoriums at each of its King County multiplexes that
25 will be converted to digital projection, and claims that it would be unreasonable for it to do
26 more.

27 15. Based on information concerning the size of the auditoriums at each of AMC's
28 six King County multiplexes (including Factoria), the total cost to AMC of equipping all of the
67 auditoriums to show captions using the USL closed-captioning system would be roughly
\$300,000, or somewhat less than \$4,500 per auditorium.

16. Based on publicly available AMC financial data, AMC in fiscal 2010 realized net
cash flow from operating activities of \$258 million. The per-auditorium net cash flow, which the

1 parties have stipulated may be applied on a pro-rata basis to AMC's King County operations,
2 was \$57,525 per auditorium for that fiscal year.

3
4 **CONCLUSIONS OF LAW**

5 1. As to injunctive relief against Regal and Cinemark, the Court finds that these
6 claims are moot. However, the claims for declaratory relief against these defendants remain.

7 2. As to claims against AMC regarding its future digital conversion plans, the Court
8 finds that the claims are ripe for adjudication. The parties agreed at oral argument on February
9 18, 2011 that the Court could make decisions based on the Defendants' commitments even
10 though the plans had not yet been implemented. Applying a cost benefit analysis, AMC has
11 committed to equip one to two auditoriums per multiplex (depending on multiplex size) with
12 new digital compatible closed-captioning equipment. Plaintiff argues that AMC can afford to do
13 more. The Court does not need any additional facts. There is no need to delay a ruling. The
14 Motion to Dismiss due to Ripeness is DENIED.

15 3. Defendants argue that Plaintiff has no viable claim for declaratory relief against
16 any Defendant under the WLAD because that statute does not authorize granting declaratory
17 relief. The Court disagrees. WLAD specifically permits the Court to issue all remedies provided
18 by the Civil Rights act of 1964. The portion of that Act dealing with public accommodations
19 permits injunctions, damages and "other orders." That same remedy provision is also
20 incorporated into Title III of the Americans with Disability Act. Moreover, the mandate that the
21 WLAD be interpreted liberally for the accomplishment of its purposes supports the authority to
22 grant declaratory relief. The purposes of the law would be frustrated if declaratory relief were
23 not permitted. Hence, the Court GRANTS the Plaintiff's Motion for Declaratory Relief.

24 4. Defendant movie theaters are "places of public accommodation" within the
25 meaning of the WLAD. RCW 49.60 et seq.

26 5. Hearing loss is a sensory disability within the meaning of the WLAD.

27 6. Defendants provide the same service to Plaintiff's members as they provide to
28 other patrons. However, providing Plaintiff's members with the same service as is provided to
non-disabled patrons does not permit Plaintiff's members to fully enjoy movies at Defendants'
theaters because they are unable to understand some or all of the dialogue and other aural
information.

1 7. Because “same service” does not allow Plaintiff’s members to fully enjoy the
2 movies, Defendants are required to offer “reasonable accommodation” instead of “same service.”
3 WAC 162-26-080.

4 8. “Reasonable accommodation” is defined as “action, reasonably possible in the
5 circumstances, to make the regular services of a place of public accommodation accessible to
6 persons who otherwise could not use or fully enjoy the services because of the person’s sensory,
7 mental, or physical disability.” WAC 162-26-040.

8 9. The regulations further define “accessible” as “usable or understandable by a
9 person with a disability.” WAC 162-26-040.

10 10. Open and closed captioning makes movie soundtracks understandable to
11 Plaintiff’s members, who cannot otherwise understand the soundtracks because of their sensory
12 disabilities.

13 11. Defendants are required by the WLAD to offer captioning, or another equally
14 effective method of making soundtracks understandable, to the extent it is reasonably possible in
15 the circumstances for each Defendant to do so.

16 12. By equipping all of their King County multiplexes that are the subject of this
17 litigation to enable them to show closed-captions for all films for which captions have been
18 prepared, and by committing to maintain that equipment, properly train staff in its operation, and
19 by committing to publicizing their closed-captioned offerings, Defendants Regal and Cinemark
20 have taken all steps reasonably possible in the circumstances to make their movie soundtracks
21 understandable. Those actions satisfy those Defendants’ obligations to Plaintiff’s members and
22 other similarly situated individuals under the present circumstances.

23 13. With respect to Defendant AMC, the remaining issue is to determine which type
24 of accommodation is reasonably possible for AMC to provide. The scope of a “reasonable
25 accommodation” is not unlimited—it must be an action that is “reasonably possible in the
26 circumstances” (WAC 162-26-040(2)), and courts should consider “the cost of making the
27 accommodation, the size of the place of public accommodation, the availability of staff to make
28 the accommodation, the importance of the service to the person with a disability, and other
factors bearing on reasonableness in the particular situation.” WAC 162-26-080(2); *see also Fell
v. Spokane Transit Auth.*, 128 Wash. 2d 618, 642 (1996).

1 14. Open and closed-captioning are means of providing accessibility to movie
2 theaters for Plaintiff's members and other individuals with substantial hearing loss. Both
3 methods are commercially available.

4 15. Although open-captioning would not cost Defendant any money, given the other
5 technology now available, Defendants have convinced the Court that requiring open-captioning
6 is not a commercially feasible option and would impose an undue burden on AMC.

7 16. Nevertheless, closed-captioning is a viable option for AMC. AMC's overall net
8 cash flow from ongoing operations in fiscal 2010 was \$258 million. The maximum one-time
9 cost to equip all of its King County auditoriums with closed-caption technology to show
10 captioned movies is estimated at \$300,000, or \$4,500 per auditorium. AMC's net cash flow per
11 auditorium for that year was \$57,525 per auditorium. Those undisputed facts demonstrate that it
12 would be reasonably possible for AMC to equip all of its King County auditoriums to show
13 captioned movies upon conversion to digital projection. Because not all movies come with
14 captions, it may be possible for AMC to equip fewer than all auditoriums and still display
15 captions for every showing of every movie for which captions have been prepared.

16 17. AMC has offered no evidence to refute the conclusion that it can afford to equip
17 enough King County theaters with closed-captioning equipment to enable it to display captions
18 for every showing of every movie for which captions have been prepared.

19 18. Regal and Cinemark have equipped enough auditoriums at their King County
20 multiplex to display captions for every showing of every movie for which captions have been
21 prepared. That fact demonstrates the facial plausibility of offering complete access to captions.

22 19. AMC argues that in the small window of time that Defendant Cinemark provided
23 closed-captioning, only a limited number of patrons used it. This is not a compelling argument
24 to the Court. WLAD is a civil rights law. The issue is not how many patrons have used the
25 technology provided, but rather, whether an individual with a sensory disability has the legal
26 right to have access to the movies when technology is now present to allow that access without
27 impeding on other patron's experience and it is feasible for the defendant to provide it.

28 20. The Court renews its findings that closed-captioning is a reasonable
accommodation under WLAD and this finding neither denies the Defendants' due process rights,
nor overreaches into an administrative agency's role.

1 **FINAL ORDER**

2 Based on the foregoing Findings of Fact and Conclusions of Law, the Court ORDERS as
3 follows:

4 1) WALD, RCW 49.60 et seq., requires movie theaters to take steps reasonably
5 possible in the circumstances to make their movie soundtracks understandable to people with
6 hearing loss. Closed-captioning is a technologically and commercially available means of
7 making soundtracks understandable. Unless a theater can devise an equally effective method of
8 making soundtracks understandable to people for whom Assistive Listening Devices are
9 insufficient, closed-captioning is required to the extent that it is reasonably possible
economically for each Defendant to provide it.

10 2) By equipping those theaters subject to this litigation with sufficient equipment to
11 enable them to offer closed captions for every showing of every movie for which captions have
12 been prepared, Defendants Regal and Cinemark have fulfilled their present legal obligations
13 under WLAD. Therefore, Plaintiff's claim for injunctive relief is DISMISSED as moot against
14 those Defendants. Should circumstances materially change in the future, such as by the
15 development of new technologies, or should Regal or Cinemark cease offering captions for every
16 available movie, nothing in this Order prevents Plaintiff or any other party from seeking relief
that it would then be reasonably possible for Regal or Cinemark to provide.

17 3) Defendant AMC has ample financial resources to equip its theaters that are the
18 subject of this litigation with sufficient equipment to enable it, upon completion of conversion of
19 those theaters to digital projection, to offer closed-captions for every showing of every movie for
20 which captions have been prepared. AMC is therefore ORDERED to equip all theaters in King
21 County that it converts to digital projection with sufficient captioning equipment to offer closed-
22 captions for every showing of every movie for which captions have been prepared. AMC is
23 ORDERED to install such equipment within 90 days of completion of conversion to digital
24 projection. AMC is further ORDERED to maintain such equipment, to train its staff in the use
of such equipment, and to publicize the availability of captioned movies in its print and internet
advertising and in its multiplex lobbies.

25 4) Having obtained a declaratory order applicable in the future to all Defendants, and
26 an injunctive order against AMC, Plaintiff is the prevailing party. Pursuant to RCW
27 49.60.030(2), Plaintiff is entitled to recover all costs of suit, including a reasonable attorneys'
28

1 fee. Counsel for Plaintiff will submit a request for fees and costs within ten (10) days of the date
2 of this Order.

3 DATED this 22nd day of July, 2011.

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6 _____
7 Judge Regina S. Cahan
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FILED
KING COUNTY WASHINGTON

The Honorable Mariane Spearman

FEB 24 2011

Hearing Date: February 18, 2011

Hearing Time: 11 a.m.

