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## Unburdening Broadway: Spotlight on the American's with Disabilites Act

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**UNBURDENING BROADWAY:  
SPOTLIGHT ON THE AMERICANS WITH DISABILITIES  
ACT**

*Naomi Edwards\**

*Inspired by the Shakespearian play, someone once said, “All the world’s a stage, some of us just have better seats,”<sup>1</sup> but what if you cannot even get into the theater to take your seat? Imagine you just watched the Tony Awards, the performers were spectacular, the musical numbers are stuck in your head, and you cannot wait to buy tickets to this year’s best musical. You go online, research the theater where the production is playing, and your heart sinks. There is a small step into the front of the theater, and the nearest handicapped bathroom is located in a hotel next door. It would be too onerous of a task to attempt to see the production in your motorized wheelchair. Instead you are left hoping that they will make a movie version.<sup>2</sup>*

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\* J.D. Candidate, Brooklyn Law School, 2019; B.A., Macauly Honors College at CUNY, 2016. I would like to thank my parents, Charlesworth and Maria Edwards, for their continuous love and support through this process. This note would not have been possible without your inspiration and encouragement. Thank you for putting up with my stress-induced idiosyncrasies, and infatuations with fictional characters. I would also like to thank the entire staff of the *Journal of Law and Policy* for their meaningful feedback and editing, particularly James Allen, and Zachary Shapiro, your insights made me a better writer.

<sup>1</sup> *Perfect Pairings: Broadway Inspired Nights*, THE SHOPS AT COLUMBUS CIRCLE, TIME WARNER CTR., <https://www.theshopsatcolumbuscircle.com/perfect-pairings-broadway-inspired-nights/> (last visited Nov. 28, 2018); see WILLIAM SHAKESPEARE, AS YOU LIKE IT act 2, sc. 7.

<sup>2</sup> See Tammy Duckworth, *Congress Wants to Make Americans with Disabilities Second-Class Citizens Again*, THE WASH. POST (Oct. 17, 2017), <https://www.washingtonpost.com/opinions/congress-is-on-the-offensive-against-americans-with-disabilities/2017/10/17/f508069c-b359-11e7-9e58->

## INTRODUCTION

The Declaration of Independence declares, as a universal truth, “that all men are created equal.”<sup>3</sup> Inspired by this ideal, the United States has enacted civil rights legislation to ensure that the principles laid out in the Declaration of Independence become a reality.<sup>4</sup> In the 1960s, legislators and civil rights advocates relied on these principles of equality when crafting the Civil Rights Act of 1964.<sup>5</sup> Following this tradition,<sup>6</sup> the Americans with Disabilities Act (“ADA”) was enacted on July 26, 1990 with the lofty goal of ending discrimination on the basis of disability.<sup>7</sup> When former-President George H. W. Bush signed the Act into law, he compared the legislation to the falling of the Berlin Wall.<sup>8</sup> On that day, he declared that the ADA stood as legislative evidence that

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e6288544af98\_story.html?utm\_term=.95ba77c3f5d7 (describing the story of Lisa Carl who experienced a similar situation when she was turned away at a movie theater because the manager would not allow her to enter in her wheelchair).

<sup>3</sup> THE DECLARATION OF INDEPENDENCE para.2 (U.S. 1776).

<sup>4</sup> Civil Rights Cases, 109 U.S. 3, 18–19 (1883) (stating that “all persons shall be entitled to the full and equal enjoyment of the accommodations [of] . . . places of public amusement . . .”).

<sup>5</sup> See A. K. Sandoval-Strausz, *Travelers, Strangers and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53, 53–55 (2005) (“The struggle for civil rights in public places was not simply an elaboration of the Revolutionary rhetoric of rights or a new birth of freedom. It was in fact a reconfiguration of pre-Enlightenment corporative and communitarian privileges into individually possessed entitlements.”).

<sup>6</sup> The ADA was “modeled after the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin . . . the ADA is an “equal opportunity” law for people with disabilities.” ADA.gov Information and Technical Assistance, *Introduction to the ADA*, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) (last visited Aug. 30, 2018).

<sup>7</sup> See Americans with Disabilities Act, 42 U.S.C. § 12183(a)(1) (1990).

<sup>8</sup> Clip of Americans with Disabilities Act Signing, C-SPAN (July 15, 2015), <https://www.c-span.org/video/?c4544536/americans-disabilities-act-signing>; see generally Statement by President of the United States, Statement by President George Bush Upon Signing S. 933, 1990 U.S.C.C.A.N. 601 WL 285753 (Leg. Hist.).

the United States, “will not accept . . . will not excuse . . . [and] will not tolerate discrimination in America.”<sup>9</sup>

Although the passage of the ADA led to more inclusion of people with disabilities,<sup>10</sup> there remain many areas of American public life which are inaccessible or unaccommodating to the physically disabled.<sup>11</sup> There are barriers to entry, which make facilities inaccessible, as well as barriers to use, which make facilities unaccommodating.<sup>12</sup> Even today, many public memorials<sup>13</sup> and museums<sup>14</sup> have been documented as less than one hundred percent wheelchair accessible.

Furthermore, restaurants have been known to “accommodate” wheelchair-bound patrons through the use of alternate passageways that direct them toward less than hospitable

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<sup>9</sup> *Id.*

<sup>10</sup> *Americans with Disabilities Act Anniversary Marks Progress, Setbacks in Accessible Design: Progress Impeded by an Imperfect Law*, PARALYZED VETERANS OF AM., <http://www.pva.org/research-resources/resources/accessible-design/accessibility-resources/ada-at-25-americans-with-disabilities-act> (last visited Aug. 30, 2018).

<sup>11</sup> *Id.* In addition to the inaccessibility that is allowed under the ADA, people with disabilities face additional challenges with non-compliance with the provisions of the ADA. As recently as 2015, accounts indicate regular and widespread, “noncompliance with the mandates of the A.D.A . . .” Kaaryn Gustafson, *More Work Needs to Be Done to Prevent Exclusion of the Disabled*, N.Y. TIMES (July 26, 2015), <https://www.nytimes.com/roomfordebate/2015/07/26/the-americans-with-disabilities-act-25-years-later/more-work-needs-to-be-done-to-prevent-exclusion-of-the-disabled>.

<sup>12</sup> *See infra* Section II.B; Marc Hershberg, *Serial Suer Targets Broadway Theaters*, FORBES (Feb. 19, 2018), <https://www.forbes.com/sites/marchershberg/2018/02/19/serial-suer-targets-broadway-theaters/#75a7e99c1449>.

<sup>13</sup> In early 2017, a memorial to Franklin Delano Roosevelt made headlines for being “inaccessible to wheelchair-using visitors.” *NYC Memorial to Wheelchair-Using FDR Inaccessible to Wheelchair-Using Visitors, Lawsuit Says*, FOX NEWS (Mar. 17, 2017), <http://www.foxnews.com/us/2017/03/17/nyc-memorial-to-wheelchair-using-fdr-inaccessible-to-wheelchair-using-visitors-lawsuit-says.html>.

<sup>14</sup> *Accessibility*, GUGGENHEIM, <https://www.guggenheim.org/accessibility> (last visited Aug. 30, 2018) (“The museum is wheelchair accessible except for the High Gallery, which is at the top of the first ramp and has two low stairs at the entrance.”).

entrances.<sup>15</sup> Additionally, it is not uncommon for restaurants to have interior stairs, which oftentimes prevent physically disabled patrons from accessing main dining areas.<sup>16</sup> Although such accommodations are *technically* in-line with the requirements under the ADA,<sup>17</sup> they maintain barriers that make it more difficult for individuals in wheelchairs to enjoy the goods and services provided by these establishments.<sup>18</sup> This kind of “shortcut compliance” with the ADA is particularly evident when examining Broadway theaters.<sup>19</sup>

According to a 2012 report from the U.S. Census Bureau, “[r]oughly 30.6 million [Americans experience] difficulty walking or climbing stairs, or [require] a wheelchair, cane, crutches[,] or walker”<sup>20</sup> to ambulate. This number is significant if you consider the fact that many areas of public life are not completely accommodating to people with physical disabilities and difficulties.<sup>21</sup> A cursory look at the accessibility pages of current Broadway shows reveals that many of the forty-one Broadway theaters,<sup>22</sup> which attracted over thirteen million patrons in the 2015-2016 season and grossed over 1.3 billion dollars in revenue,<sup>23</sup>

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<sup>15</sup> Frank Bruni, *When Accessibility Isn't Hospitality*, N.Y. TIMES (Sept. 12, 2007), <http://www.nytimes.com/2007/09/12/dining/12acce.html>.

<sup>16</sup> *Id.*

<sup>17</sup> 42 U.S.C. § 12181-12184 (1990).

<sup>18</sup> *See id.*

<sup>19</sup> *See infra* Section II.B.

<sup>20</sup> *Nearly 1 in 5 People Have a Disability in the U.S.*, Census Bureau Reports, U.S. CENSUS BUREAU (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html>.

<sup>21</sup> *See* Emma Cott and Kaitlyn Mullin, *Few Entrances, and Sometimes, No Exit*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/video/opinion/100000004791816/ride-the-subway-in-a-wheelchair.html?action=click&gtype=vhs&version=vhs-heading&module=vhs&region=title-area&cvview=true&t=7>; Gustafson, *supra* note 11.

<sup>22</sup> *Find a Show*, THEATRE ACCESS, N.Y.C., <http://www.theatreaccess.nyc/> (last visited Sept. 17, 2018).

<sup>23</sup> *Broadway Season Statistics*, THE BROADWAY LEAGUE INC., <https://www.broadwayleague.com/research/statistics-broadway-nyc/> (last visited Nov. 30, 2017).

fall short of realizing the inclusive spirit of the ADA<sup>24</sup> by having a lack of accessible: (1) entrances; (2) restrooms, and/or (3) seating arrangements.<sup>25</sup>

This Note seeks to re-examine the compliance standards established by the ADA with a specific focus on Broadway theater compliance. This Note posits that the “undue burden” and “reasonable accommodation” language under the ADA has been used by Broadway theaters and other similarly situated public accommodations as a loophole to avoid making their facilities as equally accommodating to as many members of the public as possible. Such “shortcut compliance” presents constitutional concerns of equal protection and freedom of speech.<sup>26</sup> As such, this Note argues that it is necessary for the government to re-define the definition of “undue burden” under Title III of the ADA, and make a stronger effort to realize the spirit of the law when determining what constitutes an excusable “burden” to avoid violation under the act.

Part I of this Note will provide background information regarding the structure of the ADA, as well as the legislative goals of the act. Specifically, Part I will address the ADA’s applicability to public accommodations under Title III, and explain the compliance requirements for theaters and other entertainment forums. Part II will examine the operation of the “undue burden” standard of the ADA as it has been applied to public accommodations, and the “shortcut compliance” which allows non-accommodating barriers to remain in so-called “accessible” Broadway theaters. Part III will briefly survey ADA compliance in similar fields of public accommodation, with the goal of learning from analogous entertainment facilities with similar accommodation issues. Part IV will explore the benefits of reforming the “undue-burden” language and enforcement standards of the ADA to close the loopholes in the law. It will touch on the constitutional concerns raised by neglecting to re-examine the

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<sup>24</sup> See Rich Calder, *Broadway Theaters to Make Disabled Accessibility Changes*, N.Y. POST (Jan. 30, 2014, 1:22 AM), <http://nypost.com/2014/01/30/broadway-theaters-to-make-disabled-accessibility-changes/>.

