No. 16-2160

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PAUL RICHARD McGANN,

Plaintiff-Appellant

v.

CINEMARK USA, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLANT AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

This appeal concerns the proper interpretation of Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12181 *et seq.*, and its implementing regulation in the context of a movie theater's refusal to provide an auxiliary aid and service to a deaf-blind patron. The Department of Justice (Department) has substantial responsibility for enforcing and issuing regulations implementing Title III of the ADA (Title III). See 42 U.S.C. 12186(b), 12188(b);

28 C.F.R. Pt. 36. Accordingly, the United States has an interest in ensuring that Title III and its implementing regulation are properly interpreted and applied.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

QUESTION PRESENTED

The United States will address the following question:

Whether the auxiliary aids and services provision of Title III and its implementing regulation apply to a request that a movie theater provide American Sign Language (ASL) tactile interpretation to a deaf-blind patron so that he can enjoy a movie screening.

STATEMENT OF THE CASE

1. Statutory And Regulatory Background

The ADA establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Title III broadly prohibits discrimination based on disability "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. 12182(a). The statute specifically prohibits public accommodations from affording an unequal or lesser service to individuals with disabilities than is offered to individuals without disabilities. 42 U.S.C. 12182(b)(1)(A)(ii). To that end,

Title III requires public accommodations "to make reasonable modifications" in their "policies, practices, or procedures" when doing so is necessary to afford individuals with disabilities the public accommodations' goods and services, and "to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." 42 U.S.C. 12182(b)(2)(A)(ii)-(iii).

Auxiliary aids and services include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments"; "qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments"; and "other similar services and actions." 42 U.S.C. 12103(1)(A)-(B) and (D). A public accommodation is not required to provide an auxiliary aid or service, however, if doing so "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 ADA specifically identifies a movie theater as a public accommodation. 42 U.S.C. 12181(7)(C).

The Department has issued regulations to implement Title III's requirements. See 28 C.F.R. Pt. 36. The regulation implementing Title III's auxiliary aids and services requirement mirrors the statutory language in requiring

public accommodations to "take those steps that may be necessary to ensure that no individual is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services," unless "taking those steps would fundamentally alter the nature of the goods [and] services * * * being offered or would result in an undue burden, i.e., significant difficulty or expense." 28 C.F.R. 36.303(a); see also 28 C.F.R. 36.303(g).

The regulation provides a non-exhaustive list of auxiliary aids and services that Title III may require "where necessary to ensure effective communication with individuals with disabilities." 28 C.F.R. 36.303(b)-(c); see also 28 C.F.R. 36.104 (defining "qualified interpreter"). The Department's technical assistance on "effective communication" elaborates on these examples, explicitly identifying a "tactile interpreter" as an auxiliary aid that may be necessary for people who are deaf-blind. See Department of Justice, *ADA Requirements: Effective Communication* 2 (2014) (*Effective Communication Technical Assistance*), http://www.ada.gov/effective-comm.pdf. The regulation explains that "[t]he type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place." 28 C.F.R. 36.303(c)(1)(ii).

On August 1, 2014, the Department issued a Notice of Proposed Rulemaking (NPRM) proposing to amend the existing regulatory requirements on auxiliary aids and services to explicitly require movie theaters to exhibit movies with closed captioning and audio description, subject to the fundamental alteration and undue burden defenses. 79 Fed. Reg. 44,976.[1] The NPRM does not address the use of tactile interpreters in movie theaters. The final rule has not yet been issued.

2. Statement Of Facts And Proceedings

Plaintiff-Appellant Paul Richard McGann has Usher's Syndrome Type I; as a result, he was born deaf and progressively lost his sight starting at age five, until he became completely blind about 15 years ago. J.A. 5 (Op.). McGann can expressively communicate using ASL and receptively communicate using an ASL tactile interpreter. J.A. 5 (Op.). ASL is a unique language with its own idioms, grammar, and syntax; it is not merely translated English. J.A. 51 (Am. Joint Stipulations of Fact (AJSF)). Tactile interpretation can be accomplished in several ways, including the hand-over-hand method McGann most commonly uses, in

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[1] "Closed captioning" refers to captions that only the patron requesting the aid can see because the captions are delivered to the patron at the seat. "Audio description," transmitted to a patron's wireless headset, enables individuals with vision impairments to enjoy movies by providing a spoken narration of key visual elements. 79 Fed. Reg. at 44,976-44,977. "Audio description" is also sometimes called "descriptive narration." *Id.* at 44,983.

which he places his hands lightly upon the backs of the interpreter's hands to read the ASL signs. J.A. 5-6 (Op.).