SUPERIOR COURT CLERK
BY TERESA JACKSON
DEPUTY

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

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

Plaintiff,

vs.

REGAL CINEMAS, INC.,
a subsidiary of Regal Entertainment
Group, a Delaware Corporation,
AMC ENTERTAINMENT, INC.,
a/k/a **AMERICAN
MULTI-CINEMA, INC.**,
a Delaware Corporation,
CINEMARK HOLDINGS, INC.,
a Delaware Corporation,
**SILVER CINEMAS ACQUISITION
CO., LLP.**, d/b/a Landmark 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

No. 09-2-06322-2-SEA

~~PROPOSED~~ **ORDER
DENYING
DEFENDANT CINEMARK'S
MOTION TO DISMISS MOOT
CLAIMS AND FOR INTERIM
PROTECTION FROM
DISCOVERY**

~~PROPOSED~~ **ORDER DENYING DEFENDANT CINEMARK'S
MOTION TO DISMISS MOOT CLAIMS AND
FOR INTERIM PROTECTION FROM DISCOVERY**

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ORIGINAL

Based on the pleadings on file and attached exhibits, and on the oral arguments of counsel, Defendant Cinemark's Motion to Dismiss Moot Claims is hereby DENIED. Cinemark has responded to the requested discovery, and its Motion for Interim Protection from Discovery is therefore moot, and for that reason is also hereby DENIED.



Superior Court Judge

Judge Regina Cahan

Proposed by:

John F. Waldo, WSBA # 36109
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(206) 849-5009 (cell)
johnfwaldo@hotmail.com

Attorney for Plaintiff

[PROPOSED] ORDER DENYING DEFENDANT CINEMARK'S
MOTION TO DISMISS MOOT CLAIMS AND
FOR INTERIM PROTECTION FROM DISCOVERY
Page 2 of 3

FILED

Honorable Regina Cahan

11 SEP -8 AM 8:06

Noting Date: Aug. 17, 2011

KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

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

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

Plaintiff,)

vs.)

REGAL CINEMAS, INC.,)
a subsidiary of Regal Entertainment)
AMC ENTERTAINMENT, INC.,)
Group, a Delaware Corporation,)
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)

No. 09-2-06322-2-SEA

^{RL}
~~PROPOSED~~ ORDER GRANTING
PLAINTIFF'S MOTION FOR
ATTORNEYS' FEES AND COSTS

~~PROPOSED~~ ORDER GRANTING PLAINTIFF'S MOTION
FOR ATTORNEYS' FEES AND COSTS

Page 1 of 7

The Court has reviewed and considered Plaintiff's Motion for Attorneys' Fees and Costs, the Declarations of Alexander J. Higgins and John F. Waldo, the Memorandum in Opposition filed by Defendants' Counsel and the Reply Memorandum and accompanying Declaration of John F. Waldo, the Defendants' Evidentiary Objections and Responses thereto and the Plaintiff's Supplemental Application for Attorneys' Fees and Costs, and finds as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff is the Prevailing Party for purposes of attorneys' fees pursuant to RCW 49.60.030(2). Declaratory relief furthers the purposes of the Washington Law against Discrimination, and is permitted as an "other appropriate remedy." While the Uniform Declaratory Judgment Act is not an independent basis for an award of attorneys' fees, it does not preclude an award of fees if authorized by another statute such as the WLAD.

2. The declaratory judgment entered in this case gives Plaintiff and others similarly situated specifically enforceable rights against Defendants Regal and Cinemark, and therefore, those Defendants are liable for Plaintiff's reasonable fees and costs.

3. The Court entered an injunction against Defendant AMC, and injunctive relief is specifically sanctioned by the WLAD. Therefore, Plaintiff is a prevailing party as against AMC, and AMC is also liable for Plaintiff's reasonable fees and costs.

4. Plaintiff succeeded in ^{its} every material claim against Regal, Cinemark and AMC, and has achieved unprecedented access to captioned movies for people with hearing loss in King County. Regal and Cinemark have now committed to full captioning throughout the United States. While Regal and Cinemark assert that they have long been planning to install full captioning everywhere, that alleged commitment was never made part of the record in this case or brought to the Court's attention. To the contrary, Regal and Cinemark initially resisted making

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR ATTORNEYS' FEES AND COSTS + The court has ruled in Defendants' objections in part of the Declaration in a separate order.

any commitment to captioning. Although Regal and Cinemark claim that they informed Plaintiff's counsel of that commitment in the course of settlement negotiations, there is no evidence that they ever reduced the commitment to writing. The Court therefore declines to consider the allegation that Regal and Cinemark made any binding commitment such that Plaintiff could be assured that litigation was not necessary.

NSC

5. The parties have stipulated that Plaintiff's counsel reasonably spent 765 hours on this case at a reasonable rate of \$350 per hour, for a lodestar amount of \$267,750, and incurred costs of \$2,697.76, for a total lodestar amount of \$270,447.76. (That time and those costs exclude time and costs spent on work related to the three dismissed Defendants).

6. While the lodestar amount may presumptively compensate counsel adequately, a multiple may be justified to take into account the contingent nature of the case and the results obtained. The Court finds that in this case, a multiple is justified.

7. In considering whether the contingent nature of the case justifies a multiple, the Court must look at the likelihood of success at the inception of litigation. In this case, Plaintiff was confronted at the outset with substantial adverse authority stemming from similar cases filed under the federal Americans with Disabilities Act. Plaintiff's counsel was facing well-funded and experienced opposition, and had no opportunity to recover any fees or costs should the litigation not succeed. Because the fee-shifting provision of the WLAD is designed to encourage counsel to undertake civil-rights cases, including cases such as this in which no money would be awarded, counsel must receive a premium over and above a regular hourly rate for taking such cases.

8. In addition a multiple is justified, albeit only rarely, for exceptionally high quality of work and degree of success. This is one of those rare cases in which the outcome does justify

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION
FOR ATTORNEYS' FEES AND COSTS
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such a multiple. The case has resulted in an exponential expansion of the availability of captioned movies in King County, which has benefitted not only Plaintiff's members, but a very significant number of similarly situated individuals in the community. Moreover, in the aftermath of this case, Defendants Regal and Cinemark, America's first and third largest movie-theater operators, have expanded their commitment nationwide. While the Court expressly does not find that this case caused Regal and Cinemark to make a nationwide commitment to full captioning, the fact that such a commitment was made first in this case and then nationwide suggests that this case was at the very least a positive factor in those decisions.

9. For the foregoing reasons, the Court finds that a multiplier of ~~2.0~~^{1.5} is justified for the time expended on this case prior to the Court's July 22 ruling.

10. The Court finds that a reasonable attorneys' fee to be paid by Defendants Regal, Cinemark and AMC for work prior to the Court's July 22 ruling is ~~\$535,500~~^{\$401,625}. Reasonable costs are \$2,697.76, for a total amount of ~~\$538,197.76~~^{\$404,322.76}.

11. Some of the awarded time and costs are chargeable specifically to each Defendant. Specifically, 91.75 hours are chargeable only to Regal, as are \$459 in costs. For Cinemark, 25 hours are specifically chargeable to it. For AMC, 82.75 hours and \$925 in costs are specifically chargeable. The remaining number of hours stipulated to be reasonable, 565.5 hours, and the remaining stipulated reasonable costs of ~~\$1,313.76~~ are chargeable jointly and severally to the three remaining Defendants.

12. Additionally, Plaintiff has submitted a supplemental Motion for fees incurred in filing the fee petition in the amount of \$13,212,50, consisting of 37.75 hours at \$350 per hour. Plaintiff does not seek (nor would it be entitled) to a multiple for that time, so the lodestar amount is the reasonable amount of compensation.

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION
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13. Defendant Lincoln Square Cinemas has settled with Plaintiff, and has agreed to pay \$15,000 in fees. Prior to this Court's July 22 order, Plaintiff's counsel spent 13.0 hours on matters specifically related to Lincoln Square, for which it does not seek a multiplier. Since then, Plaintiff's counsel has spent an additional 5.25 hours. The Court finds that time to be reasonable, and recoverable at \$350 per hour, for a total of \$6,387.50. The difference between that specifically chargeable amount and the amount Lincoln Square paid in settlement is \$8,612.50, which will be deemed Lincoln Square's contribution to those portions of the fee award for which all Defendants are jointly and severally liable and will reduce those Defendant's obligations dollar for dollar.

ORDER

Based on the foregoing Findings and Conclusions, the Court Orders as follows:

1. Defendants Regal, Cinemark and AMC are jointly and severally liable to Plaintiff's counsel for attorneys' fees in the amount of ~~\$401,763.75~~ ^{\$ 302,801.25}, comprised of 565.5 stipulated hours at the stipulated rate of \$350, with ~~2.0~~ ^{1.5} contingency multiplier, plus \$1,313.75 in stipulated costs, less an \$8,612.50 contribution from the Lincoln Square settlement, plus \$13,212.50 for post-ruling costs (37.75 hours at \$350) in preparing the fee petition, which amounts are not subject to a multiplier.

2. In addition to the foregoing joint and several liability, Defendant Regal is separately liable to Plaintiff's counsel for attorneys fees and costs in the amount of ~~\$64,684~~ ^{\$ 48,627.75}, consisting of 91.75 stipulated hours at \$350, with a contingency multiplier of ~~2.0~~ ^{1.5}, plus stipulated costs of \$459.