<sup>25</sup> See *infra* Section II.B.

<sup>26</sup> See *infra* Part IV.

operation of the ADA as it applies to theaters, as well as the potential long-term financial gains of increasing accessibility, and the important policy considerations of upholding American ideals of inclusion. Finally, Part V will set forth a three-step remedy which will close the loopholes in the ADA by changing the statutory interpretation of key terms in the law, and making it financially feasible for businesses to make their facilities more accommodating.

## ACT ONE: IDENTIFYING THE PROBLEM

### I. BACKGROUND ON THE ADA

In the 1980s, evidence of widespread discrimination against the disabled first came to the national consciousness.<sup>27</sup> In 1986, four years prior to the signing of the ADA, the Louis Harris Organization<sup>28</sup> conducted a nationwide phone survey of people with disabilities.<sup>29</sup> The survey results showed that the majority of people with disabilities did not partake in common American pastimes due to “feeling [unwelcome], and the lack of safe access to public facilities.”<sup>30</sup> Additionally, the survey exposed that one of

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<sup>27</sup> Robert L. Burgdorf Jr., “*Equal Members of the Community*”: *The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 551, 553–54 (1991) [hereinafter *Equal Members of the Community*]; see also Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 416–17 (1991) [hereinafter *Second-Generation Civil Rights Statute*] (explaining that the 1983 United States Commission on Civil Rights found that architectural barriers perpetuated historical discrimination against the disabled).

<sup>28</sup> Louis Harris & Associates is an American organization founded by Louis Harris a prominent “20th-century pollster who refined interpretive polling methods.” Robert D. McFadden, *Louis Harris, Pollster at Forefront of American Trends, Dies at 95*, N.Y. TIMES (Dec. 19, 2016), <https://www.nytimes.com/2016/12/19/us/louis-harris-pollster-at-forefront-of-american-trends-dies-at-95.html>.

<sup>29</sup> *Equal Members of the Community*, *supra* note 27, at 553 (citing LOUIS HARRIS & ASSOCIATES, *THE ICD SURVEY OF DISABLED AMERICANS: BRINGING DISABLED AMERICANS INTO THE MAINSTREAM* (1986)).

<sup>30</sup> *Id.* at 553–54 (“The large majority of people with disabilities [did] not go to movies, [did] not go to the theater, [did] not go to see musical

the main hindrances to the social activity of the disabled were architectural barriers that physically kept people with disabilities out of public places.<sup>31</sup> The survey also reflected that such architectural barriers fostered the perception that people with disabilities were unwanted.<sup>32</sup> At that time Congress noted that “failure to make modifications to existing facilities,” was a common form of discrimination against the physically disabled.<sup>33</sup> In response to these findings, and other evidence of regular discrimination against the disabled, Congress passed the ADA in July of 1990.<sup>34</sup>

The ADA consists of four titles, which address discrimination in various spheres: (i) employment,<sup>35</sup> (ii) public services,<sup>36</sup> (iii) public accommodations,<sup>37</sup> and (iv) transportation.<sup>38</sup> Through Title III, Congress sought to resolve the marginalization of the disabled by requiring places of public accommodation to take steps which would ensure that disabled individuals are able to experience “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, [and] accommodations of . . .” a public business or operation.<sup>39</sup> Entertainment facilities such as concert halls, stadiums, and theaters of all kinds, are considered public

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performances, and [did] not go to sports events . . . Three-fourths of all disabled persons interviewed had not seen a live theater or musical performance in the past year while only about four out of ten all adult Americans had not done so.”).

<sup>31</sup> *Id.* at 554.

<sup>32</sup> *Id.*

<sup>33</sup> 42 U.S.C. § 12101(a)(5) (1990).

<sup>34</sup> *Id.* § 12101(b).

<sup>35</sup> *Id.* §§ 12111-7.

<sup>36</sup> *Id.* §§ 12131-4.

<sup>37</sup> *Id.* §§ 12181-9.

<sup>38</sup> *Id.* §§ 12141-65.

<sup>39</sup> *Id.* § 12182(a); *see also id.* § 12181(7) (defining public accommodation for purposes of the subchapter); While not the definition adopted in § 12181(7), “public accommodations” have also been defined as “all privately operated establishments whose operations affect commerce” by interacting with the public in the exchange of goods or services. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 470 (1991).



accommodations for purposes of Title III of the ADA.<sup>40</sup> In order to better understand Broadway theater accessibility, an examination of Title III and the way that courts have interpreted it is necessary.

### A. Title III—Public Accommodations

Under Title III, public accommodations are prohibited from discriminating on the basis of disability.<sup>41</sup> However, Title III allows for exceptions in situations where compliance would “fundamentally alter the nature of the good . . . being offered or would result in an undue burden,” on the facility.<sup>42</sup> As such, Title III limits compliance to what is “readily achievable”<sup>43</sup> or reasonably accommodating<sup>44</sup> determined through a “case-by-case” analysis of the facts,<sup>45</sup> taking into consideration the economic

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<sup>40</sup> 42 U.S.C. § 12181(7)(c) (1990).

<sup>41</sup> *Id.* § 12182(a).

<sup>42</sup> *Id.* § 12182 (b)(2)(A)(iii).

<sup>43</sup> *Id.* § 12182 (b)(2)(A)(iii-iv) (“[D]iscrimination includes . . . (iii) 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*; (iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities . . . *where such removal is readily achievable.*”[emphasis added]).

<sup>44</sup> *Second-Generation Civil Rights Statute*, *supra* note 27, at 474 (“The “reasonable modifications” requirement [in Title III for public accommodations] is equivalent to the “reasonable accommodation requirement in employment. The fundamental alteration limit is a much higher standard, however, than the “undue hardship” limit in the job context.”).

<sup>45</sup> *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) (“The determination of what constitutes reasonable modifications [under the ADA] is highly fact-specific, requiring case-by-case inquiry.”); *see also Fortyne v. Am. Multi-Cinema, Inc.* 364 F.3d 1075, 1086–87 (9th Cir. 2004) (affirming a lower court’s order that the theater remove a non-companion from the companion seat adjacent to the reserved wheelchair spot.).

burden<sup>46</sup> of building modifications, and the historical significance of removing or modifying architectural boundaries.<sup>47</sup>

i. Readily Achievable, not constituting an Undue Burden

A compliance measure is considered to be “readily achievable” under the ADA if it is feasible for an establishment to implement needed modifications without great inconvenience or excessive expenditure.<sup>48</sup> The ADA enumerates multiple factors to consider when determining what is and is not to be considered “readily achievable,” under the act. They are as follows, the:

(1) nature and cost of the action; (2) overall financial resources of the facility or facilities involved; (3) number of persons employed at such facility; (4) effect on expenses and resources; (5) impact of such action upon the operation of the facility; (6) overall financial resources of the covered entity; (7) overall size of the business of a covered entity; (8) number, type, and location of its facilities; (9) type of operation or operations of the covered entity, including composition, structure, and functions of the workforce of such entity; and (10) geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.<sup>49</sup>

These factors mean that under the ADA “a major hotel chain might need to spend several thousand dollars to make a few of their rooms accessible, but a small business might only be expected to spend a few hundred dollars to grind down a three inch lip into a doorway . . .”<sup>50</sup> because their resources are

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<sup>46</sup> See *infra* Section I.A.i.

<sup>47</sup> See *infra* Section I.A.ii.

<sup>48</sup> 42 U.S.C. § 12181(9) (1990).

<sup>49</sup> *Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1273 (11th Cir. 2006) (citing 42 U.S.C. § 12181(9) (1990)).

<sup>50</sup> Susan Mizner, *House Members Are Pushing a Bill That Will Roll Back the Rights of People With Disabilities*, ACLU (Feb. 13, 2018, 9:45 AM),

comparatively more limited. Although at the time this may have seemed like a reasonable compromise to the legislative drafters of the ADA, the result is a public accommodation landscape that promotes the defeatist sentiment that inaccessible establishments are an unfortunate, but unavoidable reality.

In *Garthright-Dietrich v. Atlanta Landmarks, Inc.*, the United States Court of Appeals for the Eleventh Circuit held that a historical theater<sup>51</sup> was not required to provide additional wheelchair seating since modifications could not be done “without much difficulty or expense,” and were thus not “readily achievable” under the ADA.<sup>52</sup> In reaching this decision, the court considered: the financial costs of making the theater accommodating; the value of the historical, but unaccommodating, architecture of the theater,<sup>53</sup> and the extensive pre-ADA steps taken by the theater to make it accommodating to wheelchair-bound patrons.<sup>54</sup> In order to prevail, the court suggested it would have liked to have seen the plaintiffs in *Garthright-Dietrich* establish that the “proposed modifications [to the theater] were inexpensive,” and to prove a “financial expert . . . link [between] the estimated costs of [the] proposals [and the defendant’s] ability to pay for them.”<sup>55</sup> Such cases demonstrate the difficulties faced by plaintiffs when attempting to assert their right to equal access and use under the ADA.

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<https://www.aclu.org/blog/disability-rights/house-members-are-pushing-bill-will-roll-back-rights-people-disabilities>.

<sup>51</sup> Like the Fox Theatre at issue in *Garthright-Dietrich*, many Broadway theaters were constructed prior to the 1950s, and as such are historically architected in ways, which would could potentially make remodeling expensive if theaters hope to preserve the historic integrity of the facilities and make them more accommodating to disabled patrons. See *Garthright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1271 (11th Cir. 2006); *Broadway Theatre List*, N.Y. SHOW TICKETS, INC., <http://www.nyitix.com/Links/Broadway/broadwaytheatres.html> (last visited Nov. 30, 2017).

<sup>52</sup> *Garthright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1274–75 (11th Cir. 2006).

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* at 1271–72.

<sup>55</sup> *Id.* 1275.

Under the ADA, “undue burden” has been understood to mean accommodations which impose a “significant difficulty or expense.”<sup>56</sup> The factors used by courts to determine what constitutes an “undue burden” under the ADA closely resemble the factors used to establish when a modification is “readily achievable.”<sup>57</sup> These factors are:

- (1) The nature and cost of the needed action under this part;
- (2) The overall financial resources of the site or sites involved in the action; the number of persons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
- (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
- (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of employees; the number, type, and location of its facilities; and
- (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.<sup>58</sup>

Taken together, these definitions of modifications which are readily achievable and do not impose an undue burden on facilities might seem reasonable; however, their deference for public accommodations, particularly historical pre-existing facilities such

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<sup>56</sup> 28 C.F.R. § 36.104 (2016).

<sup>57</sup> However, it is important to note that notwithstanding the similarity in the factors, “readily achievable is a lower standard than undue burden.” Fundamental alteration and undue burden defense—Factors considered in determining undue burden, 1 *Americans with Disab.: Pract. & Compliance Manual* § 4:102 (2017).

<sup>58</sup> 28 C.F.R. § 36.104.

as the theater in *Gathright-Dietrich*,<sup>59</sup> has operated to keep theaters less accessible for the physically disabled.

## ii. Historical Considerations

In addition to the exceptions laid out in the text of the ADA, the Code for Federal Regulations (“CFR”) specifically carves out additional exceptions to ADA compliance where modifications would “threaten or destroy the historic significance of the building or facility.”<sup>60</sup> Many New York Broadway theaters, such as the Sam S. Shubert Theatre<sup>61</sup> and the Broadhurst Theatre,<sup>62</sup> were constructed decades prior to the enactment of the ADA. For many architects and historians, the architectural design of these longstanding establishments represents the history and tradition of the experience of attending a live theater production.<sup>63</sup> Considering their historical significance, and their status as “existing establishments” under the ADA,<sup>64</sup> many theaters are subject to a lower standard of accommodation than is required of newer constructions under Title III.<sup>65</sup>

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<sup>59</sup> See *Gathright-Dietrich*, 452 F.3d at 1273.

