COMMENTS OF THE ALEXANDER GRAHAM BELL ASSOCIATION FOR THE DEAF AND HARD OF HEARING IN SUPPORT OF THE "PLACES OF PUBLIC ACCOMMODATION - MOTION PICTURE HOUSES – CAPTIONING" (SB 92)

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STATEMENT OF IDENTITY AND INTEREST

The Alexander Graham Bell Association for the Deaf and Hard of Hearing (hereinafter "A.G. Bell") respectfully submits the following comments in support of the "Places of Public Accommodation - Motion Picture Houses – Captioning" Bill (SB 92).

A.G. Bell is a non-profit organization based in the District of Columbia. It has chapters throughout the United States—including in the Maryland—and international affiliates worldwide. One of the oldest and preeminent organizations in deafness, A.G. Bell advocates for spoken language in deaf children and adults. A.G. Bell provides advocacy, resources and leadership for parents, professionals, and individuals who are deaf or hard of hearing.[1] A.G. Bell has long advocated for movie captioning accessibility. A.G. Bell has participated as *amicus curiae* in court cases seeking movie captioning access, and submitted comments in favor of expanding captioning accessibility to legislative and regulatory bodies. Indeed, A.G. Bell submitted comments to the Maryland House in support of "Rachel's Law" (HB 1463) in 2011 urging the House to implement captioning access. A.G. Bell is also submitting comments concomitantly to the Maryland House in support

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[1] For simplicity's sake, references to "deaf individuals" or "deaf patrons" in these comments encompass all individuals whose hearing loss prevents enjoyment of an uncaptioned movie.

of the current HB 426 (which also contemplates open captioning access). Moreover, A.G. Bell has published numerous articles advocating movie captioning access in its publications.

In a perfect world, movie theaters would happily and voluntarily provide captioning access to deaf patrons for their feature presentations. Sadly, however, such has not been the case. History has conclusively shown theaters, when left to their own devices, either provide minimal or no captioning access for deaf patrons. While the deaf community has achieved success in requiring theaters to provide captioning accessibility for their feature presentations via litigation and settlements throughout the country, most of these efforts have resulted in closed-captioning technology access—which is not the preferred method of access for deaf moviegoers.

Although long overdue, A.G. Bell applauds the Maryland Senate focusing on movie captioning access. A.G. Bell believes that its views can inform the Senate, and assist the Senate in making an informed decision when it decides to issue laws regarding movie captioning access. In these comments, A.G. Bell will provide the Senate with a brief background to the history of movie captioning, and the deaf community's efforts to obtain captioning access.

If history is any guide, A.G. Bell fully expects the movie theater industry to oppose the bill outright, or at least minimize the potential impact of the bill.

Indeed, they did so for Rachel's Law before the Maryland House in 2011. A.G. Bell expects the theater industry to set forth the same tired and discredited arguments that it has made in court cases, to state legislatures and/or city councils considering captioning access bills, and to federal government regarding federal disability laws. Accordingly, these comments will discuss the movie theaters' historical resistance to captioning access, and will refute many of the industry's often-repeated arguments as to why a mandate for captioning access is unnecessary. The comments will also explain why open captioning accessibility mandates are necessary.

I. THE NECESSITY FOR FULL MOVIE CAPTIONING ACCESS FOR DEAF PATRONS

In order to fully appreciate the necessity of captioning access regulations, it may be helpful to have an understanding as to what movie captioning means for deaf citizens.

A. Cultural Significance of Movies and Impact of Lack of Captioning Access

There are thousands of movie theaters nationwide, each showing many features daily. To experience the "magic of movies," deaf individuals need captioning access to the movie's dialogue. Simply put, deaf individuals cannot follow a movie's storyline if (for example) they cannot understand Darth Vader's proclamation "No, Luke—I am your father" in *The Empire Strikes Back.* Nor can

they appreciate the drama of a scene without understanding (for example) Chief Brody gravely informing Quint "You're gonna need a bigger boat" in *Jaws*.

Furthermore, a movie (or even a line from a movie) may become a topic of popular discussion because of the movie's entertainment value or social message. Without captioning access, deaf individuals would not be able to follow the now-iconic "It is literally impossible to be a woman" speech from *Barbie*. *Cf.* Comment, *District Court Approves Settlement Requiring Movie Theaters to Provide Closed Captioning for Deaf and Hard of Hearing People,* 118 HARV. L. REV. 1777, 1780 (2005) (making similar point).