3. In addition to the foregoing joint and several liability, Defendant Cinemark is separately liable to Plaintiff's counsel for ^{\$ 13,125} \$17,500, consisting of 25 stipulated hours at the stipulated rate of \$350, with a contingency multiplier of ^{1.5} 2.0, with no additional costs.

4. In addition to the foregoing joint and several liability, Defendant AMC is separately liable to Plaintiff's counsel for ^{\$ 44,368.75} \$58,850, consisting of 82.75 stipulated hours at \$350, plus a contingency multiplier of ^{1.5} 2.0, plus stipulated costs of \$925.

5. These sums will bear interest from and after the date of this Order as specified by law.

DATED this 6 day of September, 2011.



~~District Judge~~

Judge Regina Cahan

Approved as to form and

Entry requested:

John F. Waldo, WSBA # 36109
2345 NW Quimby Street
Portland, OR, 97210

Attorney for Plaintiff Washington State
Communication Access Project

[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION
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FILED
11 SEP -8 AM 8:06
KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

Honorable Regina Cahan
Noting Date: Aug. 17, 2011

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.)

~~PROPOSED~~ ^{psc}
FINAL JUDGMENT

REGAL CINEMAS, INC.,)
a subsidiary of Regal Entertainment)
AMC ENTERTAINMENT, INC.,)
Group, a Delaware Corporation,)
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,)

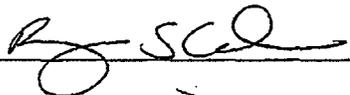
Defendants)

For the reasons set forth in the Findings of Fact, Conclusions of Law and Final Order dated July 22, 2011 and the Findings of Fact, Conclusions of Law and Order related to attorneys' fees and costs dated 9/6, 2011, the Court enters this Final Judgment in the referenced matter:

1. All Defendants are bound by the Declaratory Judgment contained in the Final Order of July 22, 2011.
2. AMC is bound by the Order for Injunctive Relief contained in the Final Order of July 22, 2011.
3. Defendants Regal, Cinemark and AMC are jointly and severally liable to John F. Waldo, counsel for Plaintiff, or to his heirs, successor and assigns, in the amount of ~~\$401,763.75~~ ^{\$302,801.25}.
4. In addition, Defendant Regal is severally liable to John F. Waldo, counsel for Plaintiff, or to his heirs, successors and assigns, in the amount of ~~\$64,684.00~~ ^{\$48,627.75}.
5. In addition, Defendant Cinemark is severally liable to John F. Waldo, counsel for Plaintiff, or to his heirs, successors and assigns, in the amount of ~~\$17,500.~~ ^{\$13,125.}
6. In addition, Defendant AMC is severally liable to John F. Waldo, counsel for Plaintiff, or to his heirs, successors and assigns, in the amount of ~~\$58,850.~~ ^{\$44,368.75}.
7. The foregoing sums will bear interest according to law from the date of this Judgment.

This is a Final Judgment pursuant to CR 58.

SO ORDERED this 6 day of Sept, 2011.


District Judge

Judge Regina Cahana

Approved as to form and

Entry requested:

John F. Waldo, WSBA # 36109
2345 NW Quimby Street
Portland, OR, 97210

Attorney for Plaintiff Washington State
Communication Access Project

RCW 49.60.030

Freedom from discrimination — Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW 48.30.300, 48.44.220, or 48.46.370 does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments

Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW 49.60.225 contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter 19.86 RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

WAC 162-26-040

Definitions.

(1) **Place of public accommodation.** RCW 49.60.040 defines and lists examples of a place of public accommodation.

(2) **General definitions special to this chapter.** The following words or phrases are used in this chapter in the meaning given, unless the context clearly indicates another meaning.

"Accessible" means usable or understandable by a person with a disability, with reasonable effort and in reasonable safety.

"Disability" is short for the term "the presence of any sensory, mental, or physical disability" used in the law against discrimination, and means the full term.

"Dog guide" means a dog that is trained for the purpose of guiding blind persons or a dog that is trained for the purpose of assisting hearing impaired persons.

"Place of public accommodation" is short for "place of public resort, accommodation, assemblage, or amusement" and means the full term.

"Reasonable accommodation" means action, reasonably possible in the circumstances, to make the regular services of a place of public accommodation accessible to persons who otherwise could not use or fully enjoy the services because of the person's sensory, mental, or physical disability. See WAC 162-26-080.

"Same service" means service without regard to the existence of a disability. See WAC 162-26-060.

"Service" means everything available to persons from a place of public accommodation.

"Service animal" means an animal that is trained for the purpose of assisting or accommodating a person's sensory, mental, or physical disability.

"Structural" means the load-bearing members and essential structure or composition of a place, as distinguished from its finish, decorations, or fittings. Examples of structural components are floors, walls, stairs, door openings, sidewalks, elevators, and escalators. Examples of things that are not structural are moveable walls, bathroom fixtures and partitions, fixtures such as water fountains (whether or not attached to a wall), doors and door hardware, cabinets, counters, handrails, signs (attached or painted), elevator controls, alarm systems, and carpeting or other floor covers.

WAC 162-26-060

General principles.

(1) **Same service preferred.** The purposes of the law against discrimination are best achieved when disabled persons are treated the same as if they were not disabled. The legislature expresses this policy in RCW 49.60.215 with the words "regardless of." Persons should, if possible, be treated without regard to their disability or use of a dog guide or service animal. This is called "same service" in this chapter.

(2) **Reasonable accommodation.** The law protects against discrimination because of the "presence" of a disability. It does not prohibit treating disabled persons more favorably than nondisabled persons in circumstances where same service will defeat the purposes of the law against discrimination.

WAC 162-26-080

Reasonable accommodation.

(1) **Unfair practice to not accommodate.** It is an unfair practice for a person in the operation of a place of public accommodation to fail or refuse to make reasonable accommodation to the known physical, sensory, or mental limitations of a person with a disability or to the use of a trained dog guide or service animal by a disabled person, when same service would prevent the person from fully enjoying the place of public accommodation.

(2) **Determining reasonableness.** Whether a possible accommodation is reasonable or not depends on the cost of making the accommodation, the size of the place of public accommodation, the availability of staff to make the accommodation, the importance of the service to the person with a disability, and other factors bearing on reasonableness in the particular situation.

significant impact on the economy, the Department will prepare a formal regulatory analysis.

Question 12. What data source do you recommend to assist the Department in estimating the number of public accommodations (i.e., entities whose operations affect commerce and that fall within at least one of the 12 categories of public accommodations listed above) and State and local governments to be covered by any Web site accessibility regulations adopted by the Department under the ADA? Please include any data or information regarding entities the Department might consider limiting coverage of, as discussed in the "coverage limitations" section above.

Question 13. What are the annual costs generally associated with creating, maintaining, operating, and updating a Web site? What additional costs are associated with creating and maintaining an accessible Web site? Please include estimates of specific compliance and maintenance costs (software, hardware, contracting, employee time, etc.). What, if any, unquantifiable costs can be anticipated from amendments to the ADA regulations regarding Web site access?

Question 14. What are the benefits that can be anticipated from action by the Department to amend the ADA regulations to address Web site accessibility? Please include anticipated benefits for individuals with disabilities, businesses, and other affected parties, including benefits that cannot be fully monetized or otherwise quantified.

Question 15. What, if any, are the likely or potential unintended consequences (positive or negative) of Web site accessibility requirements? For example, would the costs of a requirement to provide captioning to videos cause covered entities to provide fewer videos on their Web sites?

Question 16. Are there any other effective and reasonably feasible alternatives to making the Web sites of public accommodations accessible that the Department should consider? If so, please provide as much detail about these alternatives, including information regarding their costs and effectiveness in your answer.

F. Impact on Small Entities

Consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272, the Department must consider the impacts of any proposed rule on small entities, including small businesses, small nonprofit organizations, and small governmental jurisdictions. See 5 U.S.C. 603-04 (2006); E.O. 13272, 67 FR 53461 (Aug.

13, 2002). The Department will make an initial determination as to whether any rule it proposes is likely to have a significant economic impact on a substantial number of small entities, and if so, the Department will prepare an initial regulatory flexibility analysis analyzing the economic impacts on small entities and regulatory alternatives that reduce the regulatory burden on small entities while achieving the goals of the regulation. In response to this ANPRM, the Department encourages small entities to provide cost data on the potential economic impact of adopting a specific requirement for Web site accessibility and recommendations on less burdensome alternatives, with cost information.

Question 17. The Department seeks input regarding the impact the measures being contemplated by the Department with regard to Web accessibility will have on small entities if adopted by the Department. The Department encourages you to include any cost data on the potential economic impact on small entities with your response. Please provide information on capital costs for equipment, such as hardware and software needed to meet the regulatory requirements; costs of modifying existing processes and procedures; any effects to sales and profits, including increases in business due to tapping markets not previously reached; changes in market competition as a result of the rule; and cost for hiring web professionals for to assistance in making existing Web sites accessible.

Question 18. Are there alternatives that the Department can adopt, which were not previously discussed in response to Questions 11 or 16, that will alleviate the burden on small entities? Should there be different compliance requirements or timetables for small entities that take into account the resources available to small entities or should the Department adopt an exemption for certain or all small entities from coverage of the rule, in whole or in part. Please provide as much detail as possible in your response.

G. Other Issues

Question 19. The Department is interested in gathering other information or data relating to the Department's objective to provide requirements for Web accessibility under titles II and III of the ADA.

Are there additional issues or information not addressed by the Department's questions that are important for the Department to

consider? Please provide as much detail as possible in your response.