<sup>60</sup> 28 C.F.R. § 36.405 (2011).

<sup>61</sup> New York Show Tickets, *Shubert Broadway Theatre*, N.Y. SHOW TICKETS, INC., <http://www.nytimes.com/Links/Broadway/Theaters/shubert.html> (last visited Nov. 25, 2017) (“The Sam S. Shubert Theatre opened on Broadway in 1913.”).

<sup>62</sup> New York Show Tickets, *Broadhurst Broadway Theatre*, N.Y. SHOW TICKETS, INC., <http://www.nytimes.com/Links/Broadway/Theaters/broadhurst.html> (last visited Nov. 25, 2017) (“The Broadhurst Theatre . . . opened in 1917.”).

<sup>63</sup> See Herbert Muschamp, *Architecture View; Broadway’s Real Hits Are Its Antique Theaters*, N.Y. TIMES (July 30, 1995), <http://www.nytimes.com/1995/07/30/theater/architecture-view-broadway-s-real-hits-are-its-antique-theaters.html?pagewanted=all> (discussing the movement to designate many of Broadway’s theaters historical landmarks).

<sup>64</sup> Existing establishments are establishments that were constructed prior to the enactment of the ADA. See Americans with Disabilities Act, 42 U.S.C. §12147 (1990).

<sup>65</sup> See *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir. 2001) (explaining that unlike new constructions which are required to “readily accessible and usable by people with disabilities,” existing facilities are only required to “remove barriers . . . [where] such removal is ‘readily achievable.’”).

Although there is certainly an argument to be made regarding the importance of maintaining historical architecture, this lower bar should not be an excuse for theaters to avoid making their facilities fully accommodating to the disabled. If the historical importance of these theaters is so significant, then neglecting to make them fully accessible to the physically disabled could be considered yet another way that the disabled have been excluded from the history and tradition of the treasured American pastime of live theater.<sup>66</sup>

### iii. Fundamental Alteration

Finally, an important factor when determining what modifications are required under the ADA is whether a modification would constitute a “fundamental alteration” to the goods or services provided.<sup>67</sup> A fundamental alteration has been interpreted to mean a substantive change to the “essence” of the activity or service at issue.<sup>68</sup> The “fundamental alteration” test sets a ceiling on required modifications by recognizing that there are certain activities, particularly athletic ones, which would essentially cease to exist if made to be completely handicapped accessible.<sup>69</sup>

In *PGA Tour, Inc. v. Martin*, the Supreme Court considered the tradition of golf, and the skills tested by the sport, in making a determination on what constituted a fundamental alteration to the rules of the game.<sup>70</sup> The Court held that allowing competitive golfers with ambulatory disabilities to use carts to travel from hole

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<sup>66</sup> See Howard Shalwitz, *7 Reasons Why Theatre Makes Our Lives Better*, THEATRE WASHINGTON (Oct. 27, 2011), <http://theatrewashington.org/content/7-reasons-why-theatre-makes-our-lives-better> (explaining the unique importance of theater as a means educating people, fostering a sense of community, contributing to the economy and aiding public discourse and the democratic process).

<sup>67</sup> Americans with Disabilities Act, 42 U.S.C. § 12182(b)(2)(A)(iii).

<sup>68</sup> Kerri Lynn Stone, *The Politics of Deference and Inclusion: Toward a Uniform Framework for the Analysis of “Fundamental Alteration”*, 58 HASTINGS L. J. 1241, 1251–52 (2007).

<sup>69</sup> See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 663 (2001).

<sup>70</sup> *Id.* at 669–71.

to hole is not a “fundamental alteration” of the sport for purposes of Title III of the ADA.<sup>71</sup> The Court was primarily concerned with whether or not the requested accommodation of a golf-cart during tournaments would substantially undermine the athleticism that is a crucial part of the history and tradition of the sport.<sup>72</sup> Unlike golf, which involves physical activity, the “history and tradition” of attending a theatrical performance requires audience members to be largely sedentary. Since theater is a spectator activity, where patrons are primarily seated, it cannot be reasonably argued that making theaters more accommodating to wheelchair-bound patrons would constitute a “fundamental alteration” of the goods and services provided by the establishment.<sup>73</sup> Aside from any argument that the essence of theatrical performance is linked to the historical accuracy of opulent theater settings,<sup>74</sup> which would be modified by making wheelchair accommodations, increasing wheelchair accessibility does not interfere with the nature of the good at issue, which is the performance itself. As such, there is no good reason to keep Broadway theaters and other similar arenas inaccessible to the disabled and yet the current compliance measures do just that.

## II. SHORTCUT COMPLIANCE UNDER THE ADA

Although the ADA in theory creates standards which require public accommodations to increase their accessibility, businesses in practice are frequently tempted to take shortcuts. Shortcut compliance with the ADA allows businesses to avoid liability, while also avoiding making necessary modifications to their common business practices, which would make their facilities

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<sup>71</sup> *Id.* at 689–90.

<sup>72</sup> *See id.* at 663; Janet Barbookles, *Creating Reasonable Accommodations without an Undue Burden: The Future Effects the ADA Will Have on Golf Courses*, 33 GOLDEN GATE U. L. REV. 71, 72 (2003).

<sup>73</sup> *See Lentini v. California Ctr. for the Arts*, 370 F.3d 837, 846 (9th Cir. 2004) (holding that it would not be a fundamental alteration to the goods and services provided by a concert hall to allow a service animal to accompany a wheelchair-bound patron where there was no strong evidence that the dog’s rare barks disturbed other patrons or severely distracted from the overall experience of attending the performance).

<sup>74</sup> *See supra* Section I.A.ii.

more accommodating to the disabled.<sup>75</sup> An examination of exactly how the standards of the ADA have been defined by the legislature and interpreted by the judiciary reveals that a fact-intensive analysis is applied to each case of alleged violations of the ADA.<sup>76</sup> However, it appears that as long as a theater can establish that it would be extremely expensive, or historically destructive to attempt to comply with the ADA, the facility does not have to make modifications to accommodate wheelchair bound patrons to avoid liability under the act.<sup>77</sup>

Expensive alterations are undesirable for many business owners<sup>78</sup> and as a result, many theater owners seek less expensive shortcuts to avoid liability under Title III.<sup>79</sup> Shortcut measures aim to create the appearance of general ADA compliance, but often

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<sup>75</sup> See Hershberg, *supra* note 12 (discussing the inaccessible accommodations used by Broadway theaters); see also Sasha Blaire-Goldenson, *New York Has a Great Subway, if You're Not in a Wheelchair*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/opinion/new-york-has-a-great-subway-if-youre-not-in-a-wheelchair.html?mcubz=3> (providing an example of how the MTA's "accessible accommodations" do not always work for individuals confined to motorized wheelchairs); see also Michelle L. Lange, *Clinical Indicators: Power vs. Manual Wheelchairs*, DIRECTIONS VOL. 2012.4, at 50, 52 <http://www.nrrts.org/pdfs/CaseStudies/Clinical%20Indicators.pdf> (explaining how businesses make accommodations that work for manual wheelchairs but do not always work for motorized wheelchairs).

<sup>76</sup> See *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) ("The determination of what constitutes reasonable modifications [under the ADA] is highly fact-specific, requiring case-by-case inquiry."); *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1001 (9th Cir. 2000) (holding that a fundamental alteration should be determined by a focus on the specifics of the case at hand, but that such a determination cannot be made without an investigation into the fundamental nature of the activity discussed).

<sup>77</sup> See *Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1273 (11th Cir. 2006).

<sup>78</sup> See Brain Muse, *What Does "Readily Achievable" Mean and How Much Will It Cost Me?*, ADA MUSINGS (July 26, 2012), <https://adamusings.com/2012/07/26/what-does-readily-achievable-mean-and-how-much-will-it-cost-me/> (addressing the concerns of business owners who want to avoid both costly litigation, and costly modifications to their facilities).

<sup>79</sup> Modifications that can significantly improve the accessibility of a public accommodation, such as the addition of elevators and the removal of structural barriers, are often considered "not readily achievable" due to the expense involved in implementing these changes. *Id.*



neglect to consider the differences in assistive devices for people with various physical impairments, and what it means to truly *accommodate* these individuals so that they can have full use of all of the “goods and services” provided.

*A. Differences between Accommodating Manual vs. Motorized Wheelchairs*

One way that theater owners achieve the minimum accessibility requirements under Title III is to make modifications which will be appropriate for manual wheelchairs, but may not work for individuals who use motorized assistive devices.<sup>80</sup> Since the passage of the ADA, the types of mobility assistive devices available and used have changed with advances in technology.<sup>81</sup> Although the ADA addresses wheelchair accessibility generally,<sup>82</sup> there are significant differences between accommodating motorized wheelchairs and accommodating manual wheelchairs.<sup>83</sup> Manual wheelchairs tend to be lighter, and have an easier time navigating tight spaces, whereas motorized wheelchairs tend to be heavier and more cumbersome.<sup>84</sup> In a 2017 New York Times interview, Sasha Blair-Goldensohn, a New York City resident who uses a manual wheelchair to ride the subway, discussed the

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<sup>80</sup> See Hershberg, *supra* note 12; Lange, *supra* note 75, at 50, 52.

<sup>81</sup> 28 C.F.R. Pt. 36, app. A (2011) (“Other Power-Driven Mobility Device” and “Wheelchair”).

<sup>82</sup> 42 U.S.C. §§ 12101-12213 (1990).

<sup>83</sup> Under Title II of the ADA, the government has struggled to address balance the ADA accommodation requirements with the interests of preserving protected wilderness areas from the potential destruction caused by motorized mobility devices. See Jennie Bricker, *Wheelchair Accessibility in Wilderness Areas: The Nexus between the ADA and the Wilderness Act*, 25 ENVTL. L. 1243, 1257–58 (1995); see also Hershberg, *supra* note 12; Lange, *supra* note 75, at 50, 52.

<sup>84</sup> *Are Lightweight Power Chairs better than Standard Power Chairs?*, HOVEROUND (Apr. 15, 2013), <https://www.hoveround.com/help/learn-more/power-wheelchairs-101/ultra-light-power-chairs-hoveround-comparison> (indicating that lightweight motorized wheelchairs weigh approximately 300lbs when you consider the weight of the chair with the maximum weight of the user).

differences between the two types of assistive devices.<sup>85</sup> Blair-Goldenson explained, in the video accompanying the article, that his wheelchair is relatively lightweight, but that for those who have 300 pound motorized chairs, the difficulties and dangers of using the subway are heightened, considering the number of inaccessible stations and frequent elevator malfunctions.<sup>86</sup> When Blair-Goldenson encounters an accessibility barrier in his manual wheelchair, he relies on Good Samaritans to lift his chair over these obstacles.<sup>87</sup> This would not be a practical solution if he used a motorized chair,<sup>88</sup> nor is it an acceptable solution in general.

