

**Before the
DEPARTMENT OF JUSTICE
Washington, D.C. 20005**

Nondiscrimination on the Basis of)	
Disability by Public Accommodations –)	CRT Docket No. 126
Movie Theaters; Movie Captioning and)	
Audio Description)	RIN 1190-AA63

COMMENTS OF CONSUMER GROUPS
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

**National Association of the Deaf
Telecommunications for the Deaf and Hard of Hearing, Inc.
California Coalition of Agencies Serving the Deaf and Hard of Hearing
American Association of the Deaf-Blind
Cerebral Palsy and Deaf Organization
Autistic Self Advocacy Network**

The National Association of the Deaf (NAD), Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), California Coalition of Agencies Serving the Deaf and Hard of Hearing (CCASDHH), American Association of the Deaf-Blind (AADB), Cerebral Palsy and Deaf Organization (CPADO), and Autistic Self Advocacy Network (ASAN) (collectively, the “Consumer Groups”), respectfully submit these comments in response to the Department of Justice’s (“DOJ”) August 1, 2014 Notice of Proposed Rule-Making (NPRM) in the above-referenced proceeding which seeks comments on its proposal to amend title III of the Americans with Disabilities Act (ADA) to require movie theaters to provide closed movie captioning and audio description.¹

A subset of the Consumer Groups joined with the National Association of Theater Owners (NATO) in making recommendations to the Department of Justice along with a list of voluntary action. The full set of Consumer Groups listed here fully supports those recommendations, and urge their adoption. The purpose of these comments is to provide separate recommendations and input on the NPRM, specifically areas not covered in the joint recommendations. The Consumer Groups appreciate that the DOJ is broadly requiring closed captioning access in theaters across the country, and urge the requirement of open captioning as well. We respond below to specific questions in the NPRM.

¹ *Nondiscrimination on the Basis of Disability by Public Accommodations – Movie Theaters; Movie Captioning and Audio Description*, Notice of Proposed Rulemaking, CRT Docket No. 126, RIN 1190-AA63 (rel. Aug. 1, 2014).

INTRODUCTION

As advocacy organizations for people who are deaf or hard-of-hearing as well as other disabilities, we applaud the Department's Notice of Proposed Rule-Making on movie captioning and audio descriptions. The conversion to digital projection and distribution is now virtually complete. The cost of providing closed captions with digital projection is so nominal that all but the smallest theaters should be able to offer 100% captioning capability. Moreover, the option of open captioning is available at no out-of-pocket cost, which means that every digital theater in America can make every movie accessible to people who are deaf or hard-of-hearing.

The organizations filing these comments are groups that advocate for and are largely comprised of individuals who are deaf or hard of hearing or who have auditory processing difficulties such as Sensory Processing Disorder. All are non-profit membership-based organizations, and many have been involved in the successful litigation concerning movie captioning cited in the NPRM. In the aftermath of each of those cases, the defendant theaters agreed to provide closed captioning in 100% of their digital theaters. Many other theaters have done the same. We are not aware of a single digital theater anywhere in the country that has shut its doors due to an actual or potential requirement that it display closed captions. The NPRM essentially mandates nationally the results that have occurred in many parts of the country, particularly in the jurisdictions where litigation has taken place. We believe that this mandate is appropriate and achievable.

This comment is being submitted to supplement what was jointly recommended by the National Association of Theater Owners (NATO) and a subset of the Consumer Groups. In the Joint Recommendations, these groups gave specific recommendations on: the closed captioning device scoping requirements starting with a minimum level correlated to the size of the theater but primarily based on consumer demand; a compliance period that reflects the need to order and implement the necessary number of devices; optimal marketing to reach the relevant deaf and hard of hearing consumers; and the need for appropriate and diligent equipment maintenance and staff training. Again, these commenters fully support those Joint Recommendations, but wish to address topics and issues not addressed in the Joint Recommendations.

For reasons set out more fully in this comment, we urge the DOJ to adopt the NPRM substantially in its present form.

LEGAL AND FACTUAL BACKGROUND²

The Americans with Disabilities Act (ADA) addresses access for people with disabilities in all aspects of society including movie theaters. Title III facilities like movie theaters are directed to furnish "auxiliary aids and services" to achieve accessibility. For deaf and hard of hearing people, those "auxiliary aids and services" include "interpreters or other effective methods of making aurally delivered material available to individuals with hearing impairments." For people with vision loss, the corresponding definition is "qualified readers, taped texts or other effective methods of making visually delivered materials available to

² A more extensive and annotated discussion of litigation involving movie captioning may be found at John Waldo, *The ADA and Movie Captioning: The Long and Winding Road to an Obvious Destination*, 45 Valparaiso L.J. 1033 (2011)(available online at <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1835&context=vulr>, last visited Aug. 18, 2014).

individuals with vision impairments.” The regulations duly adopted by the DOJ identify captioning and described audio as “auxiliary aids and services.”

While the statutory language and its applicability to movie theaters is plain on its face, both the House and Senate reports on implementing the ADA contained stand-alone statements, without any explanation, to the effect that “open captioning of feature films playing in movie theaters is not required by this legislation.” However, this predetermination of the infeasibility of “open captioning” is rooted in the technology existing at the time and does not reflect the spirit or intent of the ADA. The Consumer Groups urges the Department to remove from the proposed Section 36.303(g)(2)(ii) the deplorable language that “Open movie captioning at some or all showings of movies is never required as a means of compliance with this section, even if it is an undue burden for a theater to exhibit movies with closed movie captioning in an auditorium.” This language runs contrary to the ADA and its principal goal of equal access for all including people who are deaf and hard of hearing.

In 1990, when ADA was passed, the only way to display movies with open captions was to laser-etch the captions on a separate print of the movie. Showing a captioned movie would require a theater to obtain and use that captioned print for all showings making the captions visible to the entire audience or to obtain both a captioned and non-captioned print so that the theater could choose when to have captioned or non-captioned showings. The prints consist of several reels of film, and are both bulky and expensive. Displaying captions for some but not all showings would necessitate changing the film reels depending upon whether the theater wished to display captions or no captions. There was no practical way in 1990 to show closed captions in movie theaters, where the captions would be visible only to certain individuals.