Dated: July 21, 2010.

Thomas E. Perez,
Assistant Attorney General, Civil Rights
Division.

[FR Doc. 2010-18334 Filed 7-22-10; 4:15 pm]

BILLING CODE 4410-13-P

DEPARTMENT OF JUSTICE

28 CFR Part 36

[CRT Docket No. 112]

RIN 1190-AA63

Nondiscrimination on the Basis of Disability; Movie Captioning and Video Description

AGENCY: Civil Rights Division, Justice.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Department of Justice (Department) is considering revising its regulation implementing title III of the Americans with Disabilities Act (ADA) in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by movie theater owners or operators at movie theaters accessible to individuals who are deaf or hard of hearing or who are blind or have low vision by screening movies with closed captioning or video description. The Department is issuing this Advance Notice of Proposed Rulemaking (ANPRM) in order to solicit public comment on various issues relating to the potential application of such requirements and to obtain background information for the regulatory assessment the Department may need to prepare in adopting any such requirements.

DATES: The Department invites written comments from members of the public. Written comments must be postmarked and electronic comments must be submitted on or before January 24, 2011.

ADDRESSES: You may submit comments, identified by RIN 1190-AA63 (or Docket ID No. 112), by any one of the following methods:

- *Federal eRulemaking Web site:* www.regulations.gov. Follow the Web site's instructions for submitting comments. The Regulations.gov Docket ID is DOJ-CRT-0112.
- *Regular U.S. mail:* Disability Rights Section, Civil Rights Division, U.S. Department of Justice, P.O. Box 2885, Fairfax, VA 22031-0885.
- *Overnight, courier, or hand delivery:* Disability Rights Section, Civil Rights Division, U.S. Department of

Justice, 1425 New York Avenue, N.W., Suite 4039, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT:

Kathleen Devine, Attorney, Disability Rights Section, Civil Rights Division, U.S. Department of Justice, at (202) 307-0663 (voice or TTY). This is not a toll free number. Information may also be obtained from the Department's toll-free ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

You may obtain copies of this ANPRM in large print or Braille or on audiotape or computer disk by calling the ADA Information Line at (800) 514-0301 (voice) and (800) 514-0383 (TTY). This ANPRM is also available on the ADA Home Page at <http://www.ada.gov>.

SUPPLEMENTARY INFORMATION:

I. Electronic Submission of Comments and Posting of Public Comments

You may submit electronic comments to www.regulations.gov. When submitting comments electronically, you must include DOJ-CRT 2010-0112 in the search field, and you must include your full name and address. Electronic files should avoid the use of special characters or any form of encryption and should be free of any defects or viruses.

Please note that all comments received are considered part of the public record and made available for public inspection online at www.regulations.gov. Submission postings will include any personal identifying information (such as your name, address, etc.) included in the text of your comment. If you include personal identifying information (such as your name, address, etc.) in the text of your comment but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also include all the personal identifying information you want redacted along with this phrase. Similarly, if you submit confidential business information as part of your comment but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on www.regulations.gov.

Comments on this ANPRM will also be made available for public viewing by

appointment at the Disability Rights Section, located at 1425 New York Avenue, N.W., Suite 4039, Washington, DC 20005, during normal business hours. To arrange an appointment to review the comments, please contact the ADA Information Line at (800) 514-0301 (voice) or (800) 514-0383 (TTY).

The reason that the Civil Rights Division is requesting electronic comments before Midnight Eastern Time on the day the comment period closes is because the inter-agency Regulations.gov/Federal Docket Management System (FDMS) which receives electronic comments terminates the public's ability to submit comments at Midnight on the day the comment period closes. Commenters in time zones other than Eastern may want to take this fact into account so that their electronic comments can be received. The constraints imposed by the Regulations.gov/FDMS system do not apply to U.S. postal comments, which will be considered as timely filed if they are postmarked before Midnight on the day the comment period closes.

II. Public Hearing

The Department will hold at least one public hearing to solicit comments on the issues presented in this notice. The Department plans to hold the public hearing during the 180-day public comment period. The date, time, and location of the public hearing will be announced to the public in the *Federal Register* and on the Department's ADA Home Page, <http://www.ada.gov/>.

III. Background

A. Statutory and Rulemaking History Up to the 2008 NPRM

On July 26, 1990, President George H.W. Bush signed into law the ADA, a comprehensive civil rights law prohibiting discrimination on the basis of disability. The ADA broadly protects the rights of individuals with disabilities in employment, access to State and local government services, places of public accommodation, transportation, and other important areas of American life. The ADA also requires, in pertinent part, newly designed and constructed or altered public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities. 42 U.S.C. 12101 *et seq.* Section 306(b) of title III directs the Attorney General to promulgate regulations to carry out the provisions of title III, other than certain provisions dealing specifically with transportation. 42 U.S.C. 12186(b).

Title III prohibits discrimination on the basis of disability in the activities of places of public accommodation (private entities whose operations affect commerce and that fall into one of twelve categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreational facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181-89.

On July 26, 1991, the Department issued its final rule implementing title III, which is codified at 28 CFR part 36. Appendix A of the title III regulation, at 28 CFR part 36, contains the ADA Standards for Accessible Design. On September 30, 2004, the Department published an advance notice of proposed rulemaking (2004 ANPRM) to begin the process of updating the 1991 regulation to adopt revised ADA Standards based on the relevant parts of the 2004 ADA/ABA Guidelines. 69 FR 58768. On June 17, 2008, the Department issued a Notice of Proposed Rulemaking (NPRM) to adopt the revised ADA Standards and, in pertinent part, revise the title III regulations. 73 FR 34466. The NPRM addressed the issues raised in the public's comments to the ANPRM and sought additional comment.

In that NPRM, the Department stated that it was considering options under which it might require that movie theater owners or operators exhibit movies that are captioned for patrons who are deaf or hard of hearing and movies that provide video (narrative) description¹ for patrons who are blind or have low vision.² The Department

¹ In the June 17, 2008 NPRM, the Department used the term "narrative description" to define the process and experience whereby individuals who are blind or have low vision are provided with a spoken narrative of key visual elements of a movie, such as actions, settings, facial expressions, costumes, and scene changes. In response to comments received from this NPRM, the Department now refers to this process as video description.

² The Department's regulations already require that public accommodations provide effective communication to the public through the provision of auxiliary aids and services, including, where appropriate, captioning and audio or video description. See generally, 28 CFR 36.303; 28 CFR part 36, Appendix B. To that end, the Department has entered into settlement agreements with a major museum and various entertainment entities requiring such aids and services. See e.g., Agreement Between the United States of America and the International Spy Museum, (June 3, 2006), available at <http://www.ada.gov/spymuseum.htm>; Agreement Between the United States of America and Walt Disney World Co. Under the Americans

noted, for example, that technical advances since the early 1990s have made open and closed captioning for movies more readily available and effective. The Department also stated that it understood that the movie industry was transitioning, in whole or in part, to movies in digital format and that movie theater owners and operators were beginning to purchase digital projectors. As noted in that NPRM, movie theater owners and operators with digital projectors may have available to them different options for providing captioning and video description than those without digital projectors. The Department sought comments regarding whether and how to require captioning and video description while the film industry made the transition to digital. Also, the Department stated its concern about the potential cost to exhibit captioned movies, noting that cost may vary depending upon whether open or closed captioning is used and whether or not digital projectors are used, and stated that the cost of captioning must stay within the parameters of the undue burden requirement in 28 CFR 36.303(a). The Department also expressed concerns about the cost of video description equipment but stated that it understood that the cost for video description was less than that for closed captioning. The Department then stated that it was considering the possibility of requiring public accommodations to exhibit all new movies in captioned format and with video description at every showing. The Department indicated that at that time, it anticipated that it would not specify which types of captioning to provide, leaving that to the discretion of the movie theater owners and operators.

The Department received numerous comments urging the Department to issue captioning and video description regulations under the ADA. These comments are discussed *infra*. Recently, the United States Court of Appeals for the Ninth Circuit held that the ADA required a chain of movie theatres to exhibit movies with closed captioning and video description unless the theaters could show that to do so would amount to a fundamental alteration or undue burden. *Arizona v. Harkins Amusement Enterprises, Inc.*,—F.3d. —, 2010 WL 1729606 (9th Cir., April 30, 2010). In light of the comments received pursuant to the NPRM, the Ninth Circuit decision, and the additional reasons

detailed below, the Department has decided to begin the process of soliciting additional comments and suggestions with respect to what an NPRM regarding captioning and video description should contain.

B. Legal Foundation for Captioning and Video Description

Creating regulations that would require movie theater owners and operators to exhibit closed captioned and video described movies falls squarely within the requirements of the ADA. Title III of the ADA includes movie theaters within its definition of places of public accommodation. 42 U.S.C. 12181(7). Title III makes it unlawful for places of public accommodation, such as movie theaters, to discriminate against an individual 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). Moreover, title III prohibits places of public accommodation from affording an unequal or lesser service to individuals or classes of individuals with disabilities than is offered to other individuals. 42 U.S.C. 12182(b)(1)(A)(ii). Title III requires places of public accommodation to take “such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently * * * because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.” 42 U.S.C. 12182(b)(2)(A)(iii). The statute defines auxiliary aids to include “qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments” and “taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments.” 42 U.S.C. 12103(1)(A)–(B). The Department’s title III regulation specifically lists open and closed captioning and audio recordings and other effective methods of making visually delivered materials available to individuals with visual impairments as examples of auxiliary aids and services that should be provided by places of public accommodations, 28 CFR 36.303(b)(1)–(2), unless the public accommodation can demonstrate that providing such aids and services would fundamentally alter the nature of the good or service being offered or would

result in an undue burden. 28 CFR 36.303(a). In addition, the Department’s title III regulation mandates that if a provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration in the nature of the goods or services being offered or in an undue burden, the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that would not result in an alteration or such burden but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods and services offered by the public accommodation. 28 CFR 36.303(f).