In 2010, the Department of Justice published updated requirements under the ADA,<sup>89</sup> establishing that public accommodations “must allow people with disabilities who use manual or power wheelchairs . . . [in] all areas where members of the public are allowed to go.”<sup>90</sup> In addition to motorized wheelchairs, the Department of Justice stipulated that facilities are required to accommodate “other power-driven mobility device[s]” (“OPDMDs”), such as Segways, scooters, and golf carts, unless it would be unsafe to do so.<sup>91</sup> In making such a determination, the Department of Justice laid out five factors to evaluate whether a particular assistive device can be reasonably accommodated by a facility. These factors are:

- (1) the type, size weight, dimensions, and speed of the device;
- (2) the facility’s volume of pedestrian traffic (which may vary at different time of the day,

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<sup>85</sup> Emma Cott and Kaitlyn Mullin, *Few Entrances, and Sometimes, No Exit*, [Video] N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/video/players/offsite/index.html?videoId=100000004791816>; Sasha Blaire-Goldenson, *New York Has a Great Subway, if You’re Not in a Wheelchair*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/opinion/new-york-has-a-great-subway-if-youre-not-in-a-wheelchair.html?mcubz=3>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Department of Justice, *Wheelchairs, Mobility Aids, and Other Power-Driven Mobility Devices*, ADA (Jan. 31, 2014), <https://www.ada.gov/opdmd.htm>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

week, month, or year); (3) the facility's design and operational characteristics (e.g., whether its business is conducted indoors or outdoors, its square footage, the density and placement of furniture and other stationary devices, and the availability of storage for the OPDMD if needed and requested by the user); (4) whether legitimate safety requirements (such as limiting speed to the pace of pedestrian traffic or prohibiting use on escalators) can be established to permit the safe operation of the OPDMD in the specific facility; and (5) whether the use of the OPDMD creates a substantial risk of serious harm to the immediate environment or natural or cultural resources, or poses a conflict with Federal land management laws and regulations.<sup>92</sup>

These factors attempt to strike a balance between accommodating the new methods of physical aids for the disabled, while limiting the use of these assistive devices to circumstances where their use does not pose a danger to pedestrians or the facility in question. Consideration of these factors, however, has not been entirely successful in achieving this goal.

Despite efforts to take technological advances in assistive devices into account, public accommodations regularly make adjustments that work for patrons who use manual chairs, but not those who use motorized chairs.<sup>93</sup> As Michelle L. Lange, an occupational therapist “with nearly [thirty] years of experience in the area of assistive technology,”<sup>94</sup> explained in an article on the differences between manual and motorized wheelchairs, “the world

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<sup>92</sup> *Id.*

<sup>93</sup> See Mobility International USA, *Should You Bring a Manual or Power Wheelchair?*, MIUSA <http://www.miusa.org/resource/tipsheet/choosingchairs> (last visited Nov. 15, 2017) (discussing three considerations for choosing between a manual or power wheelchair).

<sup>94</sup> Michelle L. Lange, *OTR/L, ABDA, ATP/SMS*, MEDBRIDGE, <https://www.medbridgeeducation.com/about/instructor/michelle-lange-occupational-therapy-assistive-technology> (last visited Aug. 31, 2018).

is inaccessible enough to manual wheelchairs, but power wheelchairs require even more accommodation.”<sup>95</sup>

For facilities that have low lips, or small steps in their entryways, manual wheelchair users may be able to easily overcome these barriers by “popping a wheelie” or having someone gently lift their chair.<sup>96</sup> Such solutions are impractical in situations where the wheelchair-bound patron is using a heavy motorized assistive device. Understanding the different architectural requirements needed to accommodate manual versus motorized wheelchairs reveals why it is not enough for a public accommodation to simply be “wheelchair accessible.” In order for a public accommodation to be *fully* accommodating, it must be accessible to *all* wheelchairs and assistive devices. Individuals use wheelchairs and other assistive devices for a variety of reasons, depending on the physical limitations that they experience.<sup>97</sup> If accommodation is limited to only those disabilities which are easiest to accommodate, it would be tantamount to penalizing the severely disabled for the severity of their impairment.

*B. So-Called “Accessible” Theaters: Shortcut Compliance in Theaters*

Broadway theaters have been criticized in the past for short-cut compliance measures, which hindered the ability of disabled patrons to attend productions.<sup>98</sup> In both 2003 and 2014, two lawsuits against the Shubert Organization and the Nederlander Organization respectively, resulted in settlement agreements that

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<sup>95</sup> Lange, *supra* note 75, at 50, 52.

<sup>96</sup> *Id.*

<sup>97</sup> Manual wheelchairs require users who have enough upper body strength to push themselves whereas individuals with decreased strength or range of mobility might *require* a motorized chair that is controlled by a joy stick or even a breath-activated device. See Jan Sheehan & Laura E. Marusinec, MD, *How to Choose the Best Wheelchair or Scooter for MS Mobility*, EVERYDAY HEALTH, <https://www.everydayhealth.com/multiple-sclerosis/living-with/choosing-a-wheelchair/> (last visited July 28, 2018).

<sup>98</sup> See Hershberg, *supra* note 12; see also Calder, *supra* note 24 (describing the inaccessibility of Broadway theaters and the attempt to reconcile them with the Americans with Disabilities Act).

sought to improve Broadway accessibility.<sup>99</sup> When asked about the combined effect of the two settlements, former-U.S. Attorney Preet Bharara explained, “more than [twenty] of Broadway’s [then forty] theaters will be ‘more accessible than ever before.’”<sup>100</sup> Although these lawsuits resulted in increased accommodations, many New York theaters, including ones owned and operated by the Shubert and Nederlander Organizations, are still not fully accommodating to wheelchair-bound patrons, particularly those who use heavy power chairs.<sup>101</sup> These theaters continue to have barriers to entry and unaccommodating interior facilities, which prevent disabled patrons from comfortably enjoying the experience of live theater. The fact that these measures pass the bar of the ADA requirements demonstrates that the bar has been set inexcusably low.

i. Access Barriers and “Accessible” Restrooms

In addition to the physical barriers which make it difficult for wheelchair-users to enter Broadway theaters,<sup>102</sup> once within the theater, there are additional barriers which hinder wheelchair users’ ability to navigate throughout the facility and to use common accommodations such as restrooms.<sup>103</sup> The 2017 Tony-Winning Best Musical *Dear Evan Hansen*,<sup>104</sup> is currently playing at the Music Box Theatre,<sup>105</sup> a Shubert Organization facility.<sup>106</sup>

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<sup>99</sup> Calder, *supra* note 24.

<sup>100</sup> *Id.*

<sup>101</sup> *See infra* Section II.B.i.

<sup>102</sup> Hershberg, *supra* note 12.

<sup>103</sup> *See Eugene O’Neill Theatre Tickets*, TICKETMASTER, <http://www.ticketmaster.com/Eugene-ONeill-Theatre-tickets-New-York/venue/393361> (last visited Sept. 28, 2017) (indicating that the Eugene O’Neill Theatre does not contain a handicapped restroom for wheelchair-bound patrons).

<sup>104</sup> *2017 Tony Awards: The Complete List of Winners and Nominees*, L.A. TIMES (June 11, 2017, 8:15 PM), <http://www.latimes.com/entertainment/arts/la-et-cm-tony-awards-nominees-winners-list-2017-story.html>.

<sup>105</sup> *Dear Evan Hansen Access Information*, TELECHARGE, <https://www.telecharge.com/eventaccessinformation.aspx?productid=11698> (last visited Sept. 28, 2017).

The Music Box is located at Manhattan's 239 West 45th Street, and was constructed in 1920,<sup>107</sup> decades before the ADA was passed in 1990.<sup>108</sup> When patrons attempt to purchase tickets to this production under the "Access Information" tab of the Telecharge website, they will see this message: "Theatre is not completely wheelchair accessible. There are no steps into the theatre from the sidewalk. Please be advised that *where there are steps either into or within the theatre, we are unable to provide assistance.*"<sup>109</sup>

A similar message appears on the website for the Eugene O'Neill Theater which opened in 1925,<sup>110</sup> and is currently home to the 2011 Tony Winning Best Musical *The Book of Mormon*.<sup>111</sup> The Eugene O'Neill Theater's accessibility page states, "[t]here are no steps into the theatre from the sidewalk. Please be advised that *where there are steps within the theatre, we are unable to provide assistance.*"<sup>112</sup> At first glance it appears that the Eugene O'Neill Theater is more accessible than the Music Box, because of the absence of the word "into," but if you scroll down further, the website explains, "[t]here is an accessible restroom available *in the hotel adjacent to the theatre*. If you require assistance, please ask a theatre employee to contact the manager."<sup>113</sup>

These "accessible accommodations" leave much to be desired, but are legal thanks to the legislative definitions and interpretations of what a "readily achievable"<sup>114</sup> modification, not constituting an

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<sup>106</sup> *Music Box Theatre, THE SHUBERT ORG.*, <http://www.shubert.nyc/theatres/music-box> (last visited Sept. 28, 2017).

<sup>107</sup> *Id.*

<sup>108</sup> Americans with Disabilities Act 42 U.S.C. §§ 12101-12213 (2018).

<sup>109</sup> See *Music Box Theatre*, *supra* note 106 (emphasis added).

<sup>110</sup> *Eugene O'Neill Broadway Theatre, NEW YORK SHOW TICKETS*, <http://www.nytimes.com/Links/Broadway/Theaters/eugeneoneill.html> (last visited Sept. 28, 2017).

<sup>111</sup> Andrea Rael, 'Book of Mormon' Wins Best Musical, 9 Tony Awards; Trey Parker and Matt Stone On 'The Daily Show' (Update), HUFFINGTON POST (Aug. 13, 2011), [http://www.huffingtonpost.com/2011/06/13/book-of-mormon-wins-best-\\_n\\_876088.html](http://www.huffingtonpost.com/2011/06/13/book-of-mormon-wins-best-_n_876088.html); *The Book of Mormon Tickets*, BOOK OF MORMON, <https://bookofmormonbroadway.com/tickets>.

<sup>112</sup> *Eugene O'Neill Theatre Tickets*, *supra* note 103 (emphasis added).

<sup>113</sup> *Id.*

<sup>114</sup> See *supra* Section I.A.i.

“undue burden,”<sup>115</sup> or “fundamental alteration” to the goods or services provided<sup>116</sup> means under the ADA.<sup>117</sup> Despite the admirable goals of the ADA, it is clear that the text of the law was written in a way which has allowed paltry accommodation measures to go unchecked and unchanged for far too long. Physical barriers into and within Broadway theaters inhibit access, but getting into the theater is only the first threshold. It is one thing for a facility to be *accessible*, meaning that patrons can enter; it is another for a facility to be *accommodating*, meaning that the facility is designed in a way that allows all patrons to enjoy the goods provided, in the same way as all other patrons. As it currently stands, Broadway theaters are falling short of this standard.<sup>118</sup>

## ii. Inferior Seats

Along with difficulty accessing and navigating the interior of theaters, even *when* wheelchair-bound patrons *are* able to access their seats, they may find that they are seated in inferior locations within the theater. Entertainment facilities often offer “limited view” seats at a discounted price for patrons who consider an obstructed view to be a minor inconvenience when weighed against the value of seeing a live production.<sup>119</sup> These tickets are usually clearly labeled for patrons who want to take advantage of this discount opportunity.<sup>120</sup> However, there is evidence to suggest that wheelchair seats in some entertainment facilities are also

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<sup>115</sup> *Id.*

<sup>116</sup> *See supra* Section I.A.iii.

<sup>117</sup> Americans with Disabilities Act, 42 U.S.C. §12182 (2017).