However, captioning technology has improved tremendously since 1990. Captioning, both open and closed, are both easily accomplished in cost-effective ways compared to what was only possible through laser-etching on film reels. Consequently, what was excluded in the legislative history should not be permanently enshrined as law when the plain language of the ADA mandates the provision of captioning as an auxiliary aid and service, and clearly includes movie theaters in the definition of “places of public accommodations.”

The Consumer Groups urge the DOJ to cease its reliance on outdated legislative history which dismissed open captioning, and instead utilize the clear language of the ADA to require that movie theaters show movies with either open or closed captioning. The ADA was written with the intent of providing equal access and rights to every person with a disability, including participating in and enjoying all aspects of life in America such as going to the movies. Further, the drafters of the ADA clearly intended for the law to incorporate new technologies to make every effort to ensure that people with disabilities have meaningful access to the programs and services offered by places of public accommodations.

Because the technology for showing open-captioned movies has changed so dramatically since the passage of the ADA, we believe that the legislative history contains a classic latent ambiguity, and that it would be well within the DOJ’s discretion to view modern open captioning differently than the open captioning available in 1990. Indeed, the Ninth Circuit court essentially invited the Department to do exactly that in the *Harkins* case. The opinion alluded to the argument that modern open captioning is fundamentally different from the captioning that existed at the time of the legislative history. The court did not find that argument without merit, nor did it find the legislative history to be controlling. Instead, the court said that the controlling authority was the Department’s commentary on open captioning. The court simply said that

theaters “should be able to rely on the plain import of the DOJ’s commentary until it is revised.” *Arizona ex rel Goddard v. Harkins Amusement Ent., Inc.*, 603 F.3d 666, 673 (9th Cir. 2010).

Even with the advent of closed captioning technologies, movie theater chains were slow to adopt and implement such technology in their facilities across the country. Regal, the nation’s largest theater chain, installed the open-captioning equipment in a small fraction of its theaters, and offered a few open-captioned showings each week, most at less-than-desirable times. A few theaters installed the Rear Windows closed-captioning system, and generally activated the captions for all showings of the movie being played in that auditorium.

The slow and sparse deployment of captioning predictably led to litigation, in which the plaintiffs argued that captioning is required under the ADA. Relying to a great extent on the legislative history and the DOJ’s interpretations regarding open captioning, the theaters argued that the ADA does not impose any captioning requirements, and that the captioning they were providing was entirely voluntary.

The theaters prevailed in most of the early cases, with federal district courts in Oregon, Texas and Arizona finding that the ADA did not require theaters to display movie captions.³ The plaintiffs had limited success in the federal court for the District of Columbia, where the judge ruled that while the legislative history may obviate any requirement to provide open captions, nothing in that history or in DOJ’s interpretations would apply to closed captions.⁴ A subsequent settlement called for equipping a small percentage of the defendant’s theater with the Rear Windows Captioning system.⁵

The tide began to turn in 2010. The 9th Circuit was the first federal appellate court to consider the question of movie captioning, and it reversed the adverse district-court decision from Arizona and declared that the ADA requires theaters to display closed captions unless the theater can demonstrate that doing so would constitute an undue burden.⁶ That case was remanded for trial-court findings to determine what specifically the defendant theater was financially able to do. Simultaneously, a Washington state court ruled that the state’s disability law requires theaters to provide closed captions to the extent that doing so would be “reasonably possible in the circumstances,” a state requirement analogous to the ADA’s “undue burden” standard, and said trial would be limited to the issue of what the defendant theaters were capable of doing.⁷

³ *Cornilles v. Regal Cinemas*, No. Civ. 00-173-AS, 2002 WL 31440885 (Jan. 3, 2002) (magistrate’s recommendations on motion for summary judgment) *adopted in part*, 2002 WL 31469787 (March 19, 2002)(D.Or.)(equipping theaters to show captioned movies would constitute undue burden as a matter of law); *Todd v. American Multi-Cinemas, Inc.*, 2004 WL 1764686 (S.D. Texas, Aug. 5, 2004)(same, also declaring that ADA requires only physical access, not accessible communication); *Arizona ex rel. Goddard v. Harkins Amusement Ent., Inc.*, 548 F.Supp.2d 723 (D.Ariz. 2008)(theater inventory consists of non-captioned movies, and ADA does not regulate composition of inventory).

⁴ *Ball v. AMC Entertainment, Inc.*, 246 F.Supp.2d 17 (D.D.C. 2003).

⁵ *Ball v. AMC Entertainment, Inc.*, 315 F.Supp.2d 210 (D.D.C. 2004)(settlement described at class-action fairness hearing). Litigation initiated by state attorneys general in New Jersey, New York and Massachusetts led to similar settlements under which a small proportion of theater auditoriums were equipped to display captions.

⁶ *Arizona ex rel Goddard v. Harkins Amusement Ent., Inc.*, 603 F.3d 666 (9th Cir. 2010).

⁷ *Washington State Comm. Access Project v. Regal Cinemas et al.*, 293 P.3d 413 (Wash.App. 2013)(affirming trial-court order).

An important element during much of that litigation was the impending introduction of digital technology. The theaters anticipated widespread adoption of digital distribution and projection long before it actually occurred. Because they were not certain that the captioning technology developed for analog projection would also work with digital, the theaters argued in every case that no captioning requirement should be imposed prior to the digital conversion.

By happy coincidence, the major theater chains solidified their financial arrangements for digital conversion at almost exactly the same time as the Ninth Circuit and Washington state courts ruled that closed captioning would be required unless the theaters could demonstrate that they could not afford to provide it. Providing captioning is much cheaper with digital projection than with analog projection. Harkins, Regal and Cinemark agreed to provide full caption-viewing capabilities as they converted to digital projection in Arizona and Washington State, and subsequently expanded that commitment to all their theaters nationwide.⁸ AMC went to trial in Washington State on the question of “undue burden,” but shortly after the trial court ruled in July of 2011 that AMC could afford to provide full closed-captioning capability upon digital conversion, it too agreed to do so nationwide.⁹

Other theaters of various sizes have installed caption-viewing devices in most if not all of their digital theaters, including Marcus Theaters, the Landmark group that specializes in “art house” films, at least some Carmike theaters, and even very small independents like the three-screen Majestic Bay theater in Seattle. Such widespread adoption of captioning technology indicates that the DOJ’s objective of complete accessibility through closed captioning is achievable for digital theaters.

