

Court of Appeals Docket No. 08-16075

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA *ex rel.* TERRY GODDARD, the Attorney General,
et al.,
Plaintiff-Appellant

and

FREDERICK LINDSTROM, et al.,
Plaintiffs-Interveners-Appellants

v.

HARKINS AMUSEMENT ENTERPRISES, et al.,
Defendants-Appellees

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA, NO. CV-07-703-PHX-ROS**

**BRIEF OF AMICI CURIAE AMERICAN COUNCIL OF THE BLIND,
AMERICAN FOUNDATION FOR THE BLIND, AMERICAN
ASSOCIATION OF PEOPLE WITH DISABILITIES, DISABILITY
RIGHTS ADVOCATES, DISABILITY RIGHTS EDUCATION &
DEFENSE FUND, SCREEN ACTORS GUILD, AND RIO AND
HELEN POPPER IN SUPPORT OF PLAINTIFFS-APPELLANTS
AND IN SUPPORT OF REVERSAL**

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Guild, and Rio and Helen Popper

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I. CONSENT TO FILING

All parties to this action have consented to the filing of this brief by *amici curiae* American Council of the Blind, American Foundation for the Blind, American Association of People with Disabilities, Disability Rights Advocates, Disability Rights Education & Defense Fund, Screen Actors' Guild, and Rio and Helen Popper.

II. STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1

The following *amici curiae* are non-profit corporations that have not issued stock and do not have parent corporations: American Council of the Blind, American Foundation for the Blind, American Association of People with Disabilities, Disability Rights Advocates, Disability Rights Education & Defense Fund, and Screen Actors Guild.

III. STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae include organizations representing individuals with vision disabilities, the country's largest organization representing film actors, and a child (Rio Popper), who is blind and appears through her mother and guardian (Helen Popper). Members, board, and staff of *amici* organizations and the individuals they serve, as well as Ms. Popper, share the same interest in attending movie screenings as their sighted counterparts, but cannot fully and equally enjoy these

movies without descriptive narration, the auxiliary aid and service sought by Plaintiffs-Appellants. Meaningful enforcement of the Americans with Disabilities Act – a broad, remedial statute – requires that such auxiliary aids and services be provided. Accordingly, *amici curiae*'s interest in this matter is to ensure that the plain meaning of the ADA's provisions concerning auxiliary aids and services is fully realized, and that the statute is interpreted to further the public policy of full inclusion of people with disabilities in all facets of society and civic life. The District Court's decision undermines the ADA's purpose and intent and eviscerates a key provision of the ADA granting rights to persons with visual impairments such as the individual *amici* and the board, staff, and members of the *amici* organizations who are blind or visually impaired.

A brief summary of each *amicus* is set forth below:

A. American Council of the Blind (ACB)

American Council of the Blind (ACB) is a non-profit organization founded in 1961 and based in Washington, D.C. It is a leading and preeminent membership organization of people who are blind or visually impaired. ACB has tens of thousands of members who belong to one or more of its 71 affiliated state, regional and special interest organizations, including affiliates in all states comprising the Ninth Circuit, including the Arizona Council of the Blind, California Council of the Blind, Alaska Independent Blind, Inc., Hawaii Association of the Blind, ACB

of Idaho, Montana Blind and Low Vision Council, Nevada Council of the Blind, ACB of Oregon, and Washington Council of the Blind. ACB serves as a representative national organization of people who are blind or visually impaired, advocating for improved social, economic and cultural participation. ACB, its affiliates, and its members have long advocated for better access to media, including entertainment media, for individuals who are blind and visually impaired. ACB has participated as *amicus curiae* in several Americans with Disabilities Act (ADA) cases, has served as an organizational plaintiff in ADA cases, and has been a party in several negotiated settlement agreements with numerous public accommodations regarding auxiliary aids and services, including accessible technology, for people who are blind or visually impaired.

ACB members, board and staff with visual impairments desire to attend movies independently, and can best do that when a theater has installed and uses descriptive narration equipment. ACB members have been involved in local efforts to encourage movie theaters to install descriptive narration equipment and benefit when such equipment is installed. ACB and its members have an interest in the outcome of this litigation and will be prevented from fully participating in the movie-going experience with blind and sighted friends and family members if the District Court's Order dismissing Plaintiffs' -Appellants' action is not reversed.

B. American Foundation for the Blind

American Foundation for the Blind (AFB) is a national non-profit organization whose mission is to eliminate the inequities faced by the more than 20 million Americans who experience significant vision loss. Among other things, AFB is the leading publisher of professional materials on blindness and low vision through its publishing arm, AFB Press; a pioneer in the development of Talking Books; a national advocate representing the interests of blind or visually impaired people before Congress and government agencies; and home to the Helen Keller Archives, the only collection of its kind in the world, containing her correspondence, documents, photographs, and memorabilia. AFB publications, distributed in various formats including over the Internet, include *Access World: Technology and People with Visual Impairments* and *Journal of Visual Impairment and Blindness*.

AFB recognizes the importance of individuals who are blind or visually impaired being able to attend movies with friends and family members. Descriptive narration equipment is essential to blind patrons' independent enjoyment of movies, and AFB staff and the community AFB serves have been involved in advocating for this technology. Attending movies is an important way that individuals – blind or sighted – participate in popular culture. Descriptive narration equipment allows movies to be accessible to people with vision loss.

Narrated descriptions provide information about key visual elements such as actions, settings, facial expressions, costumes, and scene changes. The descriptions are inserted into pauses in the soundtrack, do not interfere with the dialogue, and are delivered to blind patrons through a headset. AFB and its visually impaired board and staff rely on video description to fully participate in the movie-going experience and thus have an interest in the outcome of this litigation.