B. Movie Captioning Prior to the 1990s

The earliest movies provided full accessibility for deaf individuals, as the dialogue was printed on the screen and visible to the entire audience. The era of "silent" films effectively ended in 1927, when *The Jazz Singer* (a "talking" movie) was a commercial success. In the decades that followed, deaf individuals were largely excluded from the social, cultural, and emotional experience of movies.

The first law to address the lack of captioning issue was the Captioned Films Act, PUB. L. 85-905 (1958), when the United States Congress appropriated federal funds to lease, or accept films, provide captions for them, and distribute them through state schools for the deaf, and other appropriate state agencies. This program proved enormously popular among deaf individuals, and Congress has

expanded the captioning appropriations over time. *See generally* Heldman, *Television and the Hearing Impaired,* 34 FED. COMM. L. J. 93, 123-24 (1982) (recounting early development of federal captioning laws).

Despite extensive efforts by deaf advocates, captioning access in theaters was largely nonexistent-to-limited until recently. Prior to the 1990s, captioned films were generally not available for deaf audiences until long after they had been available to hearing audiences. Until the later Twentieth Century, captioning was a laborious process, often taking several months after a film had been released. Theaters were not interested in showing a (now captioned) movie that had outlived its commercial run. *See generally* Kovalik, *"Silent" Films Revisited: Captioned Films for the Deaf,* 41 LIBRARY TRENDS 100 (June 22, 1992).

Moreover, until the late 1990s, the only form of movie captioning that existed was "open captioning." In the movie theater context, "open" captions are seen by the entire audience, whereas "closed" captions are seen only by the deaf patron. *See Ball v. AMC Entern., Inc.,* 246 F. Supp.2d 17, 20 n.9 (D.D.C. 2003) (explaining differences between "open" and "closed" captioning). As a practical matter, "open" captions are similar to English subtitles in foreign films. However, unlike such subtitles in foreign films, "open" captions include additional aural information (i.e., "doorbell" or "telephone ringing"), as well as tone (i.e., "shouting," "whispering," "falsetto").

Theaters have long resisted extensive use of open captions, ostensibly because they are "too distracting" to non-deaf members of the audience.[2] While technological improvements have greatly simplified the captioning process (indeed, today many amateurs caption their films and videos such as YouTube and other social media), and studios have assumed responsibility for captioning their films, most theaters that show open captioned movies are reluctant to show such movies beyond non-premium times such as Tuesday evenings or Sunday mornings.

C. Development of Closed-Captioning Technology

When the federal Americans With Disabilities Act ("ADA") was enacted in 1990, deaf advocates were dismayed when the ADA's House Report contained a passage stating that "open captioning" was not required. *See* H. REP. 101-485(II)

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[2] *See, e.g.,* Holm, *Captioning System Allows Deaf Patrons to Experience Movie Magic*, WATERLOO COURIER (Nov. 1, 2006) ("[Open captioning] is on the screen, and normal customers may find that disruptive"); Beifuss, *Caption The Action - Movie Theaters Install Systems for Hearing-Impaired,* COMMERCIAL APPEAL (July 30, 2004) ("[T]heaters don't like to book [open-captioned showings] too often because patrons with full hearing are annoyed by the captioning"); Singer, *Hearing-Impaired Get Movie Treat*, CHICAGO TRIBUNE (May 7, 2004) ("[T]heater executives adamantly oppose [open captions], saying such subtitles would be a distraction to their hearing clientele . . . . Richard King, a spokesman for AMC Theaters, said his company has tested open captioning and 'we have found that is something that is not appealing to moviegoers [who] are not hearing-impaired'"); Robitaille, *Movie Magic for the Hearing Impaired*, BUSINESS WEEK (Nov. 1, 2001) ("Hollywood has always stood firmly against open captions, arguing that they would drive away hearing viewers, who would instead come to the movies only on the days the captions weren't shown"); Kisor, *System a Golden Opportunity to Rediscover the Silver Screen*, CHICAGO SUN-TIMES, (July 18, 1998) ("[H]earing moviegoers don't care for [open captions]. Too distracting").

at 108 (1990). However, deaf advocates were encouraged by language in the Report indicating that the ADA contemplated utilization of future technologies. *See id.* (ADA requirements "should keep pace with the rapidly changing technology of the times"). Based upon this language, deaf advocates—including A.G. Bell—pressed for the development of closed captioning technologies.