Notwithstanding such widespread use of closed captioning technology throughout movie theaters across the country, open captioning is still a necessary means of access to movies for many deaf and hard of hearing consumers. The plain language of the ADA does not prohibit the use of open captioning, and in fact requires it where closed captioning is not an effective means of communication access for those who are unable or have great difficulty using closed captioning technology. Legislative history from 1990 should not have any effect on transformed movie technology in 2014 and beyond especially when the statutory language was written to encompass increased access with ongoing innovation in technology to achieve equality in civil rights for people with disabilities. The Department should be promoting such innovation by requiring open captioning pursuant to our position in this Comment, and even if the Department chooses not to require open captioning as part of this rulemaking, the Department should make it clear that such a decision does not preempt any state law that may require open captioning.

⁸ Cinemark’s commitment also resolved litigation pending in California.

⁹ AMC also resolved litigation brought by the Illinois Attorney General’s office, and a pre-litigation demand in California.

SUMMARY OF COMMENTS AND POSITION

Captioning is a critical means of access for people who are deaf or hard of hearing, deaf or hard of hearing and have other disabilities, and individuals with auditory processing difficulties such as Sensory Processing Disorder. We need the aural content of movies to be easily accessible in readable text. Without easily accessible text access to movies, we cannot enjoy the movies along with our family and friends.

Every Digital Screen Should Be Accessible

The Consumer Groups applaud the efforts of the DOJ with respect to these proposed regulations. There is no reason that every digital theater cannot be made fully accessible to people who are deaf or hard of hearing as well as those with vision loss through captioning and audio description. With per-screen costs estimated at just over \$3,000, it is difficult to imagine that any digital theater, no matter how small, cannot afford to provide captioning.¹⁰

Open Captioning is an Important Accommodation

We urge that open captioning be considered as a means to satisfy the needs of deaf and hard of hearing individuals in addition to closed captioning showings. Pursuant to existing section 36.303(g), “if the provision of a particular auxiliary aid or service by a public accommodation would result in a fundamental alteration ... or in an undue burden, ... the public accommodation shall provide an alternative auxiliary aid or service, if one exists, that ... nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation.” Open captioning is an auxiliary aid or service and can be used: as an interim while a theater is working toward full closed captioning compliance; as an alternative for those theaters that cannot afford to purchase closed captioning equipment and devices; and as a supplement to closed captioning efforts particularly upon requests by deaf and hard of hearing groups including as a means to accommodate those not able to utilize closed captioning technology in their movie watching experience.

Adequate Notice of Accessible Showings Must Be Provided

We believe that until and unless captions and audio description is available for all movies, the theaters must indicate specifically which movies are captioned and described, and which are not. They must also distinguish between captioning and the volume-enhancing assistive-listening devices available at virtually all theaters. This information also needs to specify the type of captioning provided – open captioning or which type of personal captioning device.

¹⁰ We acknowledge, of course, that under ADA, a theater must be given the opportunity to demonstrate that providing full captioning would constitute an undue burden. Any administrative guidelines as to what might constitute an undue burden will require some level of expenditure greater than zero, and in that case, the question would not be whether the theater could provide full captioning, but rather, over what period of time could it afford to do so. While we disagree with the proposed language stating that open-captioned showings are never required even if a theater can demonstrate that closed-captioned showings would impose an undue burden, we question whether the situation will ever actually arise.

Every Movie Must Have Captions

It is critically important that the DOJ require every movie to have captions. While the trend is for every movie studio to provide captioning files for virtually every movie, the legal demand needs to ensure all movies and previews shown in theaters are captioned, and section 36.303(g)(2)(i) needs to reflect this mandate.¹¹

Following are our responses to the DOJ's specific questions. They represent relatively minor suggestions other than our specific request for open captioning as a mandate. Overall, we are extremely pleased with the NPRM. We know that the captioning availability that has been installed has significantly enriched the lives of many of our members. We think that expanding that availability nationwide is achievable, and is well worth doing.

RESPONSE TO SPECIFIC QUESTIONS

Question 1a: Availability of Analog Film Prints

The Department is interested in any recent data available about the likelihood that analog film prints will be available after 2015 either from the major studios, from smaller independent studios, or from small independent filmmakers. What is the likelihood that analog film prints will be available in five years? Will analog versions of older movies continue to be available for second or third run showings? How many movies will continue to be produced in both analog and digital formats?

Question 1b: Availability of Movies with Captions and Audio Description

What percentage of currently available analog films has been produced with captions or audio description? How many movies will be produced with captions and audio description in both analog and digital formats? What is the likelihood that existing analog movies that currently do not have captions or audio description will be converted to digital formats and then only the digital format would have those accessibility features? Will those older analog movies that are currently available with captions continue to be available with captions?

Question 1c: Economic Viability of Analog Theaters

How many analog theatres currently show first-run movies? If first-run analog movies are no longer produced, will analog theaters be economically viable and what types of movies would these theaters rely on to generate revenue? How many analog theaters are likely to close as the result of these changes in the market? Will this rule affect the pace by which analog theaters convert to digital cinema? If so, how? Will analog theatres converting to digital cinema convert all screens at the same time?

¹¹ We are aware, of course, that movie studios are not among the "public accommodations" enumerated in the ADA, 42 U.S.C. § 12182(7). However, the obligation to provide auxiliary aids and services extends not only to owners of those facilities, but also to "operators." 42 U.S.C. § 12182(a). Through contractual arrangements with theater owners, studios control such things as the size of the auditorium in which a movie plays and the length of the engagement. For those reasons, we submit that a movie studio is more akin to an "operator" than to a mere supplier of a product, whose involvement essentially ends when the product is furnished to the retailer.

These questions all deal with the anticipated status of analog theaters. While it is clear that the number of analog theaters has declined drastically, the Consumer Groups recommend that such theaters should be considered places of public accommodations under the ADA and that they be required to provide accessible showings of movies unless the theater can demonstrate a showing of undue burden. To otherwise exempt analog theaters would create a safe harbor carve-out to the ADA that is not accorded to any other place of public accommodation. We realize that there are technological challenges to providing captioning in analog theaters at the present time, but urge these theaters to explore open captioning options or other technological solutions that would not constitute undue burden. No categorical exemption should be accorded to analog theaters or any other theater. Providing a categorical exemption will create a slippery slope where in the future similar exemptions may be granted where none was created by the ADA.