McGann enjoys attending movies at theaters for various reasons, such as joining in discussions about movies with friends and family. J.A. 6 (Op.). He and his wife, who died in 2001, attended movies in theaters together, and his wife used tactile communication to convey aspects of the movies' audio and visual content to him. J.A. 55 (AJSF). Another movie theater chain, Carmike Cinemas, has voluntarily provided tactile interpreters for McGann at its theaters when requested. J.A. 56 (AJSF). Tactile interpretation for a movie longer than 90 minutes requires a team of two interpreters, who take breaks and switch places every 20 minutes. J.A. 10 n.1 (Op.). The interpreters communicate as much of the movie as possible, including visual, audio, and environmental aspects (such as other moviegoers laughing or crying). J.A. 10 n.1 (Op.). They do not communicate the movie's visual and audio elements in a verbatim manner. J.A. 10 n.1 (Op.); J.A. 54-55 (AJSF).

In late 2014, McGann became interested in attending a screening of the film *Gone Girl*. J.A. 6 (Op.). The movie was not then playing at a Carmike theater but was showing at Cinemark Robinson Township and XD Theater in Pennsylvania, which is owned by defendant-appellee Cinemark USA, Inc. (Cinemark). J.A. 6 (Op.); J.A. 47-48, 58 (AJSF). On December 4, 2014, McGann e-mailed that

theater requesting that Cinemark provide tactile interpreters for a showing. J.A. 6 (Op.); J.A. 58 (AJSF). After being advised to contact Lesley Pettengill, who works in Cinemark's Plano, Texas office, McGann did so. J.A. 6 (Op.). Cinemark estimated that the cost of providing the requested tactile interpreting services would be approximately $260. J.A. 64 (AJSF). On December 15, Pettengill denied McGann's request. J.A. 7 (Op.); J.A. 166-167 (Ex. 7).

On March 27, 2015, McGann filed a complaint against Cinemark under Title III. J.A. 30-39. After discovery, the parties agreed to present the case to a United States Magistrate Judge and rest on their trial briefs, an amended joint stipulation of facts, joint exhibits, and counsels' arguments. J.A. 7 (Op.).

McGann argued below that tactile interpretation is the only means by which he can enjoy the movie experience enjoyed by patrons without disabilities and that Cinemark discriminated against him under Title III by refusing to provide him tactile interpreters as an auxiliary aid. J.A. 10 (Op.). Cinemark, on the other hand, contended that Title III does not regulate the content of the goods or services provided and does not require the provision of goods or services specially designed for individuals with disabilities. J.A. 10 (Op.). In its view, furnishing tactile interpreters would constitute an additional or different service than it normally provides, not one that is supplementary, or "auxiliary," to a good or service already provided. J.A. 11 (Op.).

3. The District Court Decision

The district court, in an opinion by the chief magistrate judge, ruled that Title III does not require Cinemark to provide tactile interpreters upon request for movies it exhibits and entered final judgment in Cinemark's favor. J.A. 4-23. In reaching this decision, the court found Cinemark's so-called "access versus content" argument persuasive. J.A. 11.

First, the court relied primarily on decisions in which courts had rejected plaintiffs' claims that the ADA requires insurance companies to alter the content of their policies to make them more favorable to persons with disabilities. See J.A. 11-13 (citing *McNeil* v. *Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000); *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999)). Each of these courts used the example of a bookstore not being required to alter its inventory to stock Brailled books. *McNeil*, 205 F.3d at 187; *Doe*, 179 F.3d at 559-560. This example relates to a different Title III regulatory provision that clarifies that a public accommodation is not required "to alter its inventory to include 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, or special foods to meet particular dietary needs. 28 C.F.R. 36.307(a) and (c).

Second, the court determined that Title III's auxiliary aids and services regulation, 28 C.F.R. 36.303, did not apply to McGann's request for a tactile

interpreter. The court acknowledged that "qualified interpreters" are specifically cited by the statute and regulation as an example of an auxiliary aid or service, but it reasoned that an "*auxiliary*" aid is "necessarily one that is supplemental to that which is already provided and not an aid that provides something altogether new or different." J.A. 16 (citing www.Merriam-Webster.com/dictionary/auxilairy [sic]). Because the movie-screening service that Cinemark provides does not include tactile interpretation, the court concluded that tactile interpreters were not "auxiliary" to Cinemark's services. J.A. 17. The court distinguished contrary authority involving movie captioning on the ground that captioning, which the court thought "merely enhances the movies" (J.A. 19), is different from tactile interpreters, who provide "a separate service that is distinct from the movie itself" (J.A. 20-21).

Third, the district court agreed with Cinemark that "effective communication" for purposes of Title III was not at issue here. J.A. 21. The court believed that the communication contemplated by Title III must involve a two-way exchange between the public accommodation and the customer. But here, the court thought, Cinemark's screening of a movie, unlike information about ticket pricing, movie listings, and concessions, did not involve communication between Cinemark and McGann. J.A. 17 n.3, 21. In any event, the court added, the communication tactile interpreters would provide during a screening would not be

"effective" because they cannot provide "literal translation" of movies but instead make judgment calls about what to communicate. J.A. 21-22.