<sup>118</sup> *See supra* Part II.

<sup>119</sup> Brett Goldberg, *Gershwin Theatre Seating Chart—Gershwin Theatre Seating Info*, TICKPICKBLOG (Jan. 15, 2014), <https://blog.tickpick.com/gershwin-theatre-seating-chart-wicked-ny/> (“The key to getting decent seats at a decent price is by buying tickets that are marked obstructed view . . .”); *Partial View Broadway Tickets*, N.Y. SHOW TICKETS, <http://www.nyitix.com/Broadway/DiscountBroadwayTickets/partialview.html> (last visited Nov. 14, 2017).

<sup>120</sup> *What Does Obstructed View Mean?*, TICKETMASTER, <https://tmsupport.force.com/s/article/What-does-obstructed-view-mean> (last visited Aug. 30, 2018).

limited view seats.<sup>121</sup> For example, The Music Box Theatre has over eight hundred seats,<sup>122</sup> but offers only eleven wheelchair accessible seats,<sup>123</sup> five of which are located on the far ends of the theater at a sharp angle to the stage.<sup>124</sup> Seats such as these are often sold to the general public at a discounted price because of the inferior sight lines and the poor audio in these areas of the theater.<sup>125</sup> Able-bodied patrons looking for discounted tickets may make the choice to purchase tickets in these locations, but a wheelchair-bound patron has no choice since these limited view seats are the only accessible seats available to them.<sup>126</sup> Such a Hobsonian choice<sup>127</sup> cannot be fairly understood as supporting the

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<sup>121</sup> In 2009 a wheelchair-bound patron brought suit against the Sacramento Community Theatre for limiting wheelchair accessible seating to the back row of the theater where the line of sight to the stage was severely obstructed. KCRA News, *Teen Settles in Theater Seat Lawsuit*, YOUTUBE (Dec. 29, 2009), <https://www.youtube.com/watch?v=FL04bfUr2Zs>; Chipinoh, Comment to *Wheelchair seating=obstructed view*, TRIP ADVISOR (July 7, 2013), [https://www.tripadvisor.com/ShowUserReviews-g60993-d116465-r166683867-Riverbend\\_Music\\_Center-Cincinnati\\_Ohio.html](https://www.tripadvisor.com/ShowUserReviews-g60993-d116465-r166683867-Riverbend_Music_Center-Cincinnati_Ohio.html).

<sup>122</sup> Jack Slingland, *Music Box Theatre Seating Chart | Dear Evan Hansen Guide*, TICKPICKBLOG (Mar. 7, 2017), <https://blog.tickpick.com/music-box-theatre-seating-chart-dear-evan-hansen-guide/>.

<sup>123</sup> *Seating Chart*, THE MUSIC BOX THEATRE, <https://www.musicboxtheatre.com/about-us/seating-chart>, (last visited Sept. 21, 2018).

<sup>124</sup> At “far left and right of the Orchestra [of the Music Box Theatre], you will find the views may be partially obstructed.” *Slingland, supra* note 122; *id.*

<sup>125</sup> *Partial View Broadway Tickets*, N.Y. SHOW TICKETS, <http://www.nyitix.com/Broadway/DiscountBroadwayTickets/partialview.html> (last visited Nov. 14, 2017).

<sup>126</sup> *Id.*; *Seating Chart, supra* note 122. Although this note focuses on wheelchair accessibility, Broadway theaters have come under scrutiny for Title III violations pertaining to non-ambulatory disabilities as well. The Broadway production *Hamilton* is at the center of an ongoing lawsuit regarding the lack of auxiliary aids for blind theater patrons at most Broadway theaters. Jeff Lunden, *All Things Considered: A Blind Theatergoer’s ‘Hamilton’ Lawsuit Aims Spotlight on Broadway Accessibility*, NPR (Mar. 14, 2017 4:28 PM), <https://www.npr.org/sections/health-shots/2017/03/14/520008274/a-blind-theatergoers-hamilton-lawsuit-aims-spotlight-on-broadway-accessibility>.

<sup>127</sup> A Hobson’s Choice is “an apparently free choice when there is no real alternative.” *Hobson’s Choice*, MERRIAM-WEBSTER DICTIONARY,



legislative purpose of ending discrimination against, and eradicating the second-class status of people with disabilities.<sup>128</sup>

The pervasive practice of instituting shortcut compliance demonstrates a deep problem with the legislative interpretation and implementation of the ADA. Without detracting from the undeniable improvements in accessible public accommodations since the passage of the act, the continued inaccessible and unaccommodating Broadway theaters demonstrate that the ADA was clearly not the panacea that it appeared to be in 1990.<sup>129</sup> As it is currently operating, the ADA allows too many loopholes for the disabled to fall through, and that is simply unacceptable.

### III. ISSUES ENCOUNTERED IN SIMILAR FIELDS OF ACCOMMODATION

Broadway theaters are not the first public accommodation to encounter issues of wheelchair accessibility. Other fields of public accommodation have encountered similar issues.<sup>130</sup> Most Broadway theaters have mezzanine and balcony sections that are arranged in stadium style seating,<sup>131</sup> where the seats are tiered to allow all patrons a line of sight to the stage.<sup>132</sup> Modern movie theaters and sports arenas have similar seating arrangements,<sup>133</sup> and as such have encountered many of the same allegations of non-

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<https://www.merriam-webster.com/dictionary/Hobson's%20choice> (last visited Apr. 4, 2018).

<sup>128</sup> See 42 U.S.C. § 12101(b) (1990).

<sup>129</sup> Statement by George Bush, *supra* note 8.

<sup>130</sup> Movie Theaters and Sports Stadiums have faced ADA challenges for less than accommodating facilities. See *infra* Sections III.A-B.

<sup>131</sup> See e.g., *Richard Rodgers Theater Seating Chart | Hamilton Seating Guide*, TICKPICKBLOG.COM (June 1, 2016), <https://blog.tickpick.com/richard-rodgers-theatre-seating-chart-hamilton-on-broadway/>.

<sup>132</sup> *What is Stadium Seating?*, BIG SCREEN CINEMA GUIDE, (Nov. 10, 2014, 12:29 PM), <http://www.bigscreen.com/about/help.php?id=5>.

<sup>133</sup> Andrea W. Hattan, *Stadium-Style Seating Movie Theaters: Does the Cornerstone of the Theater Industry's Recent Transformation Violate the Americans With Disabilities Act?*, 14 SETON HALL J. SPORTS & ENT. L. 267 (2004); Laura K. McKibbin, *The ADA Takes on the Movie Industry: Do the Disabled Have A Right to the Best Seats in the House?*, 38 U.S.F. L. REV. 831, 831 (2004).

compliance under the ADA as theaters have.<sup>134</sup> In all arenas of public accommodation, however, there is no excuse for barriers, physical or otherwise, which exclude the disabled.

#### A. Movie Theaters

The passage of the ADA and the rise of stadium seating arrangements have placed movie theaters in the center of discrimination challenges, with allegations that the architectural design relegates wheelchair-bound patrons to the most undesirable seats in the house.<sup>135</sup> One of the main benefits of the stadium seating arrangement is that patrons gain a largely unobstructed view of the screen because the seats are arranged on a staircase, which elevates patrons above the head height of the patrons in front of them.<sup>136</sup> Although this type of seating arrangement has improved the viewing experience of able-bodied patrons,<sup>137</sup> without ramps or elevators to reach the seats, the only accessible seats for wheelchair-bound patrons are often those very close to the screen where viewers need to crane their necks to see partially obstructed images.<sup>138</sup> Such subpar viewing experiences fall inexcusably short of the inclusive dream of the ADA.

In *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, the Oregon Paralyzed Veterans of America and other individual wheelchair-bound movie patrons sued Regal Cinemas for violating Title III of the ADA.<sup>139</sup> The suit claimed that the movie theaters violated the ADA by preventing wheelchair-bound patrons from equally enjoying the services provided by the

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<sup>134</sup> See *infra* Sections III.A-B.

<sup>135</sup> See McKibbin, *supra* note 133.

<sup>136</sup> See John Hammerle, *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.: The Rise of Stadium Seating in Movie Theaters and the Disabled's Fight for a Comparable Seat in the House*, 54 DEPAUL L. REV. 589, 589 (2005).

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1127–28 (9th Cir. 2003) (explaining how movie theaters' stadium seating limits the accessible areas within theaters and relegates wheelchair-bound patrons to the seats closest to the screen).

<sup>139</sup> *Id.* at 1127.

theaters.<sup>140</sup> The plaintiffs claimed that the stadium style seating arrangement in many movie theaters created a disparity between the line-of-sight offered available to able-bodied patrons seated in the stadium section, and wheelchair-bound patrons restricted to the traditional seating area, where seats are arranged along a slight incline, if raked at all.<sup>141</sup> The Ninth Circuit considered the drastic difference in viewing experiences in wheelchair accessible portions of the theater, and held that such arrangements did not meet the “full and equal enjoyment” requirements of the ADA.<sup>142</sup> Had the plaintiffs in *Regal Cinemas* not pursued this matter, there is little reason to believe that the theater would have voluntarily made the necessary accommodations; a keen example of the compliance loopholes in the ADA.

### B. Sports Stadiums

In addition to movie theaters, stadium-seating arrangements in sports arenas have led to allegations of ADA violations. In *Pascuiti v. New York Yankees*, patrons sued the New York Yankees, as well as the city itself, under Titles II and III of the ADA, alleging that the lack of wheelchair seating and accommodations at Yankee Stadium violated the ADA.<sup>143</sup> In this case, the Southern District Court of New York held that evidence of multiple barriers to wheelchair-bound patrons within a facility was enough, when taken together, to establish that a facility is not readily accessible to the disabled.<sup>144</sup>

Similarly, in *Brown v. County of Nassau*, a hockey patron sued under Title II of the ADA,<sup>145</sup> alleging that Nassau Coliseum’s forty-four accessible seats and other accommodations were not

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 1128.

<sup>142</sup> *Id.* at 1133.

<sup>143</sup> *Pascuiti v. New York Yankees*, 87 F. Supp. 2d 221, 222 (S.D.N.Y. 1999).

<sup>144</sup> *See id.* at 224 (finding that “each barrier [to wheelchair-bound patrons of Yankee Stadium could be used as] a building block for a finding that the Stadium, viewed in its entirety, is not readily accessible.”).

<sup>145</sup> Title II of the ADA addresses the accessibility requirements in public services. Americans with Disabilities Act, 42 U.S.C. §§12131-65.

readily available to him in his wheelchair.<sup>146</sup> Despite the patron's ability to attend some sporting events, the court held that the difficulties associated with attending, such as issues getting seats, and an inability to use stadium restrooms, suggested that the stadium was not in compliance with the ADA.<sup>147</sup>

In an attempt to make their facilities more accessible to wheelchair-bound patrons, multiple arenas across the country have modified their seating arrangements, parking lots, restrooms, and concession stands to be more wheelchair-friendly.<sup>148</sup> An example of a stadium that has increased its ADA compliance is the Superdome, in New Orleans, Louisiana.<sup>149</sup> The stadium has increased its ADA compliance by locating accessible restrooms on "every level [of the stadium]" and dispersing accessible seating throughout the arena.<sup>150</sup> However, according to the Department of Justice, sports stadiums are only required to have one percent of their seating designated as wheelchair seating to meet the requirements of the ADA.<sup>151</sup> Many stadiums, including the Superdome, are barely meeting that minimum.<sup>152</sup>

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<sup>146</sup> *Brown v. Cty. of Nassau*, 736 F. Supp. 2d 602, 604, 614 (E.D.N.Y. 2010).