Since the late 1990s, there have indeed been several closed-captioning technologies developed, and deaf advocates sued under the federal ADA for theaters to implement these technologies. *See, e.g., Arizona v. Harkins,* 603 F.3d 666 (9th Cir. 2010) (requiring movie theaters to install closed-captioning equipment for deaf patrons); *Ball v. AMC Entm't, Inc.,* 315 F. Supp.2d 120, 122-23 (D.D.C. 2004) (same). In the mid-to-late 2000s, a few states enacted laws mandating closed-captioning access. And in 2014, the National Association of Theater Owners and several deaf advocacy groups—including A.G. Bell—agreed to standards on closed-captioning access on a nationwide basis. *See* Lieberman, *Exhibitors Agree To "Landmark" ADA Compromise on Closed Captioning*, DEADLINE (Nov. 21, 2014), *available at* https://deadline.com/2014/11/movie-theaters-closed-captioning-americans-disabilities-act-1201292123/. In 2019, Hawaii became the first state that required movie theaters to provide a minimum number of weekly open-captioned feature presentations for deaf patrons.

D. General Captioning Preferences of the Deaf Community

It has been A.G. Bell's longtime position that open-captioning—rather than closed-captioning—is the preferred method of movie access for deaf patrons. Indeed, such is the position of every major deaf advocacy organization.

Tellingly, one of the reasons why movie theaters were so reluctant to implement closed-captioning technologies in the 1990s was because they argued that deaf patrons preferred open captioning. This explanation would have been acceptable if theaters had agreed to increase their open captioned showings in lieu of installing closed captioning. But they did not do so. Rather, theaters generally continued their practice of showing open-captioned movies only a few times a year, and always at non-premium times, such as Tuesday evenings or Sunday mornings. Hence, the deaf community was forced to resort to litigation using what limited remedies the federal ADA offered (i.e., closed captioning access) to attain captioning accessibility for showtimes that the rest of the world preferred.

The reasons why the deaf community prefers open captioning over closed-captioning have been oft-repeated. A.G. Bell is confident that the Senate will hear of the shortcomings of closed-captioning technologies from other deaf citizens, and will only briefly re-state them here. Many (if not all) closed captioning technologies are cumbersome to use. The closed-captioning devices require the deaf patron to look-up/look-down to read the captions and follow the action on the

screen, whereas the open captions are within the line of sight of the screen (indeed, literally on the screen). In other words, open captions are easier to read/follow than closed captions. In addition, far too often, the closed-captioning devices suffer from operator failure or battery loss. And most users of the closed-captioning devices have experienced instances where the signal is not strong enough to the theater, resulting in missed or garbled dialogue on the closed-captioning device.

And perhaps most importantly, movie theaters have shown little appetite for improving the closed-captioning technologies that they have installed. In many theaters, the same closed-captioning system has been in place for well-over a decade. For this reason, many closed-captioning manufacturers (Sony, for example) have ceased their closed-captioning system innovations. Why bother investing in new research when theaters are not going to buy new systems?

The long and short of it is that open-captioning is a far superior form of access than closed-captioning for deaf patrons. An analogy—while admittedly imperfect—is that closed-captioning is to civil unions what open captioning is to marriage equality. It is better than nothing, but it is not equal accessibility.

II. A.G. BELL EXPECTS THE THEATER INDUSTRY TO OPPOSE SB 92

A.G. Bell has been monitoring captioning advocacy for decades and is well-familiar with the usual arguments that theaters make in opposing captioning

access. A.G. Bell will list below the more common contentions set forth by theaters in opposing captioning mandates, and will explain why none of them withstand scrutiny. A.G. Bell encourages the Senate to disregard the theaters' often-repeated arguments for avoiding captioning access mandates.

A. "We Don't Discriminate"

Although this argument has lost much steam because it has been rejected so many times, theaters often claimed that they do not discriminate against deaf individuals because deaf patrons are free to purchase tickets and watch (uncaptioned) films in the same fashion as the general public. As one court noted, this type of reasoning "missed the point" of disability discrimination laws. *See Soto v. City of Newark*, 72 F. Supp.2d 489, 496 n.12 (D.N.J. 1999) (defendants' argument that they need only treat deaf individuals "in the same fashion as everyone else . . . misses the point of the ADA").

As federal courts have recognized, failure to provide equal access through accommodations constitutes illegal discrimination. *See, e.g., Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 846-47 (9th Cir. 2004) (failure to provide accommodations is discrimination); *Walker v. Carnival Cruise Lines,* 63 F. Supp.2d 1083, 1092 (N.D. Cal. 1999) (defendants violate ADA "not simply for denying their services to disabled customers outright, *but for failing to modify or adjust their services so as to meet the needs of the disabled customers they do*

serve"; emphasis added). Accordingly, theaters cannot avoid discrimination charges merely by contending that they allow deaf patrons to buy tickets and entry to the theater in the same manner as the general public.