Accordingly, the court held that Cinemark was not required to provide McGann with tactile interpreters during a movie screening. Given that conclusion, the court said it need not reach Cinemark's fundamental alteration and undue burden defenses. J.A. 22 n.7 (citing 42 U.S.C. 12182(b)(2)(A)(ii)-(iii)). But the court added in a footnote that Cinemark's fundamental alteration defense is "coextensive" with the court's "access versus content" analysis and thus afforded another basis for denying McGann's claim. J.A. 22 n.7.

SUMMARY OF ARGUMENT

Title III's auxiliary aids and services requirement applies to a deaf-blind moviegoer's request for ASL tactile interpretation during a movie screening.

The ADA defines discrimination to include a public accommodation's "failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids or services." 42 U.S.C. 12182(b)(2)(A)(iii); accord 28 C.F.R. 36.303(a). An ASL tactile interpreter readily falls within the Act's and the regulation's definitions of "auxiliary aids and services." See 42 U.S.C. 12103(1)(A)-(B) and (D); 28 C.F.R. 36.303(b). Cinemark's obligation to provide tactile interpretation to McGann may be excused

only if doing so would "fundamentally alter" the nature of the service Cinemark offers or would result in an "undue burden." 42 U.S.C. 12182(b)(2)(A)(iii).

The district court's legal analysis in refusing to apply Title III's auxiliary aids and services requirement was seriously flawed in several respects.

First, the court incorrectly concluded that a movie theater cannot be required to provide tactile interpreters because doing so would alter the *content* of the theater's services. The court's reasoning would gut the auxiliary aids and services requirement. The service at issue here is screening movies. Tactile interpretation, like any form of interpretation, necessarily changes the *format* in which movies are communicated to those with sensory disabilities. But the use of an auxiliary aid does not change the *content* of that service. Rather, auxiliary aids are the *means* by which individuals with communication disabilities can gain access to a public accommodation's goods and services. See 42 U.S.C. 12182(b)(2)(A)(iii); 28 C.F.R. 36.303. Indeed, the Department's technical assistance on "effective communication" explicitly identifies a "tactile interpreter" as an auxiliary aid that may be necessary for deaf-blind individuals. *Effective Communication Technical Assistance* 2.

Second, the court erred in ruling that McGann did not seek an "auxiliary" aid or service because it believed an "*auxiliary*" aid is "necessarily one that is supplemental to that which is already provided" and not one "that provides

something altogether new or different." J.A. 16 (citation omitted). But, as the Ninth Circuit correctly emphasized in rejecting this same argument in *Arizona* v. *Harkins Amusement Enterprises, Inc.* (*Harkins*), "the ADA provides its *own* definition of 'auxiliary aids and services.'" 603 F.3d 666, 674 (9th Cir. 2010) (emphasis added) (citing 42 U.S.C. 12103(1)). Tactile interpretation falls comfortably within that definition.

Third, the court was wrong in determining that McGann's request for tactile interpreters did not implicate Title III's "effective communication" requirement. Screening a movie by its nature involves communicating both aural and visual content to moviegoers, thereby triggering the effective communication requirement. Equally mistaken was the court's conclusion that providing McGann with tactile interpreters would not be "effective" because interpreters do not provide literal translations of movies. The same can be said for any interpreter interpreting any kind of communication; yet qualified interpreters are specifically covered by the statute. 42 U.S.C. 12103(1).

Because Title III's auxiliary aids and services requirement applies to McGann's request for tactile interpretation, this Court should reverse and remand for consideration of Cinemark's fundamental alteration and undue burden defenses.

Fundamental alteration is an affirmative defense. See 42 U.S.C. 12182(b)(2)(A)(iii). It is unlikely that Cinemark can meet its burden of proving it, because Title III excuses only *fundamental* alterations. See, *e.g.*, *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 683 (2001). Exhibiting movies while providing tactile interpreters to a deaf-blind patron in no way alters—fundamentally or otherwise—the theater's service. For every moviegoer who does not have a sensory disability, the "fundamental character" of the movie screening remains unchanged. For those few patrons who are deaf and blind, tactile interpretation simply makes exhibition of the movie's content accessible, as required by Title III.

The United States takes no position on whether there is an undue burden in this case.

ARGUMENT

I

TITLE III'S AUXILIARY AIDS AND SERVICES REQUIREMENT APPLIES TO A DEAF-BLIND MOVIEGOER'S REQUEST FOR ASL TACTILE INTERPRETATION

A. ASL Tactile Interpretation Is The Means Of Providing Access To Cinemark's Service Of Screening Movies

Title III's auxiliary aids and services requirement applies to McGann's request that Cinemark provide ASL tactile interpreters for a movie screening.

1. Title III defines discrimination to include a public accommodation's "failure to take such steps as may be necessary to ensure that no individual with a

disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." 42 U.S.C. 12182(b)(2)(A)(iii); accord 28 C.F.R. 36.303(a). An ASL tactile interpreter falls within the Act's and the regulation's definitions of "auxiliary aids and services." See 42 U.S.C. 12103(1)(A)-(B) and (D); pp. 3-4, *supra*; see also 28 C.F.R. 36.303(b); 28 C.F.R. 36.104 (defining "qualified interpreter"). The Department's regulatory guidance on Title III's auxiliary aids and services requirement specifically advises that "if a deaf and blind individual needs interpreting services," an interpreter qualified to meet those needs "may be required." 28 C.F.R. Pt. 36, App. A, at 746 (2015). And the Department's technical assistance explicitly identifies a "tactile interpreter" as an auxiliary aid that may be necessary for deaf-blind individuals. *Effective Communication Technical Assistance* 2.