<sup>147</sup> *Id.* at 604.

<sup>148</sup> *10 Best Wheelchair Accessible Football Stadiums*, WHEELCHAIR & SCOOTER REPAIR (Sept. 2, 2016), <http://wsrsolutions.com/10-best-wheelchair-accessible-football-stadiums/>.

<sup>149</sup> *The Mercedes-Benz Superdome & The New Orleans Saints: History's Companions*, MERCEDES-BENZ SUPERDOME, <http://www.mbsuperdome.com/events/new-orleans-saints> (last visited Nov. 15, 2017).

<sup>150</sup> *10 Best Wheelchair Accessible Football Stadiums*, *supra* note 148.

<sup>151</sup> Department of Justice, *Civil Rights Division, Disability Rights Section, Accessible Stadiums*, ADA, <https://www.ada.gov/stadium.pdf> (last visited Nov. 8, 2018).

<sup>152</sup> Approximately 1.5 percent of the seats in the Paul Brown Stadium, home to the Cincinnati Bengals, are wheelchair accessible; only 1,000 out of 65,535. *See Paul Brown Stadium*, BALLPARKS.COM <http://football.ballparks.com/NFL/CincinnatiBengals/newindex.htm> (last visited Nov. 28, 2018); *see also 10 Best Wheelchair Accessible Football Stadiums*, WHEELCHAIR & SCOOTER REPAIR (Sept. 2, 2016), <http://wsrsolutions.com/10-best-wheelchair-accessible-football-stadiums/>.

## IV. REASONS TO REFORM

There are numerous reasons why the current state of theater accessibility should and must be reformed. There are constitutional, financial, and fundamental policy arguments as to why theater accessibility has wide-reaching benefits for all involved.

*A. Constitutional Reasons for Reform*

Reforming the ADA benefits more than just the disabled; it might be able to preemptively address constitutional concerns which may arise due to the lack of enforcement. The United States Constitution only applies to instances of government action.<sup>153</sup> Traditionally, to bring a claim under the constitution there needs to be proof of “state action.”<sup>154</sup> In the case of the ADA, although the government has taken the affirmative step to pass legislation, the standard for compliance is so low that the exemptions undermine the legislative intent. Even in a situation such as this, it is admittedly unlikely that a court would consider the government’s failure to implement higher standards, even in response to pervasive “shortcut” compliance, “state action.”<sup>155</sup> However, some scholars have argued, “that the rights delineated in the federal . . . [constitution provide] not only a *shield* against improper government action, but also a *sword* for use in litigation against . . . “private parties.”<sup>156</sup>

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<sup>153</sup> Scott J. Nordstrand and Paul D. Seyferth, *Private Rights Versus Public Power: The Role of State Action in Alaska Constitutional Jurisprudence*, 7 ALASKA L. R. 299, 299–300 (1990).

<sup>154</sup> *Bourne Valley Court Trust v. Wells Fargo Bank*, NA 832 F.3d 1154, 1159–60 (9th Cir. 2016) (defining state action as requiring both “an alleged constitutional deprivation caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible, *and* that the party charged with the deprivation must be a person who may fairly be said to be a state actor.”) (emphasis added).

<sup>155</sup> *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 202–03 (1989) (finding that a government agency’s failure to act did not constitute state action).

<sup>156</sup> Nordstrand & Seyferth, *supra* note 153, at 300.

Shortly after the passage of the Civil Rights Act, the Supreme Court addressed the question of whether private actors could be subject to constitutional claims in *Adickes v. S. H. Kress & Co.*<sup>157</sup> The petitioner in *Adickes* brought suit under the Fourteenth Amendment's Equal Protection clause after a restaurant denied her service because she was a white woman in the "mixed company" of African Americans.<sup>158</sup> The Court held that the petitioner could overcome the state action hurdle in making a constitutional claim if she could prove that the restaurant discriminated against her "because of a state-enforced custom of segregating the races in public restaurants."<sup>159</sup> In reaching this holding, the justices looked to the legislative intent and historical inspiration for the Fourteenth Amendment, and quoted former President Garfield<sup>160</sup> when he explained,

Even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Although not authorized by law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.<sup>161</sup>

The *Adickes* Court concluded that in certain situations customs of non-enforcement of the law, or to put it another way, enforcement of a custom or practice that runs contrary to the written law, could indicate state action, and thus implicate the private actors operating under the unwritten and unconstitutional practice of non-enforcement.<sup>162</sup>

Following *Adickes*, a private plaintiff could overcome the burden of establishing state action for purposes of bringing a constitutional claim by, in the words of President Garfield, using "systematic maladministration, or neglect or refusal to enforce

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<sup>157</sup> See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).

<sup>158</sup> *Id.* at 147.

<sup>159</sup> *Id.* at 171.

<sup>160</sup> *Id.* at 167–68 (quoting JAMES A. GARFIELD, *THE WORKS OF JAMES ABRAHAM GARFIELD*, 724, Vol. 1 1882).

<sup>161</sup> *Id.* at 167–68.

<sup>162</sup> *Id.*

[the] provisions” of the ADA<sup>163</sup> in which government regulators and private theater owners keep their facilities less than fully accessible.<sup>164</sup> Under this theory, Broadway theaters, as private establishments, could be subject to constitutional scrutiny by private litigants seeking to enforce their constitutional rights.

i. First Amendment: Public Forum

One such right implicated by theater inaccessibility is the First Amendment’s Freedom of Speech.<sup>165</sup> The First Amendment prioritizes the protection of speech, particularly if the speech is related to a matter of public concern, or is political in nature.<sup>166</sup> Art, such as theatrical productions, is a protected form of speech under the First Amendment,<sup>167</sup> and has a long history of being used as a means of political expression.<sup>168</sup> Unlike paintings, novels, or even movies, theatrical productions have the unique ability to physically transport audiences to different times and places. The audience sees, hears, smells, and sometimes even tastes<sup>169</sup> and

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<sup>163</sup> *Id.* at 167–68 (quoting JAMES A. GARFIELD, *THE WORKS OF JAMES ABRAHAM GARFIELD*, 724, Vol. 1 1882).

<sup>164</sup> *See supra* Section II.B.

<sup>165</sup> U.S. CONST. amend. I, § 1.

<sup>166</sup> When faced with the question of whether a jacket espousing a harshly worded political critique of the Vietnam War was appropriately allowed within a public courthouse, the Supreme Court explained that free expression of political ideas is a foundational principle of our American democracy and must be protected. *Cohen v. California*, 403 U.S. 15, 24 (1971).

<sup>167</sup> *Schacht v. United States*, 398 U.S. 58, 63 (1970) (noting that actors performing in theatrical performances enjoy the constitutional right to freedom of speech to criticize the government); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (holding that music is a protected form of expression under the first amendment).

<sup>168</sup> Lauren Everitt, *Hamilton vs Trump: The Long History of Political Protest in Theater*, BBC NEWS (Nov. 26, 2016), <https://www.bbc.com/news/world-us-canada-38085908>; *History of Political Theater*, PBS THIRTEEN (Mar. 18, 2005), <http://www.pbs.org/now/arts/politicaltheater.html>.

<sup>169</sup> In the Broadway Production *Once*, audience members are invited on stage to drink at the pub in the play. Zachary Pincus-Roth, “*Once*” *Musical Lets the Audience Go Onstage and Drink (Go!)*, LA WEEKLY (July 22, 2014), <https://www.laweekly.com/arts/once-musical-lets-the-audience-go-onstage-and->

participates in the actions on stage.<sup>170</sup> Such an immersive experience has a unique and powerful ability to convey a message, particularly if it relates to issues of social and political relevance.

Moreover, Broadway productions frequently touch on issues of historical and political significance.<sup>171</sup> Stephen Sondheim's musical *Assassins*, is a social and political commentary on political assassinations and the cultural climates that encourage them;<sup>172</sup> while *Hamilton: An American Musical*, is a modern dramatization of the birth of the American republic.<sup>173</sup> A prime example of the political impact of theater is the Summer 2017 Shakespeare in the Park Production of *Julius Caesar*.<sup>174</sup> The free production, which was performed in the open-air Delacorte Theater,<sup>175</sup> sparked public controversy for its' depiction of a Trumpian Julius Caesar being murdered on stage.<sup>176</sup> Critics alleged that the production sent a powerful message in support of assassinating President Trump.<sup>177</sup> Arguably, watching a simulated assassination performed on stage is a far more impactful experience than reading articles that vehemently oppose the president.

Although private theaters are not generally open to the public without a ticket, they resemble traditional public forums in the

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drink-go-4876976; see also EDNA WALSH, *ONCE* (2007) (providing stage directions for productions of *Once*).

<sup>170</sup> Patrick Pacheo, *The Peace, Love and Freedom Party*, L.A. TIMES (June 17, 2001), <http://articles.latimes.com/2001/jun/17/entertainment/ca-11317>.

<sup>171</sup> Everitt, *supra* note 168.

<sup>172</sup> Jesse Green, *Review: 'Assassins' Offers a National Anthem for Killers*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/theater/review-assassins-offers-a-national-anthem-for-killers.html>.

<sup>173</sup> See Rebecca Mead, *All About the Hamiltons*, THE NEW YORKER (Feb. 9, 2015), <https://www.newyorker.com/magazine/2015/02/09/hamiltons>.

<sup>174</sup> Jesse Green, *Review: Can Trump Survive in Caesar's Palace?* N.Y. TIMES (June 9, 2017), <https://www.nytimes.com/2017/06/09/theater/review-julius-caesar-delacorte-theater-donald-trump.html>.

<sup>175</sup> *Id.*; see *Delacorte Theater*, CENTRAL PARK, <https://www.centralpark.com/things-to-do/attractions/delacorte-theater/> (last visited Dec. 2, 2017).

<sup>176</sup> Green, *supra* note 174.

<sup>177</sup> *Id.*



sense that they are arenas for political and social discourse.<sup>178</sup> That being said, they most closely resemble limited purpose public forums for the purposes of constitutional doctrine because they are open to a part of the public for expression.<sup>179</sup> Nevertheless, the importance of the theater as a forum for political discourse was highlighted when Vice President Pence attended a production of *Hamilton* shortly after Election Day in November 2016.<sup>180</sup> In addition to the political messages of the play itself, the cast of *Hamilton* used their platform to speak directly to the then Vice President-elect who was in attendance at the theater.<sup>181</sup> The viral video of the personal address from the cast highlights the time-honored tradition of using the theatrical stage as a platform for disseminating political messages to the government and the public at large. What happens within the four walls of a darkened theater do not stay there, and often have ripple effects on the audience members who carry those messages with them into broader society.<sup>182</sup>

In addition to being important political platforms, plays have also been used to dismantle and address the social stigmatization of disabilities and mental illness. Productions such as *The Curious Incident of the Dog in the Night-Time*, depicts an autistic protagonist,<sup>183</sup> and *Next to Normal* shows how bipolar disorder can

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<sup>178</sup> Traditional Public Forums are open parks and places. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–81 (1992) (holding that neither tradition nor purpose made the interior of airports a public forum. The Court in *Lee* discussed four types of public forums in which the reasonableness of regulation of speech differs: (1) traditional public forums, (2) limited designated public forums, (3) unlimited designated public forums, and (4) all remaining public property.)