Theaters also contend that they serve their deaf patrons by installing assistive listening devices such as infrared or FM sound systems. However, such devices only benefit people with mild hearing losses, and were useless to people who were deaf or had significant hearing impairments. *See Ball,* 246 F. Supp.2d at 23 n.17 (noting point). As one legal commentator put it, "[c]aptioning is currently the only form of technology that serves as an auxiliary aid providing equally effective communication to profoundly deaf individuals as well as others with less severe hearing loss." Comment, *Open and Closed, Captioning Technologies as a Means to Equality,* 23 J. MARSHALL J. COMPUTER & INFO. L. 159, 182 n.207 (2004).

A.G. Bell expects that the movie theaters will attempt to make a similar argument with respect to closed-captioning technologies as they did with respect to assistive listening devices. However, as already discussed above, the deaf community unquestionably prefers open captioning, rather than closed captioning for movie theater access.

B. Captioning "Alters the Content of a Movie" or is a "Different Service"

Theaters have often contended that they have no control over whether studios caption movies (even though studios caption almost every major movie today), and that providing captioning access "alters the content" of a movie. As such, theaters contend, they may be liable for violating artists' First Amendment rights if they provide captioning access to deaf patrons.

Again, these "captions alter the content of a movie" arguments are absolute balderdash. Courts and commentators have flatly rejected such arguments in no uncertain terms. *See, e.g., Gottfried v. FCC,* 655 F.2d 297, 312 n.54 (D.C. Cir. 1981) ("A captioning requirement would not significantly interfere with program content"), *rev'd in part on other grounds,* 459 U.S. 498 (1983); *Ball,* 246 F. Supp.2d at 21 n.11 (captioning does not alter content of movie); Comment, *supra,* 23 J. MARSHALL J. COMPUTER & INFO. L. at 197 ("The movie product is not itself altered in any way, shape or form when [captioning] is used"). The Federal Communications Commission likewise does not believe that captioning alters the content of television programming in any fashion. *See, e.g., In re Captioning for the Deaf,* 63 F.C.C.2d 378, at *5 (Dec. 20, 1977) (noting FCC's longstanding interest in promoting television captioning for deaf viewers); Comment, *supra,* 23 J. MARSHALL J. COMPUTER & INFO. L. at 169-70 (similar point). Likewise,

Congress never indicated in the 1958 Captioned Films Act that captioning alters movies.

Moreover, in 2010, a panel of judges on the U.S. Court of Appeals for the Ninth Circuit considered and largely ridiculed the theaters' "we are in the non-captioned movies business" argument, telling counsel for the theaters: "We think, you know it's just silly for anybody to argue that."[3] Moreover, the Chief Judge of the Ninth Circuit called the theaters "jerks" for refusing to provide captioning access, and said that the theaters "are going to lose this battle [over captioning access] in the end."[4]

And even more compelling is the critical and commercial successes of foreign and/or "subtitled" movies in recent years, such as *Parasite, Pan's Labrinth,* and *The Passion of the Christ.* If American audiences had no problem watching the subtitles visible to the entire audience in these critically and commercially successful films, then it is entirely incongruent for theaters to argue that captions for deaf patrons somehow alter the nature of a movie. *Cf.* Comment, *supra,* 23 J. MARSHALL J. COMPUTER & INFO. L. at 197-98 (making similar point).

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[3] The audio file of the oral argument before the Ninth Circuit may be accessed at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004752. The "it's just silly for anybody to argue that" passage is approximately at the 44.00 minute mark of the file.

[4] The "jerks" passage is approximately at the 48.30 minute mark of the file.

C. Deaf People Are Illiterate and Can't Understand Captions

Finally, a lawsuit seeking captioning was filed in Washington State Court in the early 2000s under Washington State Disability Law. The theaters raised the usual defenses as to why they should not be required to provide captioning access. However, the theaters had made a new argument in the Washington State lawsuit that bears highlighting. Theaters argued that they shouldn't have to provide captioning access because many deaf patrons are illiterate and cannot understand captions.

Seriously. ***They made that argument.***

Like every demographic, it is true that the deaf community has some members whose reading skills are poor. However, like every demographic, the deaf community has members who have graduated from Ivy League institutions. In short, the deaf community has members of all walks and abilities of life—just like every other demographic. The theaters' argument in the Washington State case that they should not have to provide captioning access because some deaf patrons have poor reading skills is nothing short of outrageous and demonstrates the depths to which the theaters will sink to avoid captioning access mandates.

D. Captioning Will Result in Financial Burdens and/or Losses

Another favorite canard that theaters employ to resist captioning access is that it supposedly cost too much to install captioning equipment. For theaters that have converted to digital technology (i.e., any reasonably modern theater), there is no cost for implementing open captioning. Indeed, virtually every major motion picture comes with captions (produced by the studio) at present.