C. **American Association of People with Disabilities (AAPD)**

American Association of People with Disabilities (AAPD), founded in 1995 and headquartered in Washington, D.C., is the largest national nonprofit cross-disability member organization in the United States. AAPD is dedicated to organizing the disability community to be a powerful force for change – socially, politically and economically. AAPD fulfills this mission through its career and leadership programs for individuals with disabilities, policy initiatives and public awareness activities. AAPD advocates for the full implementation and enforcement of disability nondiscrimination laws, particularly the ADA. AAPD advocates in favor of better accessibility of media for individuals with disabilities, and has served as *amicus curiae* in significant litigation affecting the rights of people with disabilities. AAPD and its members benefit from the presence of

descriptive video equipment in theaters and thus have an interest in the outcome of this litigation.

D. Disability Rights Advocates (DRA)

Disability Rights Advocates (DRA) is a non-profit legal center whose mission is to ensure dignity, equality and opportunity for people with all types of disabilities throughout the United States and worldwide. Making facilities throughout the country accessible to individuals with disabilities through negotiation and litigation is one of DRA's primary objectives.

E. Disability Rights Education & Defense Fund (DREDF)

Disability Rights Education and Defense Fund, Inc. (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

F. Screen Actors Guild (SAG)

Screen Actors Guild (SAG) is the nation's largest labor union representing working actors. Established in 1933, SAG represents over 120,000 actors who work in film and digital television, industrials, commercials, video games, music videos and all other new media formats. SAG exists to enhance actors' working

conditions, compensation and benefits and to be a powerful, unified voice on behalf of artists' rights. As part of the creative arts community, SAG has an interest in ensuring the fullest possible access to the creative works performed by its members to a wide and inclusive range of patrons, including audience members who are blind or visually impaired. SAG supports the ADA's goal to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities. In coalition with the American Federation of Television and Radio Artists (AFTRA) and Actors' Equity Association (AEA), SAG is a proud partner of the tri-union IAMPWD (Inclusion in the Arts and Media of People With Disabilities) disability rights campaign to improve and promote the accuracy, inclusion and access of people with disabilities in all areas of entertainment and news media.

G. Rio and Helen Popper

Rio Popper is a seven-year-old girl who resides within the Ninth Circuit, and is blind. She cannot independently enjoy movies without descriptive narration equipment. Because her local theater does not have this equipment, Rio Popper has been denied the full and equal opportunity to participate in educational and social experiences. **Helen Popper**, Rio's mother, would like her daughter to enjoy the movie-going experience independently, but Rio is unable to do so when descriptive narration equipment is not installed. Without descriptive narration

equipment, either Rio misses content that is displayed visually, or Helen must provide a running narration, limiting Rio's independence and interfering with both of their enjoyment of the movie, and possibly that of other patrons. Helen and Rio Popper have been involved in local advocacy efforts to encourage theaters to install descriptive narration equipment. Rio Popper is interested in the outcome of this litigation, both on behalf of herself and as a representative of thousands of blind youths who want to experience movies independently. Helen Popper is interested in the outcome of this litigation, both on behalf of herself and as a representative of the sighted family members, companions and friends of persons with visual impairments who would like to attend movies with patrons who are blind or visually impaired and share full enjoyment of the content of those movies independently.

IV. PURPOSE OF PROPOSED BRIEF OF *AMICI CURIAE*

Amici Curiae are familiar with the issues in this case and the scope of their presentation. Members, board, and staff of *amici* ACB, AFB, and AAPD as well as blind individuals served by these organizations, and *amici* Rio and Helen Popper have attended movies both with and without the auxiliary aid of descriptive narration sought by Plaintiffs-Appellants in this action. The proposed Brief of *amici curiae* presents arguments that materially add to and complement the Joint Brief of the Plaintiffs-Appellants, without repeating arguments made therein. The

proposed Brief will assist the Court by addressing arguments and authorities not contained in Plaintiffs'-Appellants' brief, as follows:

A. The proposed Brief of *amici curiae* discusses the impact the District Court's interpretation of the ADA as not requiring the provision of specific auxiliary aids and services has upon individuals who are blind or visually impaired. In addition to contravening the ADA's explicit goals and requirements, the District Court's ruling denies moviegoers who are blind or have visual impairments the right to benefit from the services provided by movie theaters.

B. The proposed Brief of *amici curiae* focuses sharply on the lack of any statutory defense available to Defendants-Appellees to support their failure to provide the auxiliary aids and services required by the ADA. The proposed Brief of *amici curiae* will assist the Court in distinguishing between the ADA's requirement of auxiliary aids and services, such as the descriptive narration equipment sought by Plaintiffs-Appellants, and a narrow regulatory exception relating to inventory and special goods that the District Court misapplied to the case below.

Amici curiae respectfully submit that the points and authorities discussed in the proposed Brief will assist the Ninth Circuit in deciding this matter. Thus, *amici* respectfully request leave to file the proposed Brief submitted herewith in support of Plaintiffs-Appellants.

V. SUMMARY OF ARGUMENT

Descriptive narration equipment sought by Plaintiffs-Appellants allows movie patrons who are blind or visually impaired to understand film elements that are purely visual, such as scenes, settings, actions, and unspoken communications. The equipment provides an “audio description” of those key film elements through a headset made available by the movie theater.¹ Descriptive narration equipment affords the hundreds of thousands of movie fans who are blind or visually impaired, including *amici* and their members, board, staff and constituents, the opportunity to fully participate in the classic American past-time of enjoying movies shown at movie theaters, and brings them further into the social and cultural mainstream of American public life, as the Americans with Disabilities Act (“ADA”) intended.