Question 2: Does the proposed definition of “movie theater” adequately describe the movie theaters that should be covered by this regulation? Are there any non-profit movie theaters that would be covered by this definition? How many non-profit movie theaters are there? Should drive-in movie theaters be excluded from the definition of movie theaters at this time? Is there technology under development that might make it possible for drive-in movie theaters to provide closed captions or audio descriptions in the future?

The Consumer Groups recommend that “movie theaters” encompass all theaters that exhibit movies regardless of whether they are for-profit or not-for-profit. Nothing in the ADA purports to treat non-profit Title III facilities differently than for-profit facilities on a blanket basis, although the “undue burden” defense may be more applicable to non-profit rather than for-profit facilities. We see some collateral problems arising from any suggestion of treating non-profit movie theaters differently than their for-profit counterparts. While relatively few movie theaters may be non-profit organizations, virtually all live theaters and museums operate as non-profits, even those with vast resources and operating budgets in the tens of millions of dollars. Allowing non-profit movie theaters to be treated differently than for-profit theaters sets a dangerous precedent that non-profits of other types may demand similar exemptions.

Similarly, the Consumer Groups recommend that drive-in theaters not be exempt from the ADA requirement that places of public accommodation be accessible to people with disabilities including persons who are deaf and hard of hearing. While the drive-in market is small, such theaters are nevertheless places of public accommodation and subject to the requirements of the ADA. A showing of undue burden should be required before any drive-in theater is exempted. Open captioning and innovative forms of closed captioning are feasible options for drive-in theaters that are digital. Even analog drive-in theaters should explore other options for the use of captioning rather than be considered exempt from the ADA.

In addition, the DOJ should make it abundantly clear that it is not exempting other venues that show movies, such as museums or amusement parks, from the obligation to furnish auxiliary aids and services including but not limited to open and closed captioning. To the contrary, the ADA requirements for those entities are at least as stringent as those imposed on movie theaters because those non-theater venues cannot take even arguable advantage of the ADA’s legislative history regarding open-captioned films. The DOJ has never made a distinction between for-profit and non-profit under the ADA and should not start now.

Question 3: Should “audio description” be the nomenclature adopted in the final rule?

The Consumer Groups have no opinion on this question. Whatever terms will be best understood and supported by individuals who are blind or visually impaired ought to be used. We defer on questions related to audio description to the American Council of the Blind, American Foundation for the Blind, and National Federation of the Blind.

Question 4: Should the Department use the term “closed movie captioning” to refer to the type of captioning provided by movie theaters to individuals who view the captions at their seats? Is there a different term that should be used in order to distinguish between the closed captioning referred to in §36.303(b) and the captioning required for movie theaters in proposed §36.303(g)(2)?

“Closed captioning” is a well-understood term. The Consumer Groups do not believe there is any material difference between the way the terms are used in § 36.303(b) and the way the term will be used in proposed §36.303(g)(2). The proposed definition of “closed movie captioning” stating specifically how the term applies to movie theaters is appropriate.

Question 5: Should the Department use the term “open movie captioning” to refer to the type of captioning that is viewed on or near the movie screen by everyone in the movie theater audience? Is there a different term that should be used?

Again, open captioning is a well-understood term in the context of movie theaters. As will be discussed subsequently, we believe there are persuasive reasons why DOJ should not continue to give dispositive effect to the language in the legislative history dealing with “open captioning of feature films,” but we do not base that argument on the precise term being employed.

Question 6: Consistent with President Obama’s Memorandum issued on January 18, 2011, on regulatory flexibility, small business, and job creation, the Department invites comment on ways to tailor this regulation to reduce unnecessary regulatory burdens on small businesses. For example: Should the Department have a different compliance schedule or different requirements for digital or analog theaters that have annual receipts below a certain threshold? If so, what should the schedule, requirements, or financial threshold be? Or, should the final rule have a different compliance schedule or requirements for single-screen or miniplex analog or digital theaters? Will all mega and multiplex theaters have converted to digital by the time the final rule goes into effect? Is a four-year compliance date reasonable for those screens that will remain analog? Please provide information to support your answer. Should the Department adopt a different compliance schedule or different requirements for nonprofit movie

theaters? The Department invites comment on these alternatives and any other ways in which the final rule could be tailored to appropriately minimize costs on small theaters.

The Consumer urges the Department to require analog theaters explore technologies and options that will enable deaf and hard of hearing consumers to access the movies shown in their theaters. Any delay will result in inaction and lack of access. Innovations occur when there is a mandate to provide access, and this approach should be applied with all analog theaters as well.

Question 7: Is the proposed six-month compliance date for digital screens a reasonable timeframe to comply with the rule? Is six months enough time to order, install, and gain familiarity using the necessary equipment; train staff so that they can meaningfully assist patrons; and meet the notice requirement of the proposed rule? Will manufacturers have the capacity to provide the necessary equipment for captioning and audio description as of the six-month proposed compliance date of this rule for digital movie screens? If the proposed six-month date is not reasonable, what should the compliance date be and why? Please provide specific examples, data, or explanation in support of your responses.

The Joint Recommendations of a subset of the Consumer Groups along with the National Association of Theater Owners (NATO) specifically addresses this question.

Question No. 8: Should the Department adopts a four-year compliance date for analog movie screens (Option 1) or should it defer application of the rule's requirements to analog screens for now and consider additional rulemaking with respect to analog screens at a later date (Option 2)?

The Consumer Group reiterates in response to this question its answer to Questions 1a-1c .

Question No. 9: Do the alternative provisions regarding when and how to employ open movie captions strike an appropriate balance? Should the Department define what a timely request is in this context? Has the Department adequately addressed the possibility that new technology may develop that can be used to provide effective communication at movie theaters?