Relatedly, theaters claim that they lose money on open-captioned showings because "hearing" patrons demand refunds after discovering that a showing has open captions, or else refuse to attend open captioned showings. The former complaint can be avoided with appropriate advertising (i.e., "this presentation contains open captions") to protect against upset expectations. A.G. Bell also respectfully suggests that such people are becoming rarer and rarer, given that an entire generation has grown up with captions on television at home, airports, and bars. The public is far more accepting of open captions than it was thirty years ago.

The latter complaint (usually in the form of comparing attendance between captioned showings and non-captioned showings) fails to take into account that patrons who refuse to attend an open-captioned showing will likely adjust their schedules to attend a non-captioned showings. There is no evidence that patrons stay home entirely merely because a particular movie they wish to see is being

shown with captions. They are far more likely to simply attend a non-captioned showing of that movie rather than stay home altogether.

If anything, it can be argued that open-captioned showings *increase* attendance for theaters. Deaf people (and their close friends/relatives) are simply not going to attend non-captioned movies. They will attend open-captioned movies. And theaters will also reap the benefits of concession expenditures from those deaf patrons (and their close friends/relatives). *See Ball*, 246 F. Supp. 2d at 26 (recognizing point).

And to the extent that the theaters suggest that *any* expenditure or loss of profit necessarily constitutes economic hardship, their position is beyond frivolous. Basic disability law "contemplates some financial burden resulting from the accommodation" for people with disabilities. *United States v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1417 (9th Cir. 1994). Under the federal ADA, the "undue burden" standard is high. *See, e.g., Anderson v. Gus Mayer Boston Store of Delaware,* 924 F. Supp. 763, 781 (E.D. Tex. 1996) (defining "undue hardship" as a "concept approaching financial ruin"). Theaters can point to no example of a business (let alone a theater) going into financial jeopardy as a result of captioning access, and no such examples exist.

Moreover, courts have continually rejected comparable "we will lose business" arguments as a defense against civil rights laws. Theater owners once

argued that compliance with desegregation laws would be economically ruinous because their Caucasian patrons would be offended by the presence of African-Americans, but courts rejected such contentions. *See, e.g., United States v. Gulf-State Theaters, Inc.,* 256 F. Supp. 549, 552 (N.D. Miss. 1966) (three-judge court; rejecting theater's defense that white patrons objected to presence of African-American patrons); *Baylies v. Curry,* 21 N.E. 595, 595-96 (Ill. 1889) (rejecting theater's defense that exclusion of African-American woman was justified "to avoid collision between the races"). The Senate here should do likewise. And courts have continually rejected alleged losses of business because of "consumer preference" as a defense to civil rights lawsuits in other contexts, such as gender and religious discrimination.[5]

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[5] *See, e.g., Fernandez v. Wynn Oil Co.,* 653 F.2d 1273, 1275-76 (9th Cir. 1981) (rejecting oil company's defense to federal sex discrimination claim that Latin American clients would refuse to deal with female executives); *Diaz v. Pan Am. World Airways, Inc.,* 442 F.2d 385, 387-89 (5th Cir. 1971) (allowing male plaintiff rejected as an air steward to bring suit against airline, even though airline claimed that consumers overwhelmingly preferred female stewardesses); *Bollenbach v. Bd. of Ed.,* 659 F. Supp. 1450, 1472 (S.D.N.Y. 1987) ("The fact that the Hasidic clientele strongly prefer male [bus] drivers does not [justify discrimination]"); *Wilson v. Southwest Airlines Co.,* 517 F. Supp. 292, 302 (N.D. Tex. 1981) ("If an employer could justify employment discrimination merely on the grounds that it is necessary to make a profit, Title VII would be nullified in short order"); *see also* Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1373 (1997) ("If customers feel uncomfortable doing business with female executives or being served by male flight attendants, that's the customers' problem").

In short, merely because the captioning equipment costs money or that some hearing patrons object to open captioning are not valid bases for opposing SB 92. In the unlikely event that theaters are still facing losses from installing captioning access, they are free to adjust their business practices to offset remaining losses (if any), such as marginally increasing prices to the general public.

CONCLUSION

A.G. Bell strongly desires—and will continue to advocate for—equal access to the movie viewing experience in theaters. The theaters' resistance to captioning access mandates has significantly delayed this goal, and SB 92 would be a significant step in improving captioning access for deaf citizens. Accordingly, A.G. Bell urges the Senate to ignore the oft-repeated opposition from the theaters, and to pass SB 92.

Respectfully submitted,

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