¹ Throughout this brief, *amici* use the following terms interchangeably: descriptive narration, audio description, video description, and descriptive video. These terms encompass both the audio narration itself (which describes visual elements in a movie so that a person who cannot see those elements can understand visual aspects of the film) as well as the equipment to deliver and receive the audio narration (such as the headphones used by patrons who are blind or visually impaired). A short segment of the film “The Lion King” containing the auxiliary aids of descriptive narration (used by movie goers who are blind or visually impaired) and captioning (used by patrons who are deaf or hard of hearing) is available on line at http://ncam.wgbh.org/richmedia/media/lionking/lionking_hi.mov (last visited December 8, 2008). In a movie theater equipped with the descriptive video equipment sought by Plaintiffs-Appellants, the audio description demonstrated at this link would be delivered to blind or visually impaired patrons through a headset.

The District Court's conclusion that the ADA does not require movie theaters to provide descriptive narration should be reversed because it is based on an improper analysis of several of the law's provisions. First, contrary to the District Court's conclusion that the ADA does not require the provision of visual information in an audio format (*see* Excerpts of Record ("ER") 10:16-18 (Order at 8:6-18)), descriptive narration equipment is an auxiliary aid and service, as defined by ADA and implementing regulations, that Defendants-Appellees must, in the absence of a recognized defense, provide to moviegoers who are blind or visually impaired.

Second, the District Court erred in deciding that Defendants-Appellees could escape the requirement of providing descriptive narration because doing so would "modify the content of the services [they] offer." (*See* ER 13: 26-27 (Order at 11:26-27)). Public accommodations such as Defendants-Appellees are only exempted from providing auxiliary aids and services where to do so would result in an undue burden or would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation that the entity offers to the public. Neither of these defenses is available to Defendants-Appellees. Defendants-Appellees do not claim a defense of undue burden (*see* ER 7:6-7 (Order at 5:6-7)); consequently, that issue is irrelevant in this case. The fundamental alteration defense is also inapplicable here because descriptive narration equipment does not

fundamentally alter the nature of the service Defendants-Appellees offer to the public, *i.e.*, the screening of movies.

Third, the District Court took the narrow exception in the ADA regulations addressing inventory and “special goods” and misapplied it to descriptive narration. (*See* ER 8:3-14 (Order at 6:3-14) and ER 9:15-16 (Order at 13:16).) The “special goods” exception is irrelevant to the issue of descriptive narration, which is not a product that movie operators sell to customers, yet the District Court erroneously relied on this exception to hold that descriptive narration is beyond the ADA’s scope.

For these reasons, as discussed further below, the District Court’s opinion should be reversed. Additionally, this Court should reverse the District Court’s decision that Plaintiffs-Interveners-Appellants lack standing to challenge any theater other than the specific ones they allege having attempted to access. (*See* ER 6:16-7:24 (Order, footnote 5, at 4:16-5:24)).

VI. ARGUMENT

A. **By Allowing Movie Theater Operators to Avoid Their Obligation to Provide Auxiliary Aids and Services to Patrons Who Are Blind or Visually Impaired, the District Court’s Decision Ignores the Plain Language of the ADA and Defeats a Core Purpose of the Statute.**

In its decision granting Defendants-Appellees’ motion to dismiss, the District Court stated that the auxiliary aids and services provision of Title III of the ADA (42 U.S.C. § 12182(b)(2)(A)(iii)) “requires public accommodations to ensure

that persons with disabilities have access to the services they provide (utilizing auxiliary aids and services if necessary), but does not require public accommodations to alter or modify the content of their services.” (ER 13:23-26 (Order at 11:23-26)). The District Court then concluded that the auxiliary aid and service that the Plaintiffs-Appellants request of Defendants-Appellants – equipment to play the descriptive narration tracks that are included with movies that studios provide for showing at movie theatres – would impermissibly alter or modify the content of those movies, and is therefore not required by the ADA. (ER 13:26-27 (Order at 11:26-27)).

Amici curiae agree with the District Court that a public accommodation, absent an allowable statutory defense, must provide auxiliary aids and services when necessary to ensure access to its services. *Amici curiae* also agree that fundamental alterations in the nature of a public accommodation’s services are not required by the ADA. In concluding that descriptive narration would fundamentally alter the content of Defendants’-Appellees’ services, however, the District Court apparently misunderstood the nature, operation, and purpose of descriptive narration equipment and the nature of Defendants’-Appellees’ services. Such equipment, as explained below, is itself the quintessential “auxiliary aid and service” that enables patrons with visual disabilities to have access to a public accommodation’s services, in this case the movies that theater operators show on

screen. Audio narration is not a separate movie or a different movie. Nor does it fundamentally alter theater operators' film screening services. Rather, it is equipment that allows visually impaired moviegoers access to the very same movie being viewed by sighted movie patrons.

In addition to misconstruing the nature, operation, and purpose of descriptive narration equipment and the meaning of the ADA's auxiliary aids and services provision, the District Court's decision is contrary to the ADA's central goals and purposes, and, if upheld, would represent a significant and wide-reaching diminution of the rights of people with disabilities.

B. The ADA's Goals of Independence for People with Disabilities and Their Integration into Society Are Served by Recognizing Descriptive Narration Equipment as an Auxiliary Aid and Service.

The preamble to the ADA reads, in relevant part:

[T]he Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals...

42 U.S.C. § 12101(a)(8). Accordingly, the ADA provides a broad mandate to eliminate discrimination against people with disabilities. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

In studying the need for the ADA, Congress found that American society "has tended to isolate and segregate individuals with disabilities... and such forms of discrimination... continue to be a serious and pervasive social problem." 42

U.S.C. § 12101(a)(2). Congress further found that “individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and *communication barriers*, [...] failure to make modifications to existing facilities and practices, [...] segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.” 42 U.S.C. § 12101(a)(5) (emphasis added). Congress also highlighted persistent, ongoing disability discrimination in the areas of public accommodations and recreation. 42 U.S.C. § 12101(a)(3).