The Department's interpretation of its Title III regulation is entitled to substantial deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); accord *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations."); see also *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (Department's views regarding Title III "entitled to deference").

The service at issue here is screening movies. See *Arizona* v. *Harkins Amusement Enters., Inc.*, 603 F.3d 666, 674 (9th Cir. 2010). The use of an auxiliary aid—here, a tactile interpreter—to make that service accessible to individuals with sensory disabilities does not alter the *content* of that service, as the district court believed. Both the statute and the regulation make clear that auxiliary aids are the *means* by which individuals with communication disabilities can gain access to a public accommodation's goods and services. See 42 U.S.C. 12182(b)(2)(A)(iii); 28 C.F.R. 36.303. As the Department's Technical Assistance Manual explains, "[a] public accommodation is required to provide auxiliary aids and services that are necessary to ensure equal access" to the goods and services it offers. Department of Justice, *Americans with Disabilities Act: ADA Title III Technical Assistance Manual* § III-4.3100 (*TAM*), http://www.ada.gov/taman3.html. One court aptly put it this way: "[I]t is essential to accurately identify the principal goods or services that are being provided" and distinguish them from "the *means* for perceiving those services (*e.g.*, hearing, seeing, closed captioning, assistive listening devices), * * * which a public accommodation may, in some instances, be required to alter in order to facilitate * * * receipt of the principal goods and services by persons with disabilities." *Independent Living Res.* v. *Oregon Arena Corp.*, 982 F. Supp. 698, 734 n.49 (D. Or. 1997).

To that end, multiple courts have recognized that, subject to the fundamental alteration and undue burden defenses, Title III requires public accommodations exhibiting movies and other entertainment to afford auxiliary aids and services to patrons with visual and hearing impairments so that they may access and enjoy their services. See, *e.g.*, *Harkins*, 603 F.3d at 672-675 (Title III requires closed captioning and descriptive narration in movie theaters, subject to defenses, so that visually or hearing impaired patrons may have equal access to movie content); *Feldman* v. *Pro Football, Inc.*, 419 F. App'x 381, 390-393 (4th Cir. 2011) (defendants must provide auxiliary aids and services to convey aural content of game-related information, public service announcements, and entertainment broadcast over FedEx Field's public address system at professional football games); *Ball* v. *AMC Entm't, Inc.*, 246 F. Supp. 2d 17, 23 (D.D.C. 2003) (closed captioning of movies "clearly fits within the category of auxiliary aids and services that can be required under the ADA, because it serves as an 'effective method[] of making aurally delivered materials available to individuals with hearing impairments'") (alteration in original; citation omitted); see also *Washington State Commc'n Access Project* v. *Regal Cinemas, Inc.*, 293 P.3d 413, 424-425 (Wash. Ct. App. 2013) (construing state statute similar to ADA to require movie theaters to make movie screenings "understandable" to patrons with disabilities).

Courts likewise have found violations of Titles II or III of the ADA or of similar requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, in cases where public accommodations or other entities failed to provide sign language interpreters. See, *e.g.*, *Chisolm* v. *McManimon*, 275 F.3d 315, 328-329 (3d Cir. 2001) (reversing and remanding for determination whether detention center could have provided an ASL interpreter at critical points during plaintiff's detention); *Rothschild* v. *Grottenthaler*, 907 F.2d 286, 293 (2d Cir. 1990) (school system must provide students' deaf parents with a sign language interpreter for activities involving their children's academic or disciplinary progress); *Majocha* v. *Turner*, 166 F. Supp. 2d 316, 318-324 (W.D. Pa. 2001) (denying summary judgment to pediatrician who rejected deaf father's request for ASL interpreter to discuss son's surgery).[2]

The district court's logic in refusing to apply Title III's auxiliary aids and services provision renders the requirement meaningless. It is true, as the court

[2] In addition to other settlement agreements involving sign language interpreters, see note 5, *infra*, the Department has entered into an agreement with a county sheriff's department, in a case brought under Title II of the ADA, requiring it to "ensure that appropriate auxiliary aids and services, including qualified interpreters, and specifically tactile interpreters, are made available to all individuals who are deaf, hard of hearing, or deaf-blind" where needed for effective communication. *Settlement Agreement Between United States of America and the County of Alameda Sheriff's Office* ¶ 13 (2010), http://www.ada.gov/bonner.htm.