The Consumer Groups urges the Department to remove from the proposed Section 36.303(g)(2)(ii) the deplorable language that “Open movie captioning at some or all showings of movies is never required as a means of compliance with this section, even if it is an undue burden for a theater to exhibit movies with closed movie captioning in an auditorium.” The Consumer Groups believe strongly that open captioning is one of the auxiliary aids and services defined in the ADA and that movie theaters, as a place of public accommodation, can be compelled to provide open captioning pursuant to this reading of the ADA. Many deaf and hard of hearing individuals prefer open captioning and some have even stopped going to movie theaters because open captioning is not an option in many settings. The Wisconsin Association

of the Deaf recently conducted an online survey of deaf and hard of hearing people and their family members on movie theater access and out of 25,028 respondents, 95% said open captioning was the preferred form of access.¹² It is our experience too that the far majority of deaf and hard of hearing people prefer open captions at theaters.

While there are many deaf and hard of hearing individuals who truly appreciate and enjoy the existing forms of closed captioning technology, stories abound of many other deaf and hard of hearing individuals who are frustrated with the existing forms of closed captioning technologies. Certain devices cause individuals to become disoriented and sick trying to read captions that are close to the eyes while looking at the movie screen, which is further away. Others are unable to read the any type of device due to the difficulty of seeing the movie screen and the captions simultaneously. Young children who are deaf or hard of hearing have difficulty wearing the captioning glasses due to their adult-size and weight and also have difficulty in reading stand-alone captioning devices placed in the cup-holder of the seat while watching a movie screen.

Such frustration with inaccessible personal closed captioning devices are also common among those who are deaf or hard of hearing and have other disabilities. We've received complaints from deaf/hard of hearing people with cerebral palsy as well as visual disabilities who cannot use personal captioning devices. Individuals who have color blindness also have indicated difficulty with some personal captioning devices. We are also aware of some individuals having difficulty with wearable captioning devices due to interference with their glasses or cochlear implants.

In the Voluntary Commitments submission accompanying the Joint Recommendations of NATO and the Consumer Groups subset, NATO has committed to "encourage theater operators to accommodate large group requests for either open-captioned shows or large group requests for closed-captioning devices, subject to advance notification by patron groups and a sufficient number of patrons." The Consumer Groups ask that the DOJ require theater operators to turn on open captioning upon advance request by a group of deaf and hard of hearing individuals, or in the event that the theater does not have sufficient number of captioning devices for a large group of deaf and hard of hearing individuals.

The Consumer Groups support the language of the proposed § 36.303(g)(2)(iii) wherein movie theaters are required to have enough closed-captioning devices unless the theater "elect[s] to exhibit *all movies at all times* at that facility with open captions." To better motivate theaters to provide open captioning, we propose that the theater may "elect to exhibit any movie at any time at that facility with open captions upon request." This comports with the language proposed in page 66 of the NPRM which states that "to meet these requirements through the exhibition of movies with open captioning, in whole or in part, the movie theaters may elect to turn on the open captions only after a timely request has been made for captions." (NPRM, page 66). This language suggests that a theater may comply – perhaps completely – with the accessibility requirements if it agrees to engage the open captions upon request.

Even if the DOJ disagrees with the Consumer Group on the legal mandate for open captioning, small movie theaters – what the NPRM refers to as single-screen theaters and miniplexes -- should be allowed to choose open captioning as an auxiliary aid and service if they desire to avoid the expense of closed captioning equipment and devices. Some small theaters are

¹² Wisconsin Association of the Deaf Movie Captioning Survey. See: <https://docs.google.com/a/nad.org/file/d/0B47vSmEU4FxJMXJFV3FBUFh0bTg/edit>. See also: <https://www.youtube.com/watch?v=SLmfEJmZD-8> (posted March 26, 2014)

employing this option, and the affected patrons appear satisfied. For example, one very small (three-screen) theater in Seattle has instituted “captioned Tuesdays,” activating the open captions for all showings of all movies each Tuesday. Another small theater in a small western Washington town plans to activate the open captions for one showing of each film on Wednesdays. Still another single-screen theater is offering open captions on demand. In each instance, the deaf and hard-of-hearing patrons appear to be satisfied with those arrangements, and have no desire to jeopardize the financial health of the theaters through requirements that might prove onerous and lead to a less-desirable result.

In addition, where a theater chooses to use closed captioning devices, we believe that open captioning has a role to play in three instances. The first is as an interim bridge for theaters that will need a longer time to provide closed captioning than the proposed rules would allow. The second situation is when closed-captioning equipment is temporarily unavailable. The third is in situations where a deaf or hard of hearing group has asked in advance for an open captioned showing or deaf or hard of hearing individuals have asked for an open captioning showing because the closed captioning technology is not accessible to them. In those situations, some open-captioned showings would create access, and be consistent with the mandate in the current § 36.303(g) to the effect that a Title III entity that cannot provide full accessibility must ensure the provision of alternative auxiliary aids and services to achieve the maximum extent of accessibility. Further, the Department should ensure that any regulations on captioning do not impede state laws from requiring open captioning.

Question 10: The Department seeks public comment on its proposed scoping for individual captioning devices. If the scoping is not correct, what are the minimum number of individual captioning devices that should be available at a movie theater? Please provide the basis for alternative suggestions. If the required number of individual captioning devices is linked to the number of seats in the movie theater facility, should the percentage decrease for very large facilities with multiple screens? What should the threshold(s) be for this calculation? Should the Department consider different scoping approaches for small theaters? How so and why? Are there alternative scoping approaches that the Department should consider to address variability in demand for the devices across theaters? If so, please describe such alternatives in as much detail as possible.

The Consumer Groups refer to the Joint Recommendations of NATO and the Consumer Groups subset to answer this question, and further state that the recommendation therein is designed to ensure that the number of devices is sufficient in each location to adjust to the number of deaf and hard of hearing residents or consumers in the area likely to attend that particular theater.

Question 11: Has the Department adequately described performance standards for individual captioning devices that deliver closed captions to patrons? How should the standards address text size that is displayed on the devices?