With this in mind, Congress drafted the ADA “to bring persons with disabilities into the economic and social mainstream of American life,” (S. Rep. No. 101-116, at 2 (1989); H.R. Rep. No. 101-485(II), at 22 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303), and “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). In enacting Title III of the ADA, which prohibits discrimination against people with disabilities in places of public accommodation, Congress conferred upon individuals with disabilities the right to “full and equal enjoyment of the goods, services, privileges, advantages or accommodations of any place of public accommodation.” 42 U.S.C. § 12182(a).

In interpreting Title III, one court in this circuit has stated:

[I]t is clear that the purpose of the statute is broader than mere physical access -- seeking to bar actions or omissions which impair a disabled person's "full enjoyment" of services or goods of a covered accommodation. Indeed, the statute expressly states that the denial of equal "participation" or the provision of "separate benefit[s]" are actionable under Title III. [Citations omitted.]

Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 954 (N.D. Cal.

2006). This is in keeping with Congress's original intent for the ADA: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

Descriptive narration furthers the broad mandate of full inclusion and independence that is fundamental to the ADA. Without this important auxiliary aid and service, a movie patron who is blind cannot have "full enjoyment" of or "equally participate" in the films being shown to sighted patrons. *Amicus* Rio Popper, a seven-year-old girl who is blind, is a representative of thousands of blind youths who want to experience movies independently with friends, classmates and family and need the auxiliary aid and service of descriptive narration to do so. Similarly, there are thousands of blind parents who want, and are legally entitled, to have the experience of attending movies with their blind or sighted children and be able to fully participate in and benefit from that experience. Thousands of other members of *amicus* ACB, as well as the organization's board, staff, and non-member constituents who are blind and visually impaired, in addition to the blind and visually impaired board, staff and constituents of *amici* AFB and AAPD, have

attended movie screenings with and without audio narration. The ability to receive the visual content of a movie through the auxiliary aid of audio narration allows *amici* and the blind individuals they represent to experience the promise of the ADA's non-discrimination mandate in an iconic American social environment – the movie theater.² The District Court's order deprives them of this quintessential experience in a manner that is wholly contrary to the principles underlying the passage of the ADA.

C. Descriptive Narration Is an Auxiliary Aid and Service of the Type Envisioned by the ADA.

Both the ADA itself, as well as the Department of Justice's implementing regulations for Title III, require public accommodations such as Defendants-Appellees to provide auxiliary aids and services so that persons with disabilities

² It is irrelevant whether or not every single blind person in the United States will take advantage of descriptive narration offered by a movie theater. Indeed, the red herring of split of opinion within a minority community has come up in other contexts, and courts have resoundingly rejected it as inapposite. Instead, courts have focused on what the relevant law requires of corporate defendants. *See, e.g., Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512, n.4 (9th Cir. 1978) (Fair Labor Standards Act); *Cmtys. For Equity v. Mich. High Sch. Athletic Ass'n*, 192 F.R.D. 568, 574 (W.D. Mich. 1999) (Title IX of the Education Amendments of 1972; "the class member who wishes to remain a victim of unlawful conduct does not have a legally cognizable conflict with the class representative"); *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (Immigration and Naturalization Act). As such, if any customer who is blind or has a visual impairment visits one of Defendants'-Appellees' theaters and is not interested in hearing the descriptive narration track, he or she does not need to request the headset that plays the narration. But that person's lack of interest cannot be a bar to those who need and desire to hear the narration through a headset and receive the visually delivered on-screen information that sighted customers receive.

can participate in the public accommodation's services. Under the ADA, discrimination includes:

a 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, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

42 U.S.C. § 12182(b)(2)(A)(iii). Discussing communication access, the Department of Justice ("DOJ") regulations state,

A public accommodation shall take those steps that 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, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.

* * *

Effective Communication. A public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.

28 C.F.R. § 36.303(a) and (c).

Descriptive video equipment is an auxiliary aid and service within the meaning of the ADA and the implementing regulations.³ Auxiliary aids and services are broadly defined as including

(2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments; (3) Acquisition or modification of equipment or devices; and (4) Other similar services and actions.

28 C.F.R. § 36.303(b)(2) – (4); *see also* 42 U.S.C. § 12102(1)(B) and (C).

Descriptive narration falls squarely within this definition because it is an effective method of making visually delivered information about such film elements as scenes, settings, actions, and unspoken communications available to movie patrons who have visual impairments.

As Plaintiffs-Appellants have shown in their complaints filed below, the process of delivering descriptive narration to moviegoers who are blind or have

³ In its decision, the lower court erroneously concluded that because audio description was not included in the 2004 accessibility standards promulgated by the U.S. Access Board, this auxiliary aid and service was not required by the ADA. (*See* ER 5:3-10 (Order at 3:3-10)). The DOJ, not the Access Board, is responsible for promulgating regulations to enforce the ADA. Indeed, the Access Board itself recognized that its 2004 Standards did not occupy the field of ADA regulations, stating in Advisory 101.1 that “In addition to these requirements, covered entities must comply with the regulations issued by the Department of Justice and the Department of Transportation under the Americans with Disabilities Act. There are issues affecting individuals with disabilities which are not addressed by these requirements, but which are covered by the Department of Justice and the Department of Transportation regulations.” 36 C.F.R. Pt. 1191, App. B (2005). The provision of auxiliary aids and services is covered by DOJ regulations, which require “effective methods of making visually delivered materials available to persons with visual impairments.” 28 C.F.R. § 36.303(b)(2).