While the ADA itself contains no explicit language regarding captioning (or video description) in movie theaters, the legislative history of title III states that “[o]pen-captioning * * * of feature films playing in movie theaters, is not required by this legislation. Filmmakers, are, however, encouraged to produce and distribute open-captioned versions of films, and theaters are encouraged to have at least some pre-announced screenings of a captioned version of feature films.” H.R. Rep. No. 101–485 (II), at 108 (1990); S. Rep. No. 101–116 at 64 (1989). Congress was silent on the question of closed captioning in movie theaters, a technology not yet developed at that time for first-run movies, but it acknowledged that closed captions may be an effective auxiliary aid and service for making aurally delivered information available to individuals who are deaf or hard of hearing. See H.R. Rep. No. 101–485 (II), at 107.³ In addition, the House Committee stated 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.” *Id.* at 108.⁴ Similarly, in 1991, the Department stated that “[m]ovie theaters are not required * * * to present open-captioned films,” but was silent as to closed captioning. 56 FR 35544,

³ Congress also was silent regarding requiring video description of movies.

⁴ As the district court in *Ball v. AMC Entertainment, Inc.*, 246 F. Supp. 2d 17, 22 (D.D.C. 2003) noted, “Congress explicitly anticipated the situation presented in this case [the development of technology to provide closed captioning of movies]. Therefore, the isolated statement that open captioning of films in movie theaters was not required in 1990 cannot be interpreted to mean that [movie theaters] cannot now be expected and required to provide closed captioning of films in their movie theaters.” (Emphasis in original).

35567 (July 26, 1991). The Department also noted, however, that "other public accommodations that impart verbal information through soundtracks on films, video tapes, or slide shows are required to make such information accessible to persons who are deaf or hard of hearing. Captioning is one means to make the information accessible to individuals with disabilities." *Id.*

It is the Department's view that the legislative history of the ADA and the Department's commentary in the preamble to the 1991 regulation make clear that Congress was not requiring open captioning of movies in 1990, but that it was leaving open the door for the Department to require captioning in the future as the technology developed. It is also the Department's position that neither the ADA nor its legislative history precludes, in any way, issuing regulations regarding video description. To the contrary, given the present state of technology, we believe that requirements of captioning and video description fit comfortably within the statutory text.

In April of this year, the first federal appellate court to squarely address the question of whether captioning and video description are required under the ADA determined that the ADA required movie theatre owner and operator Harkins Amusement Enterprises, Inc., and its affiliates, to screen movies with closed captioning and descriptive narration (video description) unless such owners and operators could demonstrate that to do so would amount to a fundamental alteration or undue burden. *Arizona v. Harkins Amusement Enterprises, Inc.*,—F.3d. —, 2010 WL 1729606 (9th Cir., April 30, 2010).⁵ The Ninth Circuit found that because closed captioning and video descriptions are correctly classified as "auxiliary aids and services" that a movie theater may be required to provide under the ADA, the lower court erred in finding that these services are foreclosed as a matter of law. *Id.*

C. Movie Basics

The very first movies were silent films. "Talkies" added sound as a separate component. Although many technological advances have been made since the advent of the "talkie," the practice of exhibiting the visual portion of the movie separate from the sound is still common. Today, the cinematography portion of many movies is exhibited in an analog (*i.e.* film)

format, and the aural portion is exhibited in a digital format. Five to six reels of film are used for a typical two-hour long movie. These reels must be physically delivered to each movie theater exhibiting the movie. Digital sound is captured on CD-ROMs or optically or digitally on the film itself. Digital sound is synchronized to the visual images on the screen by a mechanism, called a reader head, that reads a timecode track printed on the film.

Digital cinema, by contrast, captures images, data, and sound on data files as a digital "package" that is stored on a hard drive or a flash drive. Digital movies are physically delivered to movie theaters on high resolution DVDs or removable or external hard drives, or to movie theaters' servers via Internet, fiberoptic, or satellite networks. The movie industry recently has begun transitioning to digital cinema and it is the Department's understanding that, in the industry's view, this transition is one of the most profound advances in motion picture production and technology of the last 100 years and will provide numerous advantages both for the industry and the audience.

D. Captioning and Video Description Generally

Captioning makes movies shown in theaters accessible to individuals whose hearing is too limited to benefit from assistive listening devices, as well as to individuals with other hearing disabilities. Open captions are similar to subtitles in that the text of the dialog is visible to everyone in the theater. Unlike subtitles, open captions also describe other sounds and sound makers (*e.g.*, sound effects, music, and the character who is speaking) in an on-screen text format. Open movie captions are sometimes referred to as "burned in" or "hardcoded" captions. However, new open captioning technology enables studios to superimpose captions without making a burned in copy or having to deliver a separate version of the movie. Open-captioned films are most often exhibited in movie theaters at certain limited showings.

Closed captioning displays the written text of the dialog and other sounds or sound makers only to those individuals who request it. It is the Department's understanding that, at the time comments were received in response to the 2008 NPRM, there were various types of closed captioning systems either in use or in development, including the Rear Window system, hand-held displays similar to a PDA (personal digital assistant), eyeglasses fitted with a prism over one lens, and

projected bitmap captions. It is also the Department's understanding that, at present, the only system that has gained a foothold in the marketplace is the Rear Window system. Unlike open captions that are sometimes burned onto the film itself, Rear Window captions are generated via a technology that neither is physically attached to the film nor requires a separate copy of the film to be made. The Rear Window system works through a movie theater's digital sound system. It uses a computer, a time code signal, and captioning software to project the captions, in reverse, on an LED display in the rear of the theater. A clear adjustable panel that is mounted on, or near an individual viewer's seat reflects the captions correctly and superimposes them on that panel so that it appears to a Rear Window user that the captions are on or near the movie image. Because this technology enables a movie theater that has been equipped with a Rear Window system to exhibit any movie that a movie producer has captioned, at any showing, without displaying captions to every movie-goer in the theater, individuals who are deaf or hard of hearing may enjoy movies in the same theater as those who do not require captioning.

Video description is a technology that enables individuals who are blind or have low vision to enjoy movies by providing a spoken narration of key visual elements of a movie, such as actions, settings, facial expressions, costumes, and scene changes. Visual description fills in information about the visual content of a movie where there are no corresponding audio elements in the film. It requires the creation of a separate script written by specially trained writers who prepare a script for video description that is recorded on an audiotape or CD that is synchronized with the film as it is projected. The script is transmitted to the user through infra-red or FM transmission to wireless headsets.

E. Increasing Numbers of Individuals With Hearing and Vision Impairments

The percentage of Americans approaching middle age and older is increasing. According to 2000 Census figures, Baby Boomers (*i.e.*, individuals born between 1946 and 1964 or who were between the ages of 36 and 54 in 2000), comprised nearly a third of all Americans. Just over a fifth of the American populous was age 55 or older. From 1990 to 2000, the two fastest growing age groups were those 45 to 49 and 50 to 54. The younger of the two groups increased by nearly 45 percent, and the older increased by more than half (54.9 percent). Together these

⁵ This court was guided, in part, by the *amicus* brief filed by the United States in support of requiring closed captioning and video description.

groups comprised nearly 38 million people (37,677,952). When joined with other "seniors," the 2000 Census figure for the over 45 age group increased to nearly 97 million people (96,944,389). Assuming the population has remained fairly constant, when the 2010 Census is completed and the results are released, Baby Boomers, who will then fall between the ages of 46 and 64, will make older Americans the largest segment of the U.S. population.

The aging of the population is significant because of the correlation between aging and hearing and vision impairment or loss. An October 21, 2008 Department of Health and Human Services' Progress Review on Vision and Hearing in the United States noted that Richard Klein, Chief of the NCHS Health Promotion Statistics Branch, found that there are about 21 million adults in the United States that are visually impaired, and about 36 million (17 percent) have some degree of hearing loss.⁶ The Progress Review also noted that "[a]s with vision problems, the number of U.S. adults with hearing loss is expected to increase significantly as the population ages, because hearing loss and aging are related to a high degree. Hearing loss is one of the three most prevalent chronic conditions in older Americans, ranking just after hypertension and arthritis." Progress Review: Vision and Hearing, <http://www.healthypeople.gov/data/2010prog/focus28/>. Moreover, at least one hearing loss Web site reports that "[a]s baby boomers reach retirement age starting in 2010, th[e] number of [Americans with hearing loss] is expected to rapidly climb and nearly double by the year 2030." Hearing Loss Association of America, Facts on Hearing Loss, <http://www.hearingloss.org/learn/factsheets.asp>.

⁶ According to the National Institute on Deafness and Other Communication Disorders of the National Institutes of Health, in 2004 there were 28 million Americans who had some type of hearing loss, and 500,000 to 750,000 Americans who had severe to profound hearing loss or deafness. Healthy Hearing 2010: Where Are We Now?, <http://www.nidcd.nih.gov/health/inside/spr05/pg1.asp>. The National Eye Institute of the National Institutes of Health reported in 2004, "With the aging of the population, the number of Americans with major eye diseases is increasing, and vision loss is becoming a major health problem. By the year 2020, the number of people who are blind or have low vision is projected to increase substantially. * * * Blindness or low vision affects 3.3 million Americans age 40 or over, or one in 28, * * *. This figure is projected to reach 5.5 million by 2020. * * * [L]ow vision and blindness increase significantly with age, particularly in people over age 65." See <http://www.nei.nih.gov/news/pressreleases/041204.asp>.