observed, that providing tactile interpreters is not a service Cinemark normally offers. J.A. 17. Tactile interpretation, like any form of interpretation, necessarily changes the format in which movies are communicated to those with sensory disabilities. But that is precisely *the purpose* of auxiliary aids such as captioning, ASL interpretation, audio recordings, Brailled materials, etc.: to change the means of delivering the service to make it accessible to people with communication disabilities. See 42 U.S.C. 12182(b)(2)(A)(iii); 28 C.F.R. 36.303. Thus, sign language interpreters, who convert aurally delivered information into visual or tactile components and vice versa, are an auxiliary aid because they provide the *means* for making that aurally delivered information accessible to persons who are deaf or hard of hearing. 28 C.F.R. 36.303(b)(1). In reasoning that McGann is not entitled to an ASL tactile interpreter because that request—unlike one for, say, a different seating arrangement—is for a service not also offered to non-disabled moviegoers (J.A. 18), the court missed the whole point of Title III's auxiliary aids and services requirement.

2. In reaching its conclusion, the district court relied on two cases that upheld limitations on insurance coverage for particular disabilities. J.A. 11-13 (citing *McNeil* v. *Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000); *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999)). Each court in these insurance cases reasoned that the ADA does not require a seller to alter the content of the

goods and services it offers, and in explaining its ruling, each court used the example of a bookstore not being required to alter its inventory to stock Brailled versions of books. See *McNeil*, 205 F.3d at 186-188; *Doe*, 179 F.3d at 559-563. That example is based on a different Title III regulatory provision—unrelated to auxiliary aids and services—which clarifies that a public accommodation is not required to alter its inventory to include 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, or special foods to meet particular dietary needs. 28 C.F.R. 36.307(a) and (c).[3] The district court also invoked this provision in explaining that tactile communication "appear[ed] to constitute a special good or service specifically designed for deafblind patrons that Cinemark does not normally provide." J.A. 22 n.6 (citing 28 C.F.R. 36.307(a)).

The court's reliance on the accessible or special goods regulation, 28 C.F.R. 36.307, and the insurance cases was misplaced.

That regulation, with its bookstore illustration, has no application here. For one thing, McGann did not ask Cinemark to change the movies it screens. Equally important, as the district court aptly observed in *Ball* when rejecting this same

[3] A bookstore would be required to order accessible books, however, if it normally makes special requests for unstocked goods, and if the accessible or special good (*i.e.*, Brailled books) could be obtained from the bookstore's customary supplier. See 28 C.F.R. 36.307(b).

argument, movie theaters are "not similarly-situated to bookstores and video stores that provide goods because Defendants provide the *service* of screening first run movies." 246 F. Supp. 2d at 24. Section 36.307, by contrast, "concerns '[a]ccessible or special *goods*.'" *Ibid.* (brackets in original); cf. *Jancik* v. *Redbox Automated Retail, LLC*, No. SACV 13-1387-DOC, 2014 WL 1920751, at *6 (C.D. Cal. May 14, 2014) (Title III does not require Redbox kiosks to carry closed-captioned DVDs unless Redbox ordinarily accepts special orders in the regular course of business).

The insurance coverage cases are equally inapposite. These cases are about altering the content of insurance policies; they do not concern using auxiliary aids to *access* the content of a good or service. As the Ninth Circuit explained in *Harkins*, although these insurance cases support the general proposition that the ADA does not require a public accommodation to change the goods or services it provides, they do not address or purport to limit the requirement in 42 U.S.C. 12182(b)(2)(A)(iii) that a public accommodation provide auxiliary aids so that a customer may gain access to the content of its services. 603 F.3d at 671-672. Indeed, as *Harkins* recognized: "By its very definition, an auxiliary aid or service is an additional and different service that establishments must offer the disabled." *Id.* at 672.

The district court further erred in relying on a magistrate judge's recommendation in *Cornilles* v. *Regal Cinemas, Inc.* for the notion that Title III requires nothing more than "access to the physical environment" of the public accommodation. J.A. 14 (quoting *Cornilles* v. *Regal Cinemas, Inc.*, No. Civ. 00-173-AS, 2002 WL 31440885, at *2 (D. Or. Jan. 3, 2002), adopted in part and rejected in part, 2002 WL 31469787 (D. Or. Mar. 19, 2002)). Upon review of that recommendation, the district court in *Cornilles* rightly rejected this portion of the magistrate judge's analysis. 2002 WL 321469787, at *1.[4] The Ninth Circuit refuted a similar claim in *Harkins*, emphasizing that "a courthouse that was accessible only by steps could not avoid ADA liability by arguing that everyone—including the wheelchair bound—has equal access to the steps." 603 F.3d at 672. Similarly, an office building could not avoid having to put Braille numbering on its elevator buttons "by arguing that everyone—including the blind—has equal access to the written text." *Ibid.*

3. The district court compounded these analytical errors by approving Cinemark's analogy between its service of screening movies and an art gallery displaying paintings or a concert hall performing music. J.A. 15. The court

[4] The district court in *Cornilles* agreed with the recommendation that defendants need not install closed-captioning systems, but on cost grounds alone, rejecting the magistrate judge's other findings. 2002 WL 31469787, at *1.

incorrectly assumed that neither of these types of public accommodations is required under the ADA to ensure that the content of paintings or performances is accessible to patrons with disabilities. According to the court, art galleries do not provide verbal descriptions of their paintings, and concert halls do not provide visual interpretations of the music being performed. J.A. 15. The court assumed that only if an art gallery provided docent-led tours of its paintings would it potentially be required to make auxiliary aids available so that patrons with disabilities "may access that service which is normally provided." J.A. 17. But here, the court said, because Cinemark "does not interpret movies for any of its patrons, providing verbal descriptions or aural interpretations would be an additional or different service than it normally provides" and thus not required under the ADA. J.A. 16.