visual impairments is simple, and requires no “special goods.”⁴ (ER (State’s Complaint (“SC”)) at 158-59 ¶¶ 20-22; ER (Plaintiff Interveners’ Complaint (“PIC”)) at 132-33 ¶¶ 30-31, 33). Plaintiffs-Appellants are simply asking that Defendants-Appellants install the equipment required to deliver the audio narration already provided by movie studios.⁵ The participating film studios make narrative descriptions available with the movies they send to theaters. (ER (SC) at 159 ¶ 22; ER (PIC) at 133 ¶ 33). Currently, participating film studios make descriptive narration available for many first-run, wide-release films. *Id.* The film studios make audio description available to theaters that request it by including a synchronized CD-Rom, containing the film’s description, with the movies they send to theaters.⁶ ER (SC) at 158 ¶ 16 and note 4; ER (PIC) at 133 ¶¶ 33. Moviegoers who are blind or have visual impairments cannot access video description unless the theaters install the necessary auxiliary aids. ER (SC) at 158 ¶ 19; ER (PIC) at 137 ¶ 59-61. Once the descriptive video equipment is installed, Defendants-Appellees would only need to play the CD-Rom that is already

⁴ The ADA regulations (*see* 28 C.F.R. § 36.307) contain a narrow exception for aspects of inventory that are deemed “special goods.” That exception is not applicable here (*see* discussion at Section VI.E., *infra*).

⁵ The issue of the theaters’ obligations if the narration were not provided by the studios is not before the Court.

⁶ In effect, then, film-makers are providing a critical component of the auxiliary aid and service, and Defendants-Appellees are preventing the benefits of that auxiliary aid from reaching the consumer.

synchronized with the movie being screened to enable moviegoers and individuals with vision disabilities to listen to the information provided on the CD-Rom through individual headsets. In light of these undisputed facts, Defendants'-Appellants' failure to install the equipment sought by Plaintiffs-Appellants affirmatively blocks movie patrons with visual impairments from accessing visual content and participating in the film experience in the manner envisioned by the studios that provided the CD-Rom. More importantly, Defendants'-Appellees' failure to install the equipment Plaintiffs-Appellants seek is a failure to take required steps to provide mandated auxiliary aids and services envisioned by Congress when it enacted the ADA.

The District Court's sweeping re-write of the ADA's auxiliary aids and services provisions has the potential to undo many of the recent and significant achievements in accessibility made possible through advances in technology. In the last nine years, *amici curiae* ACB and AFB have successfully negotiated settlement agreements with various public accommodations and entities requiring the provision of a wide range of auxiliary aids and services, including Braille, audio and large print financial information; Talking ATMs; point of sale devices with tactile keypads; accessible (audio) pedestrian signals; and accessible web

sites.⁷ These auxiliary aids and services, similar to the accessibility that can be achieved through advances in technology in the delivery of descriptive narration, provide individuals who are blind or visually impaired with access to information and technology that sighted people often take for granted without fundamentally altering the nature of the original service. For example, a Talking ATM is the same ATM in the same location with the same functionality provided to sighted people; it simply has additional technology that allows a blind customer to hear what the sighted bank customer sees on the screen. A Braille bank statement provides information about a customer's financial accounts in an alternative format to standard print, which allows the customer with a visual impairment to access the otherwise visually delivered information. An audio pedestrian signal⁸ provides an alternative method of delivering information presented by a visual pedestrian

⁷ Settlement agreements providing for auxiliary aids and services that were negotiated by *amici* ACB and AFB, as well as other blind organizations and individuals who are blind and visually impaired can be found at <http://lflegal.com/negotiations/#agreements> (last visited December 8, 2008). Agreements listed include those with Wal-Mart (providing tactile keypads so that blind customers can privately enter their PINs when purchasing goods and services at Wal-Mart check stands), Bank of America (providing accessible web sites, Talking ATMs, and Braille, audio, and Large Print financial information); and Equifax, TransUnion and Experian (providing accessible credit reports in a variety of different formats to enable access by visually impaired consumers).

⁸ An accessible pedestrian signal (APS) is a device that communicates information about pedestrian timing in non-visual format such as audible tones, verbal messages, and/or vibrating surfaces. Like descriptive narration equipment that adds audible information to an otherwise purely visual image, an APS provides additional audible (as well as vibro-tactile) information to content that is typically visual (the picture of the walking person or the word "WALK").

signal. Similarly, a theater providing descriptive narration shows the same films on the same schedule in the same location as it would if the auxiliary aids and services were not installed. Just as a Braille bank statement provides information in an alternative format, and an audio pedestrian signal provides an alternative method of delivering information presented by a visual pedestrian signal, descriptive narration is an effective method of making visually delivered information available to individuals with visual impairments.

Like Talking ATMs, audio pedestrian signals, and other statutorily endorsed auxiliary aids and services such as “taped texts, audio recordings ... and other effective methods of making visually delivered materials available to individuals with visual impairments,” descriptive narration presents visual information in an audio format. This audio description is delivered to moviegoers who are blind or have vision impairments through a headset; only individuals with that headset can access the audio narration. *See* discussion of video description, *supra*. Descriptive narration provides access to blind moviegoers, offering them information imparted visually to sighted patrons that blind moviegoers cannot see because of their disability. *Cf. Feldman v. Pro Football, Inc.*, No. 06-2266, 2008 WL 4416668, at *12 (D. Md. Mar. 30, 2008), Order of Sept. 30, 2008 (requiring defendant to provide deaf and hard of hearing visitors with equal access to aural information via

auxiliary aids and services). It clearly fits within the ADA's definition of auxiliary aids and services, and the District Court's holding to the contrary is incorrect.