F. The Department's Rulemaking History Regarding Captioning and Video Description

When the Department issued its September 30, 2004 advance notice of proposed rulemaking (ANPRM), it did not raise movie captioning or video description as potential areas of regulation. Despite that fact, several ANPRM commenters requested that the Department consider regulating in these areas. The Department has determined that since the publication of the 1991 regulation, new "closed" technologies for movie captioning and video description have been developed. By 1997, these technologies were released into the marketplace.⁷

Given the availability of this new technology, mindful that the ADA's legislative history made clear that the ADA ought not be interpreted so narrowly or rigidly that new technologies are excluded, and aware that assistive listening devices and systems in movie theaters cannot be used to effectively convey the audio content of films for individuals who are deaf or who have severe or profound hearing loss, the Department decided to broach the topic of requiring closed captioning and video description at movie theaters in the 2008 NPRM. The NPRM asked exploratory questions about, but proposed no regulatory text for, movie captioning and video descriptions. The Department received many comments from individuals with disabilities, organizations representing individuals with disabilities, non-profit organizations, state governmental entities, and representatives from movie studios and movie theater owners and operators on these two issues.

Rather than using these comments to formulate a final rule, however, the Department is issuing this supplemental ANPRM for three main reasons. First, the Department wishes to obtain more information regarding several issues raised by commenters that were not contemplated at the time the 2008 NPRM was published. Second, the Department seeks public comment on several technical questions that arose from the research the Department undertook to address some of the issues raised by commenters to the original NPRM. Finally, in the two years that have passed since issuance of the 2008 NPRM, the Department is aware that movie theater owners and operators,

⁷ The first feature film with closed captions and video description, *The Jackal*, was exhibited at a California movie theater in 1997. *The Jackal's* release was followed by the release of *Titanic*—the first major studio direct-release of a movie with closed captioning and video description capabilities.

particularly major movie theater owners and operators, either have entered into, or had plans to enter into, agreements to convert to digital cinema. However, during this same time period, the United States' economy, and the profitability of many public accommodations, experienced significant setbacks. The Department wishes to learn more about the status of digital conversion, concrete projections regarding if and when movie theater owners and operators, both large and small, expect to exhibit movies using digital cinema, when such movie theater owners and operators expect to implement digital cinema, by percentages, in their theaters, and any relevant protocols, standards, and equipment that have been developed regarding captioning and video description for digital cinema. In addition, the Department would like to learn if, in the last two years, other technologies or areas of interest (e.g., 3D) have developed or are in the process of development that either would replace or augment digital cinema or make any regulatory requirements for captioning and video description more difficult or expensive to implement.

G. Response to 2008 NPRM Comments Concerning Movie Captioning and Video Description, Analysis and Discussion of Proposed Regulatory Approach

Although the 2008 NPRM did not propose any specific regulatory language with regard to movie captioning or video description, the Department sought input from the public as to whether the Department's regulation should require movie theater owners and operators to exhibit movies that have captioning for patrons who are deaf or hard of hearing and video description for individuals who are blind or have low vision. The Department asked whether, within a year of the revised regulation's effective date, all new movies should be exhibited with captions and video description at every showing or whether it would be more appropriate to require captions and video description less frequently. The preamble made clear that the Department did not intend to specify which types of captioning to provide and stated that such decisions would be left to the discretion of the movie theater owners and operators.

Individuals with disabilities, advocacy groups, a representative from a non-profit organization, and representatives of state governments, including eleven State Attorneys General, overwhelmingly supported issuance of a regulation requiring movie

theater owners and operators to exhibit captioned and video described movies at all showings unless doing so would result in an undue burden or fundamental alteration. These groups noted that although the technology to exhibit movies with captions and video description has been in existence for about ten years, most movie theaters still were not exhibiting movies with captioning and video description. As a result, these groups indicated that they believed regulatory action should not be delayed until the conversion to digital cinema had been completed. One commenter in this group said that because federal law requires movie studios to caption movies prior to their release to cable and television media, *see, e.g.*, 47 CFR 79.1, it made good business sense for studios to caption movies prior to their being released to movie theater owners and operators. Several commenters requested that any regulation include factors describing what constitutes effective captioning and video description, including that captioning be within the same line of sight to the screen as the movie so that individuals who are deaf or hard of hearing can watch the movie and read the captions at the same time, that the captioning be accessible from each seat, that the captions be of sufficient size and contrast to the background so as to be easily readable, and that the recommendations from the Telecommunications and Electronics and Information Technology Advisory Committee (TEITAC) Report to the Access Board that captions be "timely, accurate, complete, and efficient" be included.⁸ The Department has carefully considered these requests and believes that more information is required before making a decision as to how many movies should be screened with captioning and video description available and whether factors that describe what constitutes effective captioning and video description would be helpful to movie theater owners and operators and individuals with disabilities.

The State Attorneys General supported the Department's statement in the 2008 NPRM that the Department did not anticipate specifying which type of captioning to provide or what type of technology to use to provide video description, but would instead leave that to the discretion of the movie theater owners and operators. These

⁸ See Report to the Access Board: Refreshed Accessibility Standards and Guidelines in Telecommunications and Electronic and Information Technology (April 2008), <http://www.access-board.gov/sec508/refresh/report/>.

State Attorneys General said that such discretion in the selection of the type of technology was consistent with the statutory and regulatory scheme of the ADA and would permit any new regulation to keep pace with future advancements in captioning and video description technology. These same commenters stated that such discretion may result in a mixed use of both closed captioning and open captioning, affording more choices both for the movie theater owners and operators and for individuals who are deaf or hard of hearing. The Department has considered these points and has decided that this ANPRM should request additional comments regarding whether the Department should specifically require closed captioning or permit motion picture owners and operators to choose which type of captioning to provide in order to satisfy any regulatory requirements the Department might impose.

Representatives from the movie theater industry strongly urged the Department not to issue a regulation requiring captioning (but were silent as to requiring video description) at movie theaters. Some industry commenters also opposed any regulation by the Department in this area claiming that since the Access Board has not issued a regulation to require the exhibition of captioned and video described movies in public accommodations, the Department is precluded from so doing. These commenters misunderstood the allocation of regulatory authority under the ADA. The ADA authorizes the Access Board to issue design guidelines for accessible buildings and facilities and requires that the design standards for buildings and facilities included in regulations issued by the Department be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board. *See* 42 U.S.C. 12186(c). It is beyond the scope of the Access Board's authority to establish regulations governing aspects of ADA implementation unrelated to design and construction issues. The Department, by contrast, has broad regulatory authority to implement additional provisions of the ADA, including those requiring covered entities to ensure effective communication with their clients and customers.

Industry commenters also said that the cost of obtaining the equipment necessary to display closed captioned and video described movies would constitute an undue burden. One industry commenter stated that the cost of equipment to display both closed

captions and video description per screen can approach \$11,000, plus additional installation expenses. The Department is aware that there are costs associated with providing closed captioning and video description technology and that for some movie theater owners and operators, particularly independent or very small movie theater companies, obtaining captioning and video description equipment may indeed constitute an undue burden. However, after carefully considering the concerns raised about the costs of implementing captioning and video description technology, the Department needs additional, more specific, and more recent information on the issue of undue burden.

In addition, in an effort to spread out any implementation costs so that costs could be absorbed over time and would lessen any financial impact on theater owners and operators, the Department is considering a provision that would phase in compliance requirements. It is the Department's intention that such a provision, along with normal swings in supply and demand (*e.g.*, commenters noted that as more theaters purchase closed captioning and video description technologies, their costs will drop), could insulate many movie theater owners and operators from an undue burden.

Some industry commenters argued also that because the industry has made progress in making cinema more accessible without mandates to caption or describe movies, the Department should wait until the movie industry has completed its conversion to digital cinema to regulate. According to a commenter representing major movie producers and distributors, the number of motion pictures produced with closed captioning by its member studios had grown to 88 percent of total releases by the end of 2007, early 2008; the number of motion pictures produced with open captioning by its member studios had grown to 78 percent of total releases by the end of 2007, early 2008; and the number of motion pictures provided with video description has consistently ranged between 50 and 60 percent of total releases. This commenter explained that movie producers and distributors, not movie theater owners and operators, determine whether to caption, what to caption and describe, the type of captioning to use, and the content of the captions and video description script. In addition, the movie studios, not the movie theater owners and operators, assume the costs of captioning and describing movies. This commenter also said that movie theater owners and operators must only

purchase the equipment to display the captions and play the video description in their auditoriums. That said, several commenters stated that movie theater owners and operators rarely exhibit the movies with captions or descriptions. They estimated that less than 1 percent of all movies being exhibited in theaters are actually shown with captions.