The Consumer Group reiterates that while many deaf and hard of hearing individuals appreciate and enjoy the existing closed captioning technologies available, many other deaf and

hard of hearing individuals dislike any of the available technologies. To be sure, many individuals have distinct preferences. Some find the eye-wear uncomfortable due to its weight and one-size-that-does-not-fit-all over the long duration of a movie. Some find it difficult to glance back and forth from the captioning device in the cup-holder to the screen or are unable to read it due to color-blindness or other visual disabilities. Young children are especially unable to adjust to those devices and are likely to be unable to enjoy the movies. Adults have indicated an inclination to become disoriented or sick during the use of such devices given the need for the eye to constantly refocus from reading the captions close to the eye then watching the movie on the screen and back and forth. Also some of these wearable captioning devices are not usable by those with additional disabilities and even interfere with other adaptive equipment like glasses or cochlear implants. Closed captioning devices should include the ability to increase/decrease text sizes and text color so that deaf and hard of hearing individuals who have vision challenges can adjust the size and color to better ensure readability to suit their individual needs.

There are also reports of equipment and/or device failures when deaf and hard of hearing individuals have attended movies only to find out at the start of the movie that the equipment and/or the device do not work for whatever reason. Consequently, the regulations need to require that theater operators perform continuous and frequent testing of the equipment and devices, including replacing batteries and any broken parts when needed. Further, there is a need to provide an indication that the equipment and/or devices are working at the outset of a movie theater experience such as showing captions during the previews/trailers prior to the showing of the movie. Or, in the absence of such captions for the preview/trailers, some sort of captioning should be provided on the device to indicate that the captioning feature is in working order prior to the start of the movie.

In addition, there needs to be a quality assurance system to evaluate the accuracy, completeness, timeliness, and appropriateness of the captions for each movie. Deaf and hard of hearing people are not the ones who can assess whether the captions are accurate, complete, timely, or appropriate as they have no basis for comparison between what is spoken and what is captioned. Independent evaluation of the captioning for each movie has to be performed in some fashion, and this needs to be included in the regulations.

Finally, the DOJ needs to develop a program to encourage innovation in captioning technologies so that the movie theater experience is enjoyable to all deaf and hard of hearing individuals as well as those with other disabilities such as Sensory Processing Disorder. Testing and evaluation of captioning devices should always include a significantly large number of deaf and hard of hearing individuals as well as local and national deaf and hard of hearing consumer organizations to assess overall ease in use and enjoyment by as many individuals as possible.

Question 12: How many devices capable of transmitting audio description to individuals should each movie theater have on hand for use by patrons who are blind or have low vision? Should the number of individual audio-description listening devices be tied to the number of seats in each auditorium or other location with a movie screen? Should the number of individual audio-description listening devices be tied to the number of seats in the theater facility as a whole? Please provide the basis for your comment. How many movie theaters have two-channel receivers that can be used to provide audio description? How many movie theaters will need to buy additional individual audio description listening devices? How much do audio description listening devices that meet the requirements of this proposed rule cost?

The Consumer Groups have no specific information on audio-description devices, and support the preferences of individuals who are blind or visually impaired. We defer on questions related to audio description to the American Council of the Blind, American Foundation for the Blind, and National Federation of the Blind.

Question 13: The Department invites comments on the additional time it will take and other possible costs movie theaters would incur to determine whether compliance with the rule would constitute an undue burden. What kinds of costs are involved? How much time would a theater spend determining how to comply with the rule; gathering, compiling, and reviewing financial records; and estimating the cost of compliance? Would small theaters have professionals such as accountant or lawyers review their financial records? What information should the Department use to estimate the per hour cost of the time movie theater spend undertaking these activities? How might the Department develop an estimate of the average time and cost required to determine whether full compliance would constitute an undue burden? To what extent would this rule increase movie theaters' reliance on the undue burden analysis compared to the status quo? What characteristics of small theater would make it more likely that it would be an undue burden to comply with the rule? Are there empirical studies or other credible information available for estimating the time and cost for a theater to make a legitimate determination that compliance would constitute an undue burden? The Department is interested in comments in response to these questions from the public in general, but particularly from small movie theaters owners and operators and from other small businesses covered by title III of the ADA with experience in determining whether it is an undue burden to meet their effective communication obligation.

The Joint Recommendations of NATO and the Consumer Group subset has recommendations on the time to purchase and implement all orders for closed captioning technology that we believe is optimally feasible for all theater operators. Further, the ADA text and the implementing regulations already enumerate the financial factors to be considered in the "undue burden" determination, which is an adjudicative question best handled by a court.

Question No. 14: It is the Department's view that the cost of the proposed requirement for theaters to provide notice indicating which screenings will be captioned or audio-described is de minimus. The Department requests comments on this view. Specifically, how much will it cost theaters to provide information regarding the availability of captioning and audio description for each movie and to specify whether open movie captions or closed movie captions will be provided for each particular showing and time? The Department understands that this cost may vary depending on the type of communication or advertisement, and so we request that commenters specify the type of communication or advertisement along with their cost estimate. In addition, how many times in a given year do theaters provide communications and advertisements that would trigger this proposed requirement? The Department understands that this will likely vary depending on how many screens a theater has, and so we request theater commenters to specify how many screens they operate in their response to this question. Because the rule would require 100 percent of movies available with captions and audio description to be shown with these accessibility features, should the Department permit theaters

to indicate those movies that do not have these features rather than indicating those that have these features? Would this approach have an effect on the cost of providing notice? If so, how would it affect the cost?

The Consumer Groups refer to the Joint Recommendations of NATO and the Consumer Groups subset to answer this question, and further state that the recommendation therein is designed to stress the importance of proper notice of the access being provided at each movie theater. Undisclosed access is not access at all. Because the whole point of notice is to communicate to the users, the Consumer Groups recommends that more weight be given to the form of the notice. Any notice provided by the theater operator should specify which form of access and the type of device are available at which theaters. It is necessary at least for now, that the theaters specify which movies are or are not accessible.

Question No. 15: How much additional time beyond the normal time movie theaters spend training staff would be needed to incorporate instruction in the operation and maintenance of the equipment for captioning or audio description? How much additional time do theaters anticipate spending on assisting patrons in using the captioning and audio description devices? How should the Department estimate the value of the additional time theater personnel would spend on assisting patrons in using the captioning and audio description devices? Would that additional cost be borne by the theaters, and if so, how?