D. Providing Audio Description Is Not a Fundamental Alteration of Defendants'-Appellees' Film Screening Service.

Descriptive narration, as explained above, is a method of delivering to patrons with visual impairments the visual information that a movie theater provides to its sighted customers, without altering the nature of the movie theater's services, or requiring the theater to show only particular movies. The District Court erred in concluding that the provision of the visual information in an alternative (audio) format is a fundamental alteration of the service of screening movies. Under this reasoning, virtually all auxiliary aids and services would be banned by the very statute mandating them, as the essential purpose of the auxiliary aids and services provision is to provide an alternative format to persons with disabilities who, because of their disability, cannot access the original format. To say that converting visual material to an audio format constitutes a fundamental alteration of the public accommodation's service would deprive blind and visually impaired Americans of a host of well-recognized and accepted accommodations. The District Court's ruling eviscerates the ADA's auxiliary aids and services provision and is plainly not what was envisioned by Congress when it enacted the ADA.

This Circuit has recognized that the service provided by movie theaters, such as those owned by Defendants-Appellees, is the screening of films. *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1084 (9th Cir. 2004). In *Fortyune*, the plaintiff sought an injunction that would require the defendant theater chain to change its seating policies to ensure that wheelchair users could sit with their non-disabled companions. In ruling for the plaintiff, this Court held:

Fortyune’s modification also does not fundamentally alter the nature of the services provided by the Theater. [Quoting *Martin*, 532 U.S. at 682, 121 S.Ct. 1879.] All aspects of the Theater and its policies survive the requested relief intact, save one: AMC must now ensure that companion seats are available to the companions of wheelchair-bound patrons until ten minutes prior to showtime, even if a person not accompanying a wheelchair-bound patron refuses to move. This change will have a negligible effect — if any — on the nature of the service provided by the Theater: screening films. See *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1001 (9th Cir. 2000). While the individual who is made to move seats will experience the film in a different manner (*i.e.*, from a different location in the Theater), this shift is modest and does not rise to the level of a “fundamental alteration” of the Theater itself.

Fortyune, 364 F.3d at 1084.

In this Circuit’s opinion in *Martin v. PGA Tour, Inc.*, 204 F.3d 994 (9th Cir. 2000) (*aff’d*, 532 U.S. 661 (2001)), cited in *Fortyune*, the Court reasoned that the defendant’s argument that allowing a professional golfer with a mobility disability to use a golf cart in a tournament despite a tour rule requiring contestants to walk “reads the word ‘fundamentally’ out of the statutory language” of the fundamental alteration defense. *Id.* at 1000. When the United States Supreme Court considered

and rejected the PGA's appeal, it too emphasized that the statutory defense requires a defendant to demonstrate not simply an alteration, but a "*fundamental* alteration." *Martin*, 532 U.S. at 682-83 (emphasis added).⁹ In considering whether the PGA must allow plaintiff Martin to use a golf cart during defendant's championship golf tournament, the Supreme Court reasoned that:

a modification of petitioner's golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an *essential aspect* of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification. Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, *an advantage over others* and, for that reason, fundamentally alter the character of the competition. We are not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration in either sense.

Id. (emphasis added).

⁹ In *Martin*, the issue was a public accommodation's obligation to make "reasonable modifications" in its policies pursuant to §12182(b)(2)(A)(ii). The ADA's policy modification provision has the same "fundamental alteration" defense as does the auxiliary aids and services provisions at issue here. In interpreting this defense, the Department of Justice's "ADA Title III Technical Assistance Manual" emphasizes that a mere modification is not a statutory defense: "What is a fundamental alteration? 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." (available at <http://www.ada.gov/taman3.html> (last visited Dec. 10, 2008)). The DOJ Technical Assistance Manual is entitled to "substantial deference." *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008). See also *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 875-76 (9th Cir. 2004) ("the guidance provided in the" TAM is "entitled to significant weight as to the meaning of" DOJ regulation).

Here, the District Court misapprehended both the law and the facts in reaching its conclusion that descriptive narration is not required by the ADA because it “alter[s] the form in which [the theater operator] normally provides its services,” “change[s] visual elements into an audio format” or “change[s] the content of the services [the theater operator] offers.” (ER (Order) at 10:5-13, 11:7-8.)¹⁰ Apparently, the District Court believes that *any* alteration rises to the level of a *fundamental* alteration. This is patently incorrect. Analyzed under the standard as expounded upon in *Fortyune* and *Martin*, requiring Defendants-Appellees to install descriptive narration equipment does not fundamentally alter an “essential aspect” of their movie screening services. The same movies are shown in the same locations at the same time at the same sound level whether or not the descriptive narration equipment has been installed. Nor does provision of this auxiliary aid and service give a blind movie patron an “advantage over others” so as to “fundamentally alter the character” of the films movie theater operators screen. Instead it provides the movie’s visual information in a format that the blind or visually impaired patron can access. Under both *Martin* and *Fortyune*, the

¹⁰ This Court has held that whether an accommodation “fundamentally alters” the nature of a service is “an intensively fact-based inquiry.” *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 845 (9th Cir. 2004). Amici question whether an “intensively fact-based-inquiry” can be made on a motion to dismiss. At the very least, given *Lentini*’s admonition, the District Court should have allowed the parties to proceed through discovery and into summary judgment before deciding

provision of audio narration to moviegoers who are blind or have visual impairments is not a fundamental alteration within the meaning of the ADA. *Cf. id.*¹¹

The error in the District Court’s ruling on fundamental alteration is also demonstrated by the fact that hundreds of movie theaters across the country have installed audio description equipment and have been screening films with this auxiliary aid and service for years. For example, in 2005, the Attorney General of the State of New York announced a settlement with eight national movie theater chains requiring the installation of descriptive narration equipment in order to “permit individuals who are . . . visually impaired to share in the cultural

(continued . . .)

whether the provision of descriptive narration equipment fundamentally alters the nature of Defendants’-Appellants’ service.