Unsurprisingly, the court cited no authority supporting its assumption that art galleries and concert halls are not required to make the content of their services accessible. Not only is that assumption inconsistent with Title III (and, concerning concert halls, with the Fourth Circuit's decision in *Feldman*), but it is belied by the Department's exercise of its enforcement authority over the past two decades. The Department has entered into various settlement agreements with museums and concert venues to require them to make the content of their displays and

performances accessible to persons with visual and hearing disabilities.[5] Any request for auxiliary aids and services, of course, remains subject to the public accommodation's fundamental alteration and undue burden defenses. 42 U.S.C. 12182(b)(2)(A)(iii); see *TAM* § III-4.3600 (suggesting it may be an undue burden for a small historic house museum on a shoestring budget to provide a sign language interpreter).

B. ASL Tactile Interpretation Is An "Auxiliary" Aid Or Service, And A Movie Screening Is Subject To Title III's "Effective Communication" Requirement

The district court further erred in holding that McGann did not seek an "auxiliary" aid or service and that the requirement of "effective communication" was not implicated by his request.

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[5] See, *e.g.*, *Settlement Agreement Between the United States of America and the International Spy Museum* ¶¶ 24-25 (2008), http://www.ada.gov/spymuseum.htm (requiring museum to "provide auxiliary aids and services to ensure that the content of its exhibitions, public programs and other offerings is accessible and effectively communicated to individuals with hearing and vision impairments"); *Settlement Agreement Between the United States of America and the Mount Vernon Ladies' Association of the Union* ¶ 21 (2010), http://www.ada.gov/mt_vernon/mtvernon.htm (same for Mount Vernon); *Settlement Agreement Between the United States of America and the New Orleans Jazz and Heritage Foundation, Inc.* ¶ 2(b) (2001), http://www.ada.gov/nojazz.htm (requiring sign language interpretation of musical events and performances at "Jazz Fest"); Doc. 42, at 1, 3, 7, 8-9 (district court docket) (*Settlement Agreement Between the United States of America and the Warner Theatre* (1997) (requiring Warner Theatre to provide sign language interpretation of performances for customers with hearing impairments); *Settlement Agreement Between the United States of America and Sledge Inc., D/B/A The 9:30 Club* (requiring 9:30 Club to provide song set lists and lyrics and, upon request, sign language interpretation of performances for customers with hearing impairments)).

1. The court determined that Title III's auxiliary aids and services regulation, 28 C.F.R. 36.303, was inapposite because, in its view, an aid that is "*auxiliary*" is "necessarily one that is supplemental to that which is already provided and not an aid that provides something altogether new or different." J.A. 16 (citing www.Merriam-Webster.com/dictionary/auxilairy [sic]). The court was wrong from the standpoints of both semantics and statutory interpretation. The dictionary cited by the court defines "auxiliary" in part as "supplementary," http://www.merriam-webster.com/dictionary/auxiliary, and defines "supplementary" in part as "additional," http://www.merriam-webster.com/dictionary/supplementary. "Additional" is an eminently reasonable description of what an auxiliary aid or service is—an "additional" aid or service. See *Harkins*, 603 F.3d at 672 ("By its very definition, an auxiliary aid or service is an *additional* and different service that establishments must offer the disabled.") (emphasis added). More importantly, however, as the Ninth Circuit emphasized in rejecting this same argument, "the ADA provides its *own* definition of 'auxiliary aids and services.'" *Id.* at 674 (emphasis added) (citing 42 U.S.C. 12103(1)). As discussed above, tactile interpretation easily falls within that definition.

2. Equally problematic was the district court's determination that Title III's "effective communication" requirement was not at issue. J.A. 21. Cinemark is required to ensure that the content of its services—here, screening movies—is

effectively communicated to its patrons. See 28 C.F.R. 36.303(c). That requirement applies regardless of whether patrons have anything to communicate in return to Cinemark. As the Department's technical assistance on "effective communication" explains, "the purpose of the effective communication rules is to ensure that the person with a communication disability *can receive information from*, and convey information to, the covered entity." *Effective Communication Technical Assistance* 5 (emphasis added). Although the court assumed that exhibiting a movie does not qualify as communication (J.A. 21), the very nature of this service involves communicating both aural and visual content to moviegoers, thereby triggering the effective communication requirement. If it were otherwise, cases holding that Title III requires movie theaters and other entertainment venues to provide auxiliary aids and services would lack legal foundation. See, *e.g.*, *Harkins*, 603 F.3d at 672-675; *Feldman*, 419 F. App'x at 390-393; *Ball*, 246 F. Supp. 2d at 23.