The Department has carefully considered this information and acknowledges that significant strides have been made by movie producers in terms of furnishing movies that have the potential to make movies more accessible for individuals with disabilities. Despite these strides, however, the percentage of captioned and video described movies actually exhibited or made available in movie theaters appears to be disproportionately low by comparison. The Department is concerned about what appears to be a significant disconnect between the production of movies that have captioning and video description capabilities and the actual exhibition or availability of such movies to individuals with sensory disabilities. The Department also is concerned that even when captioned and video described movies are exhibited, their showings appear to be relegated to the middle of the week or midday showings. Commenters lamented that individuals with disabilities generally do not have the option of attending movies on days and times (e.g., weekends or evenings) when most other moviegoers see movies because movie theaters usually only show captioned or video described movies during the week at off-peak hours. The Department has not been persuaded that movie theaters have made such significant strides in making the current captioning and video description technology available to moviegoers with disabilities that regulatory action in this area would be unnecessary.

Industry commenters have requested that any regulation regarding captioning and video description be timed to occur after the conversion to digital cinema is complete. The Department is aware that in 2005, the movie industry began transitioning away from the exclusive use of analog films to exhibit movies to a digital mode of movie delivery. However, the completion date of that conversion has remained elusive. One industry commenter said while there has been progress in making the conversion, only approximately 5,000 screens, out of 38,794, have been converted, and the cost to make the remaining conversions involves an investment of several billion dollars. Some commenters have suggested that

completion of digital conversion may be 10 or more years in the future. The Department also is concerned that because of the high cost of converting to digital cinema (an industry commenter estimated that the conversion to digital costs between \$70,000 and \$100,000 per screen and that maintenance costs for digital projectors are estimated to run between \$5,000 and \$10,000 a year, approximately five times as expensive as the maintenance costs for film projectors) and current economic conditions, a complete conversion to digital cinema may be postponed or may not happen at all. For example, National Public Radio reported that "[f]or more than seven years, film studios and theaters have been hyping digital projectors and the crisp, clear picture quality they'll bring to movie screens. But the vast majority of the nation's cinemas are still using old analog projectors. * * * Despite the clear economic advantages of digital projection of the nation's more than 38,000 movie screens, only 2,200 have digital projectors." All Things Considered, Digital Projection in Theaters Slowed Down by Dispute (Mar. 21, 2007), available at <http://news.wvpubcast.org/templates/transcript/transcript.php?storyId=9047637>.

Whether a complete conversion to digital cinema will occur in a time certain, or not at all, is unknown. Even if the conversion of digital proceeds, until there is a complete digital conversion, at least some theaters will employ analog cinematography (i.e., 35 mm film) to exhibit movies. It is the Department's understanding that currently the vast majority of movie theaters in the United States exhibit film-based movies. Many, however, use a digital sound system (e.g., Digital Theater Systems, Dolby Digital, Sony Dynamic Digital Sound, etc.). Digital sound systems operate independently from analog projectors that deliver the visual portion of a movie. It is also the Department's understanding that the closed captioning and video description technology that is currently available requires a movie theater to have a digital sound system but that digital cinema is not necessary for the captioning and video description technology. Thus, because the Department has not been presented with any substantive information indicating that a complete conversion to digital cinema is necessary to provide individuals with disabilities the opportunity to attend a closed captioned or video described movie, and the date for any complete conversion to digital cinema is unclear,

at best, the Department believes that it may be unnecessary and inappropriate to wait to establish rules pertaining to closed captioning and video description for movies.

It appears that existing captioning and video description equipment can be used with digital cinema. Commenters appeared to agree that when theaters move to digital technology, both the caption data and video descriptions can be embedded into the digital signal that is projected. A few commenters said that the systems currently used to provide captioning and video description will not become obsolete once a theater has converted to digital cinema because their major components are compatible with, and can be used by, digital cinema systems. These commenters said that the only difference for a movie theater owner or operator using digital cinema is the way the data are delivered to the captioning and video description equipment in place in an auditorium. In other words, because closed captioning and video description equipment operates through the digital sound systems most theaters have, the fact that those sound systems may be integrated with the digital cinema system will not necessitate changing the captioning and description equipment, only the manner in which the data they project are delivered to the digital cinema system. The Department seeks additional and updated information on this point.

Finally, the Department is considering proposing that 50% of movie screens would offer captioning and video description 5 years after the effective date of the regulation. The Department originally requested guidance on any such figure in its 2008 NPRM. Individuals with disabilities, advocacy groups who represented individuals with disabilities, and eleven State Attorneys General advocated that the Department should require captioning and video description 100% of the time. Representatives from the movie industry did not want any regulation regarding captioning or video description. A representative of a non-profit organization recommended that the Department adopt a requirement that 50% of movies being exhibited be available with captioning and video description. The Department seeks further comment on this issue and is asking several questions regarding how such a requirement should be framed.

IV. Requests for Comments

While the Department has been persuaded by comments from individuals, advocacy groups, governmental entities, and at least some

representatives of the movie industry that the time may be right to issue regulations on captioning and video description at movie theaters, the Department has a series of questions concerning the details of how best to frame and implement any such requirements. The Department believes that input from interested parties and the public would prove to be very useful. Specifically, the Department is seeking additional comment in response to the following questions:

A. Coverage Issues

Question 1. The Department is considering proposing a regulation that contains a sliding compliance schedule whereby the percentage of movie screens offering closed captioning and video description increases on a yearly basis, beginning with 10 percent in the first year any such rule becomes effective, until the 50 percent mark is reached in the fifth year. Please indicate whether this approach achieves the proper balance between providing accessibility for individuals with sensory disabilities and giving movie theaters and owners sufficient time to acquire the technology and equipment necessary to exhibit movies with closed captioning and video descriptions. Also, if you believe that a different compliance schedule should be implemented, please provide a detailed response explaining how this should be accomplished and the reasons in support. Should a different compliance schedule be implemented for small businesses? If so, why? What should that schedule require?

Question 2. The Department is considering proposing regulatory language requiring movie theater owners and operators to exhibit movies with closed captions and movies with video description so that, after any sliding compliance scale has been achieved by the final year (e.g., at year 5), all showings of at least one-half of the movie screens at the theater will offer captioning and video description. We seek comment on the most appropriate basis for calculating the number of movies that will be captioned and video described: Should this be the number of screens located in a particular theater facility, the number of screens owned by a particular movie theater company, the number of different movies being screened in a particular theater facility, or some combination thereof? Should a different basis be used for small business owners? If so, why? What basis should be used? Please include an explanation of the advantages and disadvantages of each

option and the reasons a particular option is preferred over another.

Question 3. If the number of screens located in a particular theater facility is the preferred option, please explain whether the fact that some theaters show the same movie on multiple screens poses any concerns with regard to the number of movies being screened with captions and video descriptions, and if so, what they are and whether there are any ways to address those concerns. Does this option pose particular concerns to small businesses? If so, what are they? Please indicate whether the Department should include specific language in the regulation that states that the basis for calculating the number or percentage is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies.

Question 4. If the number of screens owned by a particular movie theater company is the preferred option, please explain whether there are any concerns about the geographic distribution of movies being screened with captions and video descriptions, and if so, what they are and whether there are any ways to address those concerns. Does this option pose particular concerns to small businesses? If so, what are they? Please indicate whether the Department should include specific language in the regulation that states that the basis for calculating the number or percentage of movies is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies.

Question 5. If the number of movies being screened in a particular movie theater facility is the preferred option, please indicate whether the Department should include specific language in the regulation that states that the basis for calculating the number or percentage of movies is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies. Does this option pose particular concerns to small businesses? If so, what are they?

Question 6. If some combination of these three methods is the preferred option, please explain that option and how it would be implemented. Should a different combination or percentage be used for small business owners? If so, why? What combination or percentage should be used for small business owners? Please indicate whether the

Department should include specific language in the regulation that states that the basis for calculating the number or percentage is the number of captioned and video described movies the theater receives from the movie producers in order to make clear that the owner has no independent obligation to caption or describe movies.

Question 7. Should any such regulation require that the same number or percentage of movies with video description be exhibited as required for movies with captioning or should a different number or percentage be imposed? If the latter, what would be the justification for distinguishing between these forms of access? Should small businesses use a different ratio or percentage of video described movies or should they also be required to exhibit the same number or percentage of video described and captioned movies as other entities?

Question 8. Should the Department adopt a requirement that movie theater owners and operators exhibit captioned and video described movies beginning on the day of their release? If not, why not (e.g., could such a requirement impose additional burdens and if so, what are they)? Should a different requirement be imposed on small business owners? If so, why? What should that requirement be?

Question 9. While the Department is not considering requiring the use of open captioning, should movie theater owners and operators be given the discretion to exhibit movies with open captioning, should they so desire, as an alternate method of achieving compliance with the captioning requirements of any Department regulation? If theaters opt to use open captioning, should they be required to exhibit movies with such captioning at peak times so that people with disabilities can have the option of going to the movies on days and times when other moviegoers see movies?

B. Digital Cinema

Question 10. How many movie theater owners or operators have converted, in whole or in part, to digital cinema? How many have concrete plans to convert 25 percent of their theaters in the next five years? Next ten years? How many have concrete plans to convert 50 percent of their theaters in the next five years? Next ten years? How many have concrete plans to convert 75 percent of their theaters in the next five years? Next ten years? What are the estimates for the cost for a movie theater to convert a movie auditorium to digital cinema? Are these costs different for small businesses? Have small businesses

entered into any cost-sharing agreements or other financing arrangements to assist in such a conversion?

Question 11. Have specific protocols or standards been developed for captioning and video description for digital cinema and, if so, what are they?