<sup>179</sup> See Ronnie J. Fischer, Comment, "What's In a Name?": An Attempt to Resolve the "Analytical Ambiguity" of the Designated and Limited Public Fora, 107 DICK. L. REV. 639, 648–74 (2003) (discussing limited purpose public forums and their interpretation by the courts).

<sup>180</sup> Patrick Healy & Christopher Mele, 'Hamilton' Had Some Unscripted Lines for Pence. Trump Wasn't Happy, N.Y. TIMES (Nov. 19, 2016), <https://www.nytimes.com/2016/11/19/us/mike-pence-hamilton.html>.

<sup>181</sup> *Id.*

<sup>182</sup> *See id.*

<sup>183</sup> Ruthie Fierberg, *Watch the First Autistic Actor to Play Curious Incident of the Dog in the Night-Time's Lead Role in Rehearsal*, PLAYBILL (Oct.

negatively impact one's familial relationships.<sup>184</sup> Most recently, an all-deaf production of *Spring Awakening* made Broadway history by depicting an entirely disabled cast of actors in a spirit of inclusion,<sup>185</sup> an ironic twist considering the less than inclusive nature of their Broadway venue.<sup>186</sup>

Moreover, the federal government recognized the unique importance of theater when it established the National Foundation on the Arts and Humanities.<sup>187</sup> Under this title, Congress acknowledged the political and social importance of the arts by asserting that the arts and humanities "belong to all the people of the United States," that the arts played an important role in supporting democracy,<sup>188</sup> and fostering respect for diverse beliefs and values in a pluralistic society.<sup>189</sup> In the case of theater accessibility, if theaters are being used as forums of politically and socially significant speech, then access barriers to these facilities could be considered a violation of the First Amendment's protection of public forums as arenas with no barriers to entry.

The First Amendment asserts, "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble . . ." <sup>190</sup> Within that promise is the protection of public forums as arenas of discourse as well as the creation of inverse constitutional rights. For example, in *Boy Scouts of America v. Dale*, the Court held that the Boy Scouts could not be forced to allow homosexual troop leaders if doing so ran contrary to their organization's fundamental principles.<sup>191</sup>

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10, 2017), <http://www.playbill.com/article/watch-the-first-autistic-actor-to-play-curious-incident-of-the-dog-in-the-night-times-lead-role-in-rehearsal>.

<sup>184</sup> *Next to Normal Synopsis*, STAGE AGENT, <http://stageagent.com/shows/musical/227/next-to-normal> (last visited Nov. 15, 2017).

<sup>185</sup> Charles Isherwood, *Review: 'Spring Awakening' by Deaf West Theater Brings a New Sensation to Broadway*, N.Y. TIMES (Sept. 27, 2015), <https://www.nytimes.com/2015/09/28/theater/review-spring-awakening-by-deaf-west-theater-brings-a-new-sensation-to-broadway.html>.

<sup>186</sup> See *supra* Section II.B.

<sup>187</sup> 20 U.S.C.A. § 951 (West 1965).

<sup>188</sup> § 951 (1), (4).

<sup>189</sup> § 951 (6), (10).

<sup>190</sup> U.S. CONST. amend. I.

<sup>191</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648–51 (2000).

There, the Court established that implicit in the freedom to associate is the freedom *not* to associate.<sup>192</sup> It could be similarly argued that implicit in the protection of the right to speak is the right *not* to speak as well as the right of others to *hear* you speak. Any alternative interpretation runs counter to the spirit of the law, because the value of speech is diminished to zero when spoken into a vacuum.

Freedom of speech is rooted in the importance of discourse, which requires the communication and exchange of ideas with an audience. Considering the protected status of theatrical speech,<sup>193</sup> and the importance of theaters as forums for political discourse,<sup>194</sup> the government's willingness to allow non-workable "short-cut-compliance" with the ADA could be considered a violation of the First Amendment. It has been argued that the First Amendment grants an almost absolute guarantee of access to traditional arenas of public discourse.<sup>195</sup> Under this theory, if people with physical limitations are unable to access the interior of a theater to view a live theatrical performance, they are being denied the immersive and politically significant opportunity to engage in a uniquely impactful form of public discourse and engagement.<sup>196</sup>

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<sup>192</sup> *Id.* at 648.

<sup>193</sup> *Schacht v. United States*, 398 U.S. 58, 61–62 (1970).

<sup>194</sup> PBS, *supra* note 168.

<sup>195</sup> "[R]egulation of speech . . . that has traditionally been available for public expression is subject to the highest scrutiny." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

<sup>196</sup> The importance of the live theater experience has been echoed in debates over theater copyright. In those instances, it has been noted that because of the high expense of seeing a live production, non-Broadway theater groups provide the public with a benefit when they closely replicate Broadway productions for less affluent theater-appreciators. Although these arguments focus on the *financial* inaccessibility of expensive productions and not the *physical* inaccessibility of production venues, the arguments in favor of making live theater easily accessible to all segments of the population are functionally equivalent. See Margit Livingston, *Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV. 427, 462 (2009); see also Deana S. Stein, "Every Move That She Makes:" *Copyright Protection for Stage Directions and the Fictional Character Standard*, 34 CARDOZO L. REV. 1571, 1586 (2013) (noting the fact that the value of theatrical productions is made more readily available to wider sections of the population and not just those who

## ii. First Amendment: Association

In addition to speech concerns, the inaccessibility of Broadway theaters may present an issue of freedom of association. In *Roberts v. United States Jaycees*, the Supreme Court addressed the issue of freedom of association with regards to a semi-public organization, which limited its membership to males within a certain age range.<sup>197</sup> The court held that it was not a violation of freedom of association to require the Jaycees to allow women to hold full membership positions within the organization.<sup>198</sup> In reaching their decision, the court noted that the Jaycees served a socially significant role of promoting the “intelligent participation by young men in the affairs of their community”<sup>199</sup> and since the group’s ability to engage in its protected activities would be only minimally affected, the group should allow full female membership.<sup>200</sup> The *Jaycee* Court explained that the First Amendment grants freedom of association, “for the purpose of engaging in . . . speech, assembly, petition for the redress of grievances, and the exercise of religion”<sup>201</sup> and asserted, “[a]n individual’s freedom to speak . . . could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”<sup>202</sup> In the same way that the Jaycees served a vital community need, as already established, live-theatrical performances have a significant community purpose. They are traditional meeting grounds for the dissemination of ideas, and the right to associate with the theater community should never be hindered on the basis of disability.

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can afford to attend an expensive Broadway show when they are produced in localities distant from New York City).

<sup>197</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 613 (1984).

<sup>198</sup> *See id.* at 610, 621.

<sup>199</sup> *Id.* at 613.

<sup>200</sup> *See id.* at 627.

<sup>201</sup> *Id.* at 618.

<sup>202</sup> *Id.* at 622.

## iii. Fourteenth Amendment: Equal Protection

In addition to First Amendment concerns, there are equal protection concerns under the Fourteenth Amendment that are implicated by allowing “shortcut compliance” to continue in Broadway theaters. These equal protection concerns are raised on both a federal and state level through the Fifth and Fourteenth Amendment.<sup>203</sup> Under the Fourteenth Amendment “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>204</sup> Thus, when Congress passed the ADA they “invoke[d]” their authority to enforce the Fourteenth Amendment’s Equal Protection clause to end discrimination against the disabled.<sup>205</sup> Furthermore, the stated purpose of the ADA is “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”<sup>206</sup> which implies targeting instances where the disabled are subject to discriminatory disparate impact.

However, the Supreme Court has been reluctant to classify the disabled as a suspect or quasi-suspect class, for purposes of the Fourteenth Amendment, and has not applied strict scrutiny or intermediate scrutiny to instances of alleged discrimination against the disabled.<sup>207</sup> Instead, the Court has applied deferential rationality review which requires laws relating to the disabled to be

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<sup>203</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.”).

<sup>204</sup> U.S. CONST. amend. XIV, § 1.

<sup>205</sup> *Id.*; 42 U.S.C. § 12101(b)(4) (1990) (“to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.”).

<sup>206</sup> *See* 42 U.S.C. § 12101(b)(1) (1990).

<sup>207</sup> *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (holding that mental disability was not a “quasi-suspect classification calling for a more exacting standard of judicial review.”).

“rationally related to a legitimate governmental purpose.”<sup>208</sup> Under this standard of review, the Court considers the historical discrimination of a class of people to determine whether or not a law, which has a disparate impact, is animated by animus.<sup>209</sup> Even without being considered a suspect class, considering the well-documented history of discrimination against the disabled as a marginalized segment of society, it is quite possible that legislative loopholes which prevent the disabled from fully participating in major areas of public life may be considered a violation of the disabled’s equal protection of the law under the Fourteenth Amendment.<sup>210</sup>

From an Equal Protection standpoint both Congress and New York State<sup>211</sup> have failed disabled theater patrons when it comes to Broadway theater accessibility. New York State, in failing to enforce the principles of the ADA, and allowing theaters to escape liability through straw men claims of “undue burden” to accommodate,<sup>212</sup> and Congress, in failing to close the legislative loopholes which Broadway theaters are taking advantage of to the detriment of all involved, including the theaters themselves.<sup>213</sup>

### B. *Financial Reasons to Reform*

In addition to the constitutional reasons to reform Title III of the ADA, there are financial reasons why compliance standards should be increased under the act. Due to the limited accessibility

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<sup>208</sup> *Id.* at 446.

<sup>209</sup> *See id.* at 437, 441, 454.

<sup>210</sup> *See id.* at 442, 452–53 (finding that even though the disabled are not a suspect class for purposes of the Fourteenth Amendment, a deferential rationality review could still find a violation of the Equal Protection Clause); *see infra* Section VC (suggesting that equal protection claims would be easier to bring and succeed if the disabled *were* considered a “discrete and insular minority”).

<sup>211</sup> NEW YORK CIV. RIGHTS ART. 4 §40-c(2) (stating that “[no] person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability . . . be subjected to any discrimination in his or her civil right . . .” and yet it allows Broadway to shortcut compliance with the ADA to keep the disabled community at an arm’s length.).

<sup>212</sup> *See supra* Section II.B.

<sup>213</sup> *See supra* Section I.A.

in many Broadway theaters, the ADA requires that accessible seats, usually located in the expensive orchestra section of the theater, be sold at the same price as the cheapest seat in the house.<sup>214</sup>

A public accommodation shall ensure that wheelchair spaces and companion seats are provided in each specialty seating area that provides spectators with distinct services or amenities that generally are not available to other spectators. If it is not readily achievable for a public accommodation to place wheelchair spaces and companion seats in each such specialty seating area, it shall provide those services or amenities to individuals with disabilities and their companions at other designated accessible locations at no additional cost.<sup>215</sup>

This means that for a popular production such as *The Book of Mormon*,<sup>216</sup> for example, the box office is required to make the orchestra seats, priced at \$252,<sup>217</sup> accessible to wheelchair bound

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<sup>214</sup> The C.F.R. states, “Ticket prices. The price of tickets for accessible seating for a single event or series of events shall not be set higher than the price for other tickets in the same seating section for the same event or series of events. Tickets for accessible seating must be made available at all price levels for every event or series of events. If tickets for accessible seating at a particular price level cannot be provided because barrier removal in an existing facility is not readily achievable, then the percentage of tickets for accessible seating that should have been available at that price level but for the barriers . . . shall be offered for purchase, at that price level, in a nearby or similar accessible location.” 28 C.F.R. § 36.302 (f)(3) (2016). See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION, ADA 2010 Revised Requirements: Ticket Sales (July 2010), 3 [https://www.ada.gov/ticketing\\_2010.pdf](https://www.ada.gov/ticketing_2010.pdf) (explaining the Department of Justice’s ADA guidelines for accessible seating).