¹¹ Defendants’-Appellees’ unfounded claim, in their Motion to Dismiss, that the law’s requirement that public accommodations provide access to their services means only that Defendants-Appellees need to provide access to instructions on how to purchase tickets and popcorn, is directly contradicted by *Fortyune*. Movie theaters do sell tickets and popcorn and must provide auxiliary aids and services to ensure effective communication with people with sensory disabilities to enable them to partake of those services in a manner equal to sighted patrons who want to buy popcorn and tickets. However, movie theaters are plainly in the business of showing movies to paying customers. *Fortyune*, 364 F.3d at 1084. As such, movie theaters also have the obligation to provide auxiliary aids and services – effective methods of making visually delivered materials available to individuals with visual impairments – to enable access to the displayed content of those movies.

experience and entertainment of a movie screening.”¹² Members of *amicus curiae* ACB and others enjoy attending movies with audio description provided in the Ninth Circuit and all across the country. If video description fundamentally altered a theater’s services of screening movies, theaters across the country would not be providing it.

E. The Narrowly-Tailored “Braille Book Exception” Does Not Apply to Descriptive Narration, which Is an Auxiliary Aid and Service.

In its opinion, the District Court mistakenly analogized Braille books to the provision of descriptive narration (the auxiliary service that *amici curiae* seek), and used this analogy to bolster its holding that the ADA does not require movie theater operators to provide descriptive narration. The District Court’s analogy is flawed.

The Department of Justice ADA regulations contain a narrow exception protecting a public accommodation from having to alter its inventory by purchasing “accessible or special goods” (such as a bookstore providing Braille books) except under particular narrow circumstances. 28 C.F.R. § 36.307. This

¹² See *Movie Theaters to Expand Screenings for People with Disabilities*, http://www.oag.state.ny.us/media_center/2005/Dec05a-05.html (last visited December 10, 2008). See also *Assurance of Discontinuance Pursuant to Executive Law 63(15), settling New York State Attorney General’s claims against Loews Cineplex Entertainment Corporation and requiring installation of descriptive narration equipment at theaters in the Loews chain in New York, located at* http://www.oag.state.ny.us/bureaus/civil_rights/pdfs/Loews%20Cineplex%20Entertainment%20Corp.pdf (last visited December 9, 2008).

exception is inapt here, because movies are not “inventory” of theater operators or exhibitors such as Defendants-Appellees, and descriptive narration is not an “accessible or special good.” The District Court’s reasoning on this issue causes a narrowly tailored exception designed to protect inventory to swallow the broad auxiliary aids and services mandate.

As discussed in Section VI.A., above, the ADA contains a broad anti-discrimination mandate, decrying disability-based discrimination in “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.” 42 U.S.C. § 12101(a)(3); *see generally* 42 U.S.C. § 12101.¹³ Embedded in that mandate is the specific obligation of a public accommodation to provide “auxiliary aids and services.” 28 C.F.R. § 36.303 (a) (“A public accommodation shall [...] 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” unless it can show that to do so would “result in an undue burden, *i.e.*, significant difficulty or expense.”).

This term “auxiliary aids and services” is broad and non-exhaustive. As discussed above, in addition to including “qualified readers, taped texts, or other

¹³ Congress recently affirmed in the findings of the ADA Amendment Act of 2008 (“ADAAA”), Pub. L. No. 110-325, 122 Stat. 3553 (2008) that the ADA is a

effective methods of making visually delivered materials available to individuals with visual impairments,” auxiliary aids and services also include the “acquisition or modification of equipment or devices.” 42 U.S.C. §§ 12102(b) and (c).

Descriptive narration equipment falls squarely within this definition. As described above, descriptive narration includes a track with on-screen information in an audible format, and the equipment necessary to present the audible information to movie patrons who are blind or visually impaired. Taken together, the equipment and information allow blind movie-goers to access visual aspects of movies that are otherwise unavailable to them. It is itself an auxiliary aid that gives people who are blind or visually impaired access to the service being provided by the theater – the service of exhibiting movies for the public to enjoy. Audio description equipment is simply a means of making the movie’s visual information available to people with vision disabilities.¹⁴

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remedial statute intended to be construed broadly to address discrimination.

¹⁴ The District Court’s erroneous view of auxiliary aids and services also led it to improperly analyze three judicial opinions – *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000); *McNeil v. Time Ins. Co.*, 205 F.3d 179 (5th Cir. 2000); and *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557 (7th Cir. 1999). All three cases dealt with insurance coverage, which is subject to unique analysis and defenses as specified in Title V of the ADA. See 42 U.S.C. § 12201(c). Additionally, the District Court’s discussion of these three cases obfuscates the fact that auxiliary aids and services, such as the descriptive narration sought by Plaintiffs-Appellants, do not constitute a *different* good or service, but are a different means for delivering the same information to people with disabilities. Changing visual information to aural information is precisely what Congress intended when it defined term “auxiliary aids and services” as including “effective

Braille books, in contrast, are specifically recognized in the DOJ regulations as “accessible or special goods” within the meaning of 28 C.F.R. § 36.307. Such goods have been (in most instances) explicitly excluded from the reach of the ADA. 28 C.F.R. § 36.307.