C. Equipment and Technology Questions

Question 12. Do the closed captioning and video description technologies currently available require the use of a digital sound system or digital cinema? Have technologies been developed that do not require the use of either a digital sound system or digital cinema in order to display open or closed captions and offer video description? If any new technologies have been developed, please explain how they work and what, if any, additional costs are associated with the purchase or use of such technologies? Are there technologies in development that will not require the use of a digital sound system or digital cinema in order to display captions or video description? If so, what are they and when are they expected to be available for use by movie theater owners and operators? Please explain what, if any, additional costs are associated with the purchase or use of such technologies.

Question 13. Is the existing closed captioning and video description equipment in use for digital sound systems compatible, or able to be integrated, with digital cinema systems? If not, why not? Are there additional costs associated with using this equipment with digital cinema systems? If so, please provide details. Are the costs different for small businesses? If so, why? What are they?

Question 14. With regard to closed captioning systems, is the ability to read the captions equally good throughout the movie theater or are there certain seats in the theater that provide an enhanced level of readability or line of sight both to the screen and the adjustable panel affixed at or near the patron's seat? If certain seats enable individuals who are deaf or hard of hearing to view movies more effectively, which seats are they and why are they better (e.g., the image is better, there are fewer obstructions, there is less need to continually adjust the panel, etc.)? Should movie theater owners and operators be required to hold such seats for individuals with disabilities who wish to use the theater's closed captioning system? Since movie theater seating is usually first-come, first-serve, is there an effective system that movie theaters would be able to implement to

hold back releasing such seats? Should movie theater owners and operators be allowed to release such seats if they are not requested within a certain amount of time before the start of the movie? Should movie theater owners and operators be allowed to release such seats to the general movie going audience once all of the other seats in the theater have been sold out? Are there alternatives for seating that minimize the cost but still provide patrons who are deaf or hard of hearing with effective and efficient readability of the captions and lines of sight to the screen?

Question 15. Are there other factors that the Department should include with regard to the display of captions or the use of video description? What is the cost of purchasing/incorporating video description equipment per screen/theater? Are the costs different for small businesses? If so, why? What are they?

Question 16. Has any specific equipment been developed or is there equipment in development for use with digital cinema that would be necessary to exhibit closed captioned movies or movies with video description? If so, is that equipment included in the general cost of the conversion to digital cinema or is an additional fee imposed? If an additional fee is imposed, please provide details. Are the costs different for small businesses? If so, why? What are they?

Question 17. Are there any other technical requirements that the Department should consider for inclusion in any regulation? If so, please provide details.

D. Notice Requirements

Question 18. Should the Department include a requirement that movie theater owners and operators establish a system for notifying individuals with disabilities in advance of movie screenings as to which movies and shows at its theaters provide captioning and video description? If so, how should such a requirement be structured? For example, should the Department require movie theater owners and operators to include, in their usual movie postings in the newspaper, on telephone recordings, and on the Internet, a notation or some other information that a movie is captioned, the type of captioning provided, or that the movie has video description? Should the Department require movie theater owners and operators to establish a procedure or method for directing individuals with sensory disabilities to where in each movie theater they should go to obtain any necessary captioning and video

description equipment? Should movie theater owners and operators have the discretion to determine what notification procedure or method is most appropriate or should the Department specify how and where individuals with disabilities can obtain such equipment at each theater? What are the costs for these types of notifications? Are there any alternative types of notifications possible? Are these costs different for small businesses? If so, why? What are they?

E. Training

Question 19. Should the Department consider including a training requirement for movie theater personnel? Should the Department require that movie theater owners and operators ensure that at least one individual working any shift at which a captioned or video described movie is being screened be trained on how any captioning and video description equipment operates and how to convey that information quickly and effectively to an individual with a disability who seeks help in using that equipment? What are the costs and burdens to implementing such a training requirement? Are these costs different for small businesses? If so, why? What are they? Would written and recorded explanations of how the equipment works be a better alternative?

F. Cost and Benefits of Movie Captioning and Video Description Regulations

Because this is an ANPRM, the Department is not required, at this time, to conduct certain economic analyses or written assessments that otherwise may be required for other more formal types of agency regulatory actions (e.g., notices of proposed rulemaking or final rules) that, for example, are deemed to be economically significant regulatory actions with an annual economic impact exceeding \$100 million annually or that are expected to have a significant economic effect on a substantial number of small entities or non-federal governmental jurisdictions (such as State, local, or tribal governments). See, e.g., Regulatory Flexibility Act of 1980, 5 U.S.C. 603-04 (2006); E.O. 13272, 67 FR 53461 (Aug. 13, 2002); E.O. 12866, 58 FR 51735 (Sept. 30, 1993), as amended by E.O. 13497, 74 Fed. Reg. 6113 (Jan. 30, 2009); OMB Budget Circular A-4, <http://www.whitehouse.gov/OMB/circulars/a004/a-4.pdf> (last visited June 5, 2010).

Nonetheless, one of the purposes of this ANPRM is to seek public comment on various topics relating to captioning and video description, including

perspectives from stakeholders concerning the benefits and costs of revising the Department's title III regulation to ensure the accessibility of movies (from both a quantitative and qualitative perspective), particularly from members of the disability community, industry, and governmental entities. The Department thus asks for information so that the Department can determine whether such a proposed rule (1) should be deemed an economically "significant regulatory action" as defined in section 3(f) of E.O. 12866; or (2) would have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act and, if so, consider suggested alternative regulatory approaches to minimize any such impact.

Consistent with the Regulatory Flexibility Act of 1980 and Executive Order 13272, the Department must consider the impacts of any proposed rule on small entities, including, in pertinent part, small businesses and small nonprofit organizations. See 5 U.S.C. 603-04 (2006); E.O. 13272, 67 FR 53461 (Aug. 13, 2002). The Department will make an initial determination as to whether any rule it proposes is likely to have a significant economic impact on a substantial number of small entities, and if so, the Department will prepare an initial regulatory flexibility analysis analyzing the economic impacts on small entities and regulatory alternatives that reduce the regulatory burden on small entities while achieving the goals of the regulation. In response to this ANPRM, the Department encourages small entities to provide cost data on the numbers of small entities that may be impacted by this rule, the potential economic impact of adopting a specific requirement for captioning and video description and recommendations on less burdensome alternatives, with cost information.

Question 20. The Small Business Administration size standard for small movie theatres is \$7 million dollars in annual gross revenues. Does the public have estimates of the numbers of small entities that may be impacted by future regulation governed by this ANPRM? How many small entities presently provide movie captioning or video description? How many small entities already have, or have plans to convert to, digital cinema? How many small entities presently have, or plan to convert to, digital sound systems? How much would it cost each small entity to provide movie captioning and video description technology using digital sound? How much would it cost each small entity to provide movie

captioning or video description if the entity converted to digital cinema?

Question 21. Currently, what are the general costs per movie theater owner or operator to display movies with closed captioning? How many small entities offer this feature? What are the general costs to small entities to display movies with open or closed captioning? For all entities, is that figure per auditorium, per facility, or per company? Do these costs change for showing IMAX or 3D films with captions? Are there any cost-sharing or cost-allocation agreements that help mitigate these costs for movie theater owners or operators? Is most or all of this expense a one-time fee? If not, please explain.

Question 22. Currently, what are the general costs per movie theater owner or operator to display movies with video description? How many small entities offer this feature? What are the general costs to small entities to display movies with video description? For all entities, is that figure per auditorium, per facility, or per company? Are there any cost-sharing or cost-allocation agreements that help mitigate these costs for movie theater owners or operators? Is most or all of this expense a one-time fee? If not, please explain.

Question 23. Currently, what are the general costs to convert to digital cinema? Are the costs different for small entities? If so, why? What are the costs for small entities? Is that figure per auditorium, per facility, or per company? Are there cost-sharing or cost-allocation agreements that help mitigate these costs for movie theater owners or operators?

Question 24. What impact will the measures being contemplated by the Department requiring captioning and video description of movies have on small entities? Please provide information on: (a) Capital costs for equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures; (c) any effects to sales and profits, including increases in business due to tapping markets not previously reached; and (d) changes to market competition as a result of the proposed rule.

Question 25. Should any category or type of movie theater be exempted from any regulation requiring captioning or video description? For example, the Department now considers it likely that drive-in theaters will not be subject to this rule because the Department is not aware of any currently available technology that would enable closed captioning or video description of movies shown in drive-in theaters. Are

there other types of movie facilities that should be exempted and why?

Question 26. If an exemption is provided, how should such an exemption be structured? Should it be based on the size of the company? To determine size, should the Department consider (a) using the Small Business Size Standard of \$7 million dollars in annual gross revenue so that movie theater owners who fall within those parameters should be exempt?; (b) using factors such as whether the movie theater owner is an independent movie house (not owned, leased, or operated by, a movie theater chain), or small art film house in order to be exempt?; or (c) using some other formula or factors to determine if a movie theater owner should be exempt? Should the Department consider the establishment of different compliance requirements or timetables for compliance for small entities, independent movie houses, or small art film houses to take into account the resources available to small entities? What are other alternatives for small businesses, independent movie houses, or small art film houses that would minimize the cost of future regulations?

Dated: July 21, 2010.

Thomas E. Perez,
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Division.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 926

[SATS No. MT-030-FOR; Docket ID No. OSM-2009-0007]

Montana Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; reopening and extension of public comment period on proposed amendment.

SUMMARY: We are announcing receipt of revisions pertaining to a previously proposed statutory amendment to the Montana regulatory program (hereinafter, the "Montana program") under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA" or "the Act"). Montana revised its original amendment proposal to remain consistent with SMCRA and Office of Surface Mining Reclamation and Enforcement ("OSM") policy. The