This question deals with the internal costs incurred to train staff in the operation of captioning devices, and in assisting patrons to use them. We have no information on that subject, but agree that this is an extremely important issue. The effectiveness of each theater's training varies from excellent to poor. Unfortunately, there have been instances in which theater attendants have steadfastly denied the existence of caption-viewing equipment even when that equipment has been clearly visible to knowledgeable patrons. Our only input on this issue is to make sure that theaters report only the additional costs incurred, not the per-hour value of the time spent on these duties by attendants who would otherwise be on duty. It is critical that at all times of a movie theater's operation, someone knowledgeable with the technical use and repair of the captioning device be onsite at all times.

Further, the Department should mandate that theaters, when assisting patrons in the use of any captioning devices, are not allowed to require the retention of credit cards or driver's licenses or other personal effects as a condition for the patrons' use of such devices. In addition, any sign up information to procure these devices should be regarded as private and not available for others to view. We have received complaints of individuals being required to provide drivers' licenses in order to use captioning devices or being required to fill out information on a document that lists everyone who has been given captioning devices in recent days or weeks. Such practices deprives deaf and hard of hearing individuals of privacy and should be banned.

Question No. 16: The Department invites comment on the Initial RA's methodology, cost assumptions, and cost estimates, including the specific costs of purchasing, installing and replacing captioning and audio description equipment, and the costs of complying with the training and notice requirements of the rule. The Department is particularly interested in

receiving comments about the frequency with which captioning and audio description devices need to be replaced. The Department is also interested in estimates of how much time it would take for theaters to acquire the equipment needed to comply with this rule.

This is a question about the costs of equipment and its useful life. Our limited information is consistent with the numbers being used in the Initial Regulatory Assessment. We are also aware that some of the equipment is sold by independent regional suppliers, who may quote different prices than would be quoted in other regions. We are also pleased to see that the cost of this equipment seems to be declining as more theaters install it. In response to a query, the National Association of Theatre Owners (NATO) stated that the estimated costs were too low because the DOJ did not include in its cost averaging the relatively high-cost glasses that Sony manufactures and Regal uses. We think DOJ's failure to include those costs is proper. The question DOJ is asking is the minimum cost to comply with the proposed regulations. The fact that some large theaters chains may elect to spend more than the minimum amount does not affect that minimum-cost number.

Moreover, the Consumer Groups urges the Department to include measures that will assure the development of continually improved technologies for captioning and audio description, and incentivize theaters in upgrading their captioning equipment.

Question No. 17: The Department invites comments on methods and data for monetizing or quantifying the societal benefits of the proposed regulation, including benefits to persons who are deaf or hard of hearing or blind or have low vision, as well as to other members of the movie-going public or other entities. For example, the Department invites comments on methods and data for estimating the number of people with vision or hearing disabilities who would benefit from this rule, and addressing the challenges noted above in developing such estimate, as well as comments on methods and data that could be used to estimate the value of the different types of benefits noted above. The Department also invites comments on its qualitative discussion of the benefits of this rule, which include equity, human dignity, and fairness.

The Consumer Groups believe the Department's use of Census responses vastly understates the number of people who are deaf or hard of hearing. Better information comes from epidemiological studies that use the actual audiograms from a large, random sample of the adult population. That information comes from data gathered from 2001 to 2008 in connection with the National Health and Nutritional Examination Surveys. It has been analyzed and reported by Dr. Frank Lin and his colleagues at Johns Hopkins University.

According to this research, there are 48 million people who have "hearing loss" which is defined as "not being able to hear sounds of 25 decibels or less in the speech frequencies" in one or both ears.. The study is available online at http://www.hopkinsmedicine.org/news/media/releases/one_in_five_americans_has_hearing_loss (last visited November 20, 2014).

The vast discrepancy between self-reports of hearing problems and objectively determined existence of those problems stems from our experience with hearing loss. While there are many different types of hearing loss, by far the most common is the decreased sensitivity to higher-frequency sounds. English-language vowel sounds are powerfully voiced and relatively low frequency, but consonant sounds are softly voiced, if voiced at all, and are

much higher frequency. While the vowel sounds tell us someone is speaking, it is the consonant sounds that shape and give meaning to speech, and those are the sounds we fail to apprehend. For very many of us, our subjective experience is that our hearing is fine – we are hearing voices at a normal volume – but that the speaker is mumbling, because we are not understanding what is being said.

The question of how many of those people might need captioning to enjoy a movie is more difficult, because it depends to a great extent on the specific movie involved. Dialogue occurring during background noise – even pleasant noise like a musical soundtrack – will be much more difficult to understand than dialogue that occurs when there are no other sounds. Some accents are more difficult than others – “British” is notoriously difficult to understand. Animated films and voice-over narration are extremely challenging because speech-reading does not provide much additional information. And obviously, understanding the dialogue is far more important in some movies than in others.

People who find it difficult to enjoy movies simply stop thinking of movies as an available entertainment option. It will take time, patience and continued publicity to demonstrate that captioning technology has in fact made movies accessible to millions of people who have given up on them. This is more likely to be a generational challenge than something that will yield dramatic results overnight.¹³

That said, we firmly agree with the Department that issues of equity, fairness and human dignity warrant this rule. The trial court in the Washington State movie-captioning case reached that same conclusion. In response to AMC’s argument that sparse usage of captioning devices at other theaters demonstrated that deploying those devices was not cost-effective, the court said:

The issue is not how many patrons have used the technology provided, but rather, whether an individual with a sensory disability has the legal right to have access to the movies when technology is now present to allow that access without impeding on other patrons’ experience and it is feasible for the defendant to provide it.

Washington State Communication Access Project v. Regal Cinemas et al., No. 09-2-06322-2-SEA (King Cty. Sup. Ct., July 22, 2011).

We would observe, though, that the caption-viewing devices have other uses, some of which may prove far more profitable than providing English-language captions for people with hearing loss. As the NPRM noted, the devices can display captions in multiple language. We are not aware that any studios are providing foreign-language captions as part of their data packages, but it would certainly be possible for them to do so. Now that display devices are widely available, it would seem attractive to provide foreign-language captions, particularly to reach the rapidly growing Hispanic population.¹⁴

¹³ We think the most realistic “model” of people returning to the movies may be the painfully slow increase in women’s sports participation after the adoption of Title IX to the Civil Rights Act.

¹⁴ As the statistics from the Motion Picture Association of America point out, Hispanics attend movies far more frequently relative to their total population than non-Hispanic Caucasians. http://www.mpa.org/wp-content/uploads/2014/03/MPAA-Theatrical-Market-Statistics-2013_032514-v2.pdf, p. 12 (last visited Aug. 22, 2014).