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,” although it “shall order accessible or special goods at the request of an individual with disabilities, if, in the normal course of its operation, it makes special orders on request for unstocked goods, and if the accessible or special goods can be obtained from a supplier with whom the public accommodation customarily does business.” 28 C.F.R. §§ 36.307(a) and (b). Examples of “accessible or special goods” included in the regulations are “items such as Brailled versions of books, books on audio cassettes, closed-caption video tapes, special sizes or lines of clothing, and special foods to meet particular dietary needs.” *Id.* at 36.307(c).

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methods of making visually delivered materials available to individuals with visual impairments.” 42 U.S.C. § 12102(1)(B); *see also* 28 C.F.R. § 36.303(b)(2) (same). The District Court’s conclusion that changing visual elements into sound constitutes a “special good” or a prohibited fundamental alteration of the nature of a public accommodation’s services is wholly antithetical to the purpose and the plain language of the ADA.

One court has clearly recognized the distinction between “auxiliary aids and services” on the one hand and “accessible and special goods” on the other in the context of movie screenings, and has found equipment that assists disabled movie patrons (in that case, captioning) to fall within the first category. *See, Ball v. AMC Entm’t, Inc.*, 246 F. Supp. 2d 17 (D. D.C. 2003). In *Ball*, the court rejected Defendants’ assertion on summary judgment that showing closed captioned movies for deaf and hard-of-hearing movie patrons constitutes a special good or service. In reaching its conclusion that court reasoned that “Defendants fail to recognize that they are not similarly-situated to bookstores and video stores that provide goods because Defendants provide the service of screening first run movies.” *Id.* at 24. The court further held that because closed captioning could be provided to deaf individuals during normal screening of captioned films, installation of equipment to provide captioning “can be required under the ADA because it would not change the nature of the service supplied by Defendants – screening first run movies to the public.” *Id.* at 24-25. As in *Ball*, Plaintiffs-Appellants are not asking Defendants-Appellees to sell a particular product, show particular movies, or alter the nature of the service they provide. Instead, they are simply asking Defendants-Appellees to provide an auxiliary aid and service, to ensure that patrons with visual impairments are not denied access to the visual content of movies that Defendants-Appellees normally screen.

In this regard, descriptive narration is akin to Braille menus. Braille menus allow blind customers to perceive the visual material provided to sighted customers by the regular menu, just as descriptive narration allows blind moviegoers to perceive the visual material presented to sighted moviegoers on the screen. Like descriptive narration, Braille menus are not accessible/special products or goods; they are aids to information access, and they do not change the nature of the information provided. *See* 28 C.F.R. Pt. 36, App. B, Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities (Published July 26, 1991) (listing Braille menus as an example of auxiliary aids and services, along with providing waiters to read the menu options to a blind patron). Accordingly, just as Braille menus are considered an auxiliary aid and service required by the ADA, descriptive narration should be as well.

F. Plaintiffs-Interveners-Appellants Are Not Required to Encounter Barriers to Access at Each of Defendants'-Respondents' Theaters in Order to Challenge Them.

The District Court erred substantially in holding that Plaintiffs-Interveners-Appellants lack standing to challenge access barriers at any theater other than the one they visited. Such a draconian definition of standing comports with neither Ninth Circuit nor Supreme Court precedent.

The ADA, like other civil rights statutes, is primarily enforced through private lawsuits. In such cases, courts take a “broad view of Article III standing [...].” *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1043 (9th Cir. 2008) (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)).

Plaintiffs-Interveners-Appellants have met the test for Article III standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). First, Plaintiffs-Interveners-Appellants have suffered an “injury in fact” – “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Id.* at 560 (citations omitted). This requirement is satisfied where, as here, “a plaintiff has visited a public accommodation on a prior occasion and is currently deterred from visiting that accommodation by accessibility barriers [...].” *Doran*, 524 F.3d at 1041. The “injury in fact” requirement is broad in scope; Plaintiffs-Interveners-Appellants need not show that they have personally encountered each and every barrier to obtain appropriate injunctive relief. *Id.* at 1043-1044. Instead, they may permissibly challenge all barriers related to their disability in one lawsuit. *Id.* at 1047.

Further, Plaintiffs-Interveners-Appellants have standing to challenge the same access barriers at any of the theaters where they are aware that barriers exist. This is true regardless of whether Plaintiffs-Interveners-Appellants have visited

these other theaters: as long as these theaters continue to house known access barriers, attempts by moviegoers who are blind or have visual impairments would be futile. *See, e.g., Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136-1137 (9th Cir. 2002) (“Thus, under the ADA, once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury. [citation] So long as the discriminatory conditions continue, and so long as a plaintiff is aware of them and remains deterred, the injury under the ADA continues.”); *see also* 28 C.F.R. § 36.501(a) (“Nothing in this section shall require a person with a disability to engage in a futile gesture if the person has actual notice that a person or organization covered by title III of the Act or this part does not intend to comply with its provisions.”).

Moreover, Plaintiffs-Interveners-Appellants have shown that the causal connection between the injury they suffered and the conduct complained of is traceable to Defendants’-Appellees’ actions. *Lujan*, 504 U.S. at 560 (citation omitted). Plaintiffs-Interveners-Appellants have alleged that they suffered discrimination based on their disability because Defendants-Appellees failed to use available auxiliary aids and services. Plaintiffs’-Interveners’-Appellants’ injury is a direct result of Defendants’-Appellees’ failure to act. Plaintiffs-Interveners-Appellants have shown that a favorable decision would likely, and not merely

speculatively, redress the injury they suffered. With the aid of descriptive narration, they would be able to enjoy the movie-viewing experience comparable to that of sighted moviegoers. Accordingly, Plaintiffs-Interveners-Appellants have met the standards for Article III standing.

VII. CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the District Court's ruling below.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5,354 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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