The district court distinguished *Ball* and *Feldman* on the ground that tactile interpreters are different from movie captioning. J.A. 18-21. In the court's view, captioning "merely enhances the movies," unlike tactile interpreters, who provide "a separate service that is distinct from the movie itself." J.A. 19-21. But the ADA does not favor one type of auxiliary aid over another. See 28 C.F.R. 36.303(b)(1) (listing both qualified interpreters and captioning as examples of

auxiliary aids and services). The circumstances dictate which auxiliary aid or service is appropriate. 28 C.F.R. 36.303(c)(1)(ii).

Nor was the court correct in suggesting that tactile interpretation stands on an inferior legal footing to captioning and other aids because, according to the court, the Department has recognized that assisted listening devices, closed captioning, and descriptive narration "are now required under the ADA." J.A. 19 (citing 73 Fed. Reg. 34,529-34,531 (June 17, 2008); 1991 Standards for Accessible Design § 4.33.7, 28 C.F.R. Pt. 36, App. D; 2010 ADA Standards for Accessible Design (2010 Standards) § 706, https://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards.pdf)).[6] Although there is a current regulatory requirement that assembly areas, including movie theaters, provide assistive listening systems, see 2010 Standards §§ 106.5, 219, 706,[7] the Department has issued only an NPRM, 79 Fed. Reg. 44,976 (Aug. 1, 2014), not a final rule, regarding movie theaters' obligation to exhibit movies with closed captioning and audio descriptions. Thus, there is no explicit regulatory

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[6] The district court cited the 2008 rulemaking, but the Department decided to address separately movie theaters' obligations to exhibit movies with captioning and audio descriptions in a later NPRM. 75 Fed. Reg. 56,287 (Sept. 15, 2010).

[7] An assistive listening system is "[a]n amplification system utilizing transmitters, receivers, and coupling devices * * * by means of induction loop, radio frequency, infrared, or direct-wired equipment." 2010 Standards § 106.5.

requirement currently in place that requires movie theaters to provide any particular auxiliary aid or service (*e.g.*, closed captioning, audio description, or tactile interpretation) as a matter of course. "The proposed rule for captioning and audio description rests on the *existing* obligation of title III-covered facilities—such as movie theaters—to ensure that persons with disabilities receive 'full and equal enjoyment' of their respective goods and services, including, as needed, the provision of auxiliary aids and services." 79 Fed. Reg. at 45,004 (emphasis added); see also *id.* at 44,977, 44,992 (reiterating covered entities' obligation to ensure effective communication with individuals with disabilities). That existing obligation applies with no less force to a request for tactile interpretation than for more common auxiliary aids and services.

What is more, the court's conclusion that providing McGann with tactile interpreters would not be "effective" because tactile interpreters do not provide literal translations of movies does not withstand scrutiny. J.A. 21-22. The same could be said for *any* interpreter interpreting any kind of communication; yet qualified interpreters are specifically covered by the statute. 42 U.S.C. 12103(1). Certainly sign language interpreters do not produce a verbatim translation of the communications they are interpreting because, as noted above, ASL is a unique language with its own idioms, grammar, and syntax; it is not merely translated English. J.A. 51 (AJSF); see also Department of Health & Human Services,

National Institute on Deafness and Other Communication Disorders, *American Sign Language* 2 (2015), https://www.nidcd.nih.gov/sites/default/files/Documents/health/hearing/NIDCD-American-Sign-Language.pdf ("ASL is a language completely separate and distinct from English."); *EEOC* v. *UPS Supply Chain Solutions*, 620 F.3d 1103, 1105 (9th Cir. 2010) (describing ASL as "a visual, three-dimensional, non-linear language [whose] grammar and syntax differ from the grammar and syntax of English and other spoken languages"). The district court's reasoning that the absence of verbatim translation means that communication cannot be "effective," and hence no auxiliary aid is required, would nullify the auxiliary aids and services mandate.

Notably, for a person with a disability to gain "full and equal enjoyment" of a service, 42 U.S.C. 12182(a), it is not necessary that the person be able to "achieve an identical result or level of achievement as persons without a disability." *Feldman*, 419 F. App'x at 392 (quoting 28 C.F.R. Pt. 36, App. [C] (discussing 28 C.F.R. 36.201)); *Argenyi* v. *Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (similar point under Section 504). A tactile interpreter can provide McGann "effective communication" even though his experience of a movie will not be identical to that of a person without a disability.[8]

[8] The district court also downplayed the need for tactile interpretation to communicate environmental aspects of the movie experience, because "viewer

(continued…)

For all these reasons, the district court erred in refusing to apply the auxiliary aids and services provision of Title III and its implementing regulation to McGann's request for tactile interpretation.