<sup>215</sup> 28 C.F.R. § 36.308. See Erik Piepenburg, *Making Broadway Accessible for the Disabled*, N.Y. TIMES (Mar. 2, 2010), <https://artsbeat.blogs.nytimes.com/2010/03/02/making-broadway-accessible-for-the-disabled/> (indicating that the Theater Development Fund Accessibility Program usually provides a fifty-percent discount on orchestra seats for disabled patrons).

<sup>216</sup> Russ D’ Souza, *After Five Years On Broadway, ‘Book of Mormon’ Tickets Still Sought After*, FORBES (Mar. 11, 2016), <https://www.forbes.com/sites/russdsouza/2016/03/11/after-five-years-on-broadway-book-of-mormon-tickets-still-sought-after/#697a8c5e7581>.

<sup>217</sup> *The Book of Mormon, Best Seats*, TICKETMASTER, <https://www1.ticketmaster.com/the-book-of-mormon-new-york-new-york-new->

patrons, and their companions at a discounted price of approximately \$128,<sup>218</sup> which is the lowest ticket price available.<sup>219</sup> On its face, this may seem like a perk for wheelchair-bound theater patrons and their companions, but it does not help the most physically impaired who are unable to fully access, or use these facilities to take advantage of these discounts. Furthermore, it does not help the theaters themselves who lose out on the potential profit of being able to sell those seats at non-discounted prices.

As long as Broadway theaters have limited wheelchair seating, they will be required to make these expensive seats available for significantly lower prices to both wheelchair-bound patrons and their companions.<sup>220</sup> For a theater such as the Music Box Theatre with eleven wheelchair accessible seats,<sup>221</sup> if every wheelchair-bound patron is accompanied by at least one able-bodied companion, that is twenty-two discounted seats. Premium orchestra tickets for *Dear Evan Hansen*, currently playing at the

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york-11-19-2017/event/030050C1F50893E9?artistid=1714389&majorcatid=10002&minorcatid=207&brand=bom#efeat4212 (last visited Nov. 15, 2017).

<sup>218</sup> *The Book of Mormon, Lowest Price*, TICKETMASTER, [https://www1.ticketmaster.com/the-book-of-mormon-new-york-new-york-new-york-11-19-](https://www1.ticketmaster.com/the-book-of-mormon-new-york-new-york-new-york-11-19-2017/event/030050C1F50893E9?artistid=1714389&majorcatid=10002&minorcatid=207&brand=bom#efeat4212)

2017/event/030050C1F50893E9?artistid=1714389&majorcatid=10002&minorcatid=207&brand=bom#efeat4212 (last visited Nov. 15, 2017).

<sup>219</sup> *See id.*

<sup>220</sup> *See* 28 C.F.R. § 36.308 (2005).

<sup>221</sup> The ground floor of the Music Box, has five wheelchair seats and six aisle seats with removable armrests which allow wheelchair bound patrons to transfer from their assistive device to the theater chair if they are comfortable and able to do so. *Telecharge, Dear Evan Hansen Tickets & Information*, Access Information

<https://www.telecharge.com/eventaccessinformation.aspx?productid=11698> (last visited Sept. 21, 2018); *see also Access for the Disabled at Broadway Shows in New York City* New York Show Tickets (Sept. 10, 2018)

<https://www.nytimes.com/articles/access-for-the-disabled-at-broadway-shows-in-new-york-city> (“There are two types of wheelchair accommodations in Broadway theatres—an empty wheelchair spot, or a transfer seat . . . [which] allow the wheelchair users to transfer out of their wheelchair into an actual seat, where their companion, or the usher, will relocate the users wheelchair to the back of the auditorium.”).



Music Box, are sold for over \$400.<sup>222</sup> If wheelchair-bound patrons and their companions are entitled to those seats at approximately \$150<sup>223</sup> the theater loses roughly \$5,500 per-show. In a Broadway year where there are eight productions per-week, every week,<sup>224</sup> this discount could amount to upwards of two million dollars annually. This number is particularly significant when you consider that *Dear Evan Hansen*'s capital investment was nine and a half million dollars.<sup>225</sup> That means that the discounts when taken in the aggregate could amount to approximately a quarter of the overall investment for the entire production. This lost profit opportunity could be avoided if Broadway theaters make a significant effort to become more accessible for wheelchair-bound patrons. Elevators and interior ramps would remove the physical barriers, which prevent wheelchair users from accessing the cheaper seats in the house, and would open up the most expensive seats to any and all patrons willing and able to pay the listed ticket price. Such modifications would both literally and figuratively level the playing field for all individuals who wish to enter, and bring Broadway theaters into compliance with the spirit of the ADA.

### *C. Overarching Policy Reasons to Reform: Upholding American Ideals*

Along with the legal and financial reasons why the government should enact higher ADA standards with regards to Broadway theaters, there are important policy reasons for more stringent enforcement. In order for our society to function, citizens need to

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<sup>222</sup> *Dear Evan Hansen Tickets & Information*, TELECHARGE.COM, <https://www.telecharge.com/ticketsearchresults.aspx?ProductId=11698> (last visited Dec. 1, 2017).

<sup>223</sup> *See supra*, note 221.

<sup>224</sup> Most, if not all Broadway productions perform eight-times a week on a rotating schedule. James Miller, *Weekly Schedule of Current Broadway Shows*, PLAYBILL.COM (Aug. 30, 2018), <http://www.playbill.com/article/weekly-schedule-of-current-broadway-shows-com-142774>.

<sup>225</sup> Gordon Cox, *Tony Champ 'Dear Evan Hansen' Turns a Profit on Broadway*, VARIETY (July 17, 2017), <http://variety.com/2017/legit/news/dear-evan-hansen-recoup-1202497331/>.

have faith in the law, and confidence that legislation will be enforced. This is particularly important for civil rights legislation. As explained in the introduction, the ADA is part of an American tradition of civil rights legislation aimed at realizing the promises of the Declaration of Independence.<sup>226</sup> If theaters are allowed to take advantage of loopholes in the legislation to avoid full compliance with the purpose of the ADA, faith in the government may be called into question. A law has no power to produce change if it is easily sidestepped by the entities that it purports to govern.<sup>227</sup> A piece of legislation is only as impactful as its enforcement.<sup>228</sup> The purpose of the ADA is to end discrimination against the disabled, but that goal cannot be accomplished without stringent enforcement of those principles. Justice Harlan once stated, “[i]f the constitutional amendments be enforced, according to the intent with which [they] were adopted, there cannot be, in this republic any class of human beings in practical subjection to another class.”<sup>229</sup> Just as the Thirteenth,<sup>230</sup> Fourteenth,<sup>231</sup> and Fifteenth amendments<sup>232</sup> were passed to end the subjugation of

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<sup>226</sup> See *supra* Introduction.

<sup>227</sup> Justice Harlan commented on the disconnect between legislative intent and enforcement of the laws when he wrote, “The letter of the law is the body; the sense and reason of the law is the soul.” *Civil Rights Cases*, 109 U.S. at 26 (1883) (Harlan, J., dissenting).

<sup>228</sup> President Andrew Jackson famously commented on the impotence of legislation without enforcement when he responded to the Supreme Court’s decision in *Worcester v. Georgia* by saying, “John Marshall has made his decision, now let him enforce it.” Jeffrey Rosen, *Supreme Court History: The First Hundred Years*, THIRTEEN, 2 (Dec. 2006), <https://www.thirteen.org/wnet/supremecourt/antebellum/history2.html>.

<sup>229</sup> *Civil Rights Cases*, 109 U.S. at 62 (Harlan, J., dissenting).

<sup>230</sup> U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”)

<sup>231</sup> U.S. CONST. amend. XIV § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States of the State wherein they reside.”)

<sup>232</sup> U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United State or by any State on account of race, color, or previous condition of servitude.”)

African Americans,<sup>233</sup> the ADA was passed to end the suppression of the disabled.<sup>234</sup> Any legislative loopholes, which maintain second-class status for the disabled, should not be allowed in a society that prides itself on “liberty and justice for all”<sup>235</sup> particularly when it comes to arenas such as theaters which are used as pulpits for political and social commentary.<sup>236</sup>

#### ACT TWO: “BLOCKING” A REMEDY

#### V. CRAFTING A SOLUTION

As indicated in the preceding paragraphs, Title III of the ADA is not currently operating to fully achieve its legislative purpose. Many Broadway theaters are not as accommodating to wheelchair bound patrons as they are to able-bodied patrons.<sup>237</sup> This is particularly true for patrons who are confined to motorized chairs.<sup>238</sup> However, identifying the problem is only the first act, the second act is crafting a solution to theater accessibility. It is necessary to propose a three-prong solution to modify the ADA, and close the loopholes, which Broadway theaters are currently using to the detriment of the disabled. The first prong is to include a modification of the statutory definition of “undue burden” under the ADA. The second prong is to create a tax for public accommodations to develop a financial reserve which would cover the expenses of making facilities more accessible and accommodating for people with disabilities. The third, and final prong is to categorize the disabled as a discrete and insular minority. This multifaceted solution aims to offer a clear path forward to achieve true Broadway theater accessibility.

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<sup>233</sup> See Civil Rights Cases, 109 U.S. at 10.

<sup>234</sup> 42 U.S.C. § 12101 (1990).

<sup>235</sup> JAMES MUSSATTI & THOMAS J. SHELLY, CONSTITUTION OF THE UNITED STATES: ITS ORIGINS, PRINCIPLES, AND PROBLEMS 98 (1956).

<sup>236</sup> See *supra* Section IV.A.i.

<sup>237</sup> See *supra* Section II.B.

<sup>238</sup> See *supra* Section II.A.

### A. *Re-Doing Undue Burden*

The current understanding of what constitutes an “undue burden” under the ADA is insufficient to achieve the legislative intent of the act. Title III of the ADA does not statutorily define “undue burden,”<sup>239</sup> but Title I of the ADA defines “undue hardship.”<sup>240</sup> Under Title I, “undue hardship” considers,

- (i) the nature and cost of the accommodation . . . ;
- (ii) the overall financial resources of the facility . . . ; (iii) the overall financial resources of the covered entity . . . ; and (iv) the type of operation or operation of the covered entity.<sup>241</sup>

As explained, although “undue burden” under Title III is considered a higher standard of review than “undue hardship,” the two terms have been interpreted to encompass many of the same factors.<sup>242</sup> For this reason, the legislature may have considered a definition of “undue burden” superfluous, but a specific definition of “undue burden” with additional factors may result in increased accessibility for public accommodations generally, and Broadway theaters specifically.

An amendment to Title III of the ADA which defined “undue burden” as: “an action requiring significant difficulty or expense when considered in light of”<sup>243</sup> (1) the cost of implementing the modification; (2) the potential cost of not implementing the modification; (3) the financial resources of the public accommodation; and (4) the political and social significance of the activity or goods provided, would require a holistic approach to accessibility.<sup>244</sup> Factors one and three address the financial practicality of increasing accessibility, but factor two requires public accommodations such as theaters to consider the financial consequences of *not* modifying their facilities. In the case of Broadway theaters, the potential financial losses can be

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<sup>239</sup> See 42 U.S.C. § 12181 (2009).

<sup>240</sup> *Id