In short, fairness and equity are enough to warrant the proposed rule requiring 100% roll-out of captioning devices for digital theaters. Even on a monetary level, the return on providing this technology has great potential for the movie industry.

Access for DeafBlind People

While the department recognizes the need to ensure access for those who are deaf or hard of hearing as well as those who are blind, there is no discussion about providing access to those who are DeafBlind. Many DeafBlind individuals have some vision and we've heard from representatives of the DeafBlind community that some DeafBlind individuals can read open captions but not captions on personal devices. Moreover, many deaf and hard of hearing people would like to be able to enjoy movies with descriptions on a Braille reader. The Consumer Groups urge the Department to consider ways to provide access to DeafBlind people – such as those who enjoy television with captions or using Braille readers connected to the television closed captioning.

Question 18a: Numbers of Small Businesses

The Department is interested in receiving comments and data on all of the assumptions regarding the numbers of small entities impacted by this regulation, particularly on the numbers of small entities that have digital or analog screens (or both), the number of screens in each theater, the type of movies shown at these theatres (first-run commercial films, independent films, etc.), and the type of captioning equipment and devices these theatres already have. The Department is particularly interested in data regarding small analog theatres, such as the availability of analog film prints, the availability of movies with captions and audio description (in both analog and digital formats), the rate at which small theatres are converting to digital cinema, and the economic viability of both small analog and small digital theatres. The Department would also be interested in data on the number of analog and digital theaters by theater type and annual receipts. Finally, the Department is interested in whether and to what extent small analog and small digital theaters are participating in certain cost-sharing programs to help convert theaters to digital technology, such as a virtual print fee (VPF) program. If they are not participating in such cost-sharing programs, why not? (See Question 1 for additional questions about analog theatres).

Question 18b: Numbers of Small Nonprofit Entities

The Department seeks comment and data on small nonprofits that operate theatres that would be covered by this proposed rule, particularly on the number of small entities in this category, and the potential costs and economic impacts of the proposed rule. Should the Department adopt a different compliance schedule for these theaters?

Question 19: Small Business Compliance Costs

The Department seeks comment and data on the small business compliance cost estimates, including the costs associated with procuring and maintaining digital and analog equipment, the availability of this equipment, estimates of the average cost of this proposed rule by establishment and firm, and the ratio of average costs of this proposed rule to firm receipts. The Department is interested in comment on whether small theaters will incur higher prices in the purchase and installation of this equipment due to the lower volume needed. The Department also seeks public comment on its proposed scoping for individual captioning devices. Should the Department consider approaching scoping differently for small theatres? How so and why? (Please see Question 10 for additional questions about scoping for captioning

devices). How many devices capable of transmitting audio description to individuals should each movie theater have on hand for use by patrons who are blind or have low vision? (Please see Question 12 for additional questions about scoping for audio description). Do small theaters face any additional costs not already included in these cost estimates? The Department seeks comment and data on what, if any, particular requirement of this rule would cause a small business to claim that it is an undue burden to comply with the requirements of this proposed rule.

Question 20: Other Costs for Small Businesses

The Department invites comment on the estimation of operation and maintenance costs for this proposed rule, which include administrative costs to keep track of equipment, staff training and availability (see Question 15 for additional questions related to staff training), maintenance and replacement of captioning and audio description hardware and individual devices, and the notice requirement (see Questions 14 and 16 for additional questions about the notice requirement). The Department is particularly interested in receiving comments about the costs and frequency of replacing captioning and audio description equipment. Are there other compliance costs, such as regulatory familiarization, that should be included in this small business analysis?

Question 21a: Significant Alternatives for Small Analog Theaters under the RFA

Is the four-year compliance date in Option 1 reasonable for those screens that will remain analog? If not, why not? Should the Department adopt Option 2 and defer requiring theaters with analog screens to comply with the specific requirements of this rule? (See Questions 6 and 8).

Question 21b: Significant Alternatives for Small Digital Theaters under the RFA

Is the proposed six-month compliance date for digital screens a reasonable timeframe to comply with the rule? Is six months enough time to order, install, and gain familiarity with the necessary equipment; train staff so that they can meaningfully assist patrons; and meet the notice requirement of the proposed rule? If the proposed six-month date is not reasonable, what should the compliance date be and why? (See Question 7).

Question 21c: Other Significant Alternatives for Small Theaters under the RFA

The Department invites comment on ways to tailor this regulation to reduce unnecessary regulatory burdens on small businesses.^[58] For example: Should the Department have a different compliance schedule for digital or analog theaters that have annual receipts below a certain threshold? If so, what should the financial threshold be? (See Question 6). The Department is also interested in receiving comment and data on the use of the undue burden defense by small businesses.

The Department's questions concerning burdens on small businesses and non-profits have been addressed in our prior responses. We believe that any such extension of time for compliance should be conditioned upon those theaters making their movies accessible through periodic, scheduled open-captioned showings. We do not believe that non-profit theaters should be carved out for special regulatory treatment, but rather, that the over-arching rule of "undue burden" should apply to all theaters, regardless of type.

CONCLUSION

The Consumer Groups appreciate the opportunity to submit comments in this important rulemaking.

Respectfully submitted,

Howard A. Rosenblum
Chief Executive Officer
National Association of the Deaf
8630 Fenton Street, Suite 820
Silver Spring, MD 20910

Claude L. Stout
Executive Director
Telecommunications for the
Deaf and Hard of Hearing, Inc.
8630 Fenton Street, Suite 121
Silver Spring, MD 20910

Mark Hill
President
Cerebral Palsy and Deaf Organization
12025 SE Pine Street, Apt.#302
Portland, OR 97216

Mark Gasaway
President
American Association of the Deaf-Blind
PO Box 8064
Silver Spring, MD 20907-8064

Sheri A. Farinha
Vice Chair
California Coalition of Agencies Serving the
Deaf and Hard of Hearing, Inc.
4708 Roseville Rd, Ste 111
North Highlands, CA 95660

Ari Ne'eman
President
Autistic Self Advocacy Network
PO Box 66122
Washington, DC 20035

Dated: December 1, 2014