II

THIS COURT SHOULD REVERSE AND REMAND FOR CONSIDERATION OF CINEMARK'S DEFENSES

Because the auxiliary aids and services requirement applies to McGann's request, this Court should reverse and remand for consideration of Cinemark's fundamental alteration and undue burden defenses. See 42 U.S.C. 12182(b)(2)(A)(iii).

A. Providing Tactile Interpretation For A Deaf-Blind Moviegoer Is Unlikely To Fundamentally Alter The Nature Of The Movie-Screening Service

The district court suggested in a footnote that Cinemark's fundamental alteration defense is "coextensive" with the court's "access versus content" analysis and thus afforded another basis for rejecting McGann's claim. J.A.

(…continued)
reactions are not something Cinemark provides but is merely a by-product of the movie itself." J.A. 18 n.5. But the court ignored the requirement that public accommodations "consider[] how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience." *Baughman* v. *Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012). Even Cinemark admits that the movie experience it provides consists of more than just viewing a film. See J.A. 49 (AJSF) ("[P]eople 'come to the theatre to watch a movie, not just sit in a seat. We wouldn't let someone into an empty auditorium.'").

22 n.7. That conclusory assertion does not provide an alternative ground for affirmance and is likely wrong in any event. For the reasons discussed above, the court erred in determining that a tactile interpreter would alter the content of Cinemark's service; instead, a tactile interpreter would provide McGann the *means*—indeed, the *only* means—by which he can access the theater's services. The statute's fundamental alteration defense does not provide a better home for the court's faulty reasoning.

Fundamental alteration is an affirmative defense; thus, Cinemark bears the burden of proving it. See 42 U.S.C. 12182(b)(2)(A)(iii) (requiring entity to take necessary steps to provide auxiliary aids and services "unless *the entity can demonstrate* that taking such steps would fundamentally alter" its goods or services) (emphasis added); see also *National Fed'n of the Blind* v. *Lamone*, 813 F.3d 494, 508 (4th Cir. 2016); *Lentini* v. *California Ctr. for the Arts*, 370 F.3d 837, 845 (9th Cir. 2004); *Johnson* v. *Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997).

It is unlikely that Cinemark can meet that burden. Title III excuses only *fundamental* alterations. 42 U.S.C. 12182(b)(2)(A)(ii)-(iii). "A fundamental alteration is a modification that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered." *TAM* § III-4.3600; see, *e.g.*, *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 683 (2001)

(concluding that requested modification of using a golf cart while others walked the course was not a fundamental alteration because it was not "inconsistent with the fundamental character" of the service provided by PGA Tour); see also *Fortyune* v. *American Multi-Cinema, Inc.*, 364 F.3d 1075, 1084 (9th Cir. 2004) (requiring movie theater to ensure availability of seats for companions of patrons using wheelchairs would "have a negligible effect—if any—on the nature of the service provided by [a theater] screening films").

As discussed above, a movie theater screens movies. Exhibiting movies while providing tactile interpreters to a deaf-blind patron in no way alters—fundamentally or otherwise—the theater's service. Indeed, Cinemark concedes that the use of tactile interpretation does not change the movie exhibited in any way. J.A. 65 (AJSF). Carmike Cinemas has accommodated McGann on several occasions, apparently without complaint. J.A. 56, 63 (AJSF). For every patron in the theater who does not have a sensory disability and does not request an auxiliary aid, the "fundamental character" of the movie screening remains wholly unchanged. Cf. *Arizona* v. *Harkins Amusement Enters., Inc.*, 603 F.3d 666, 673 (9th Cir. 2010) (only individual moviegoers, not entire audience, can see closed captions); see also note 1, *supra*. For those few patrons who are deaf and blind—and McGann's is the *only* request for tactile interpreters that Cinemark has ever received (J.A. 68 (AJSF))—tactile interpretation simply makes exhibition of the

movie's content accessible, as required by Title III. 42 U.S.C. 12182(a) and (b)(2)(A)(iii).

B. Cinemark's Undue Burden Defense Should Be Considered On Remand

"Undue burden" is another affirmative defense that must be proved by Cinemark. See 42 U.S.C. 12182(b)(2)(A)(iii). An "undue burden" means a "significant difficulty or expense." 28 C.F.R. 36.104, 36.303(a). The regulations identify factors the court should consider on remand in determining whether providing tactile interpreters to McGann would result in an undue burden. Such factors include the action's nature and cost and the overall financial resources of the public accommodation (and any parent corporation) involved. 28 C.F.R. 36.104 (defining "undue burden"); see also *TAM* § III-4.3600.

The United States takes no position on whether there is an undue burden in this case.

CONCLUSION

The Court should reverse the district court's judgment and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rules 28.3(d) and 46.1(a), I hereby certify that I am exempt from the Third Circuit's bar admission requirement as counsel representing the United States.

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Date: July 18, 2016

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1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 6,995 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Date: July 18, 2016

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I hereby certify that on July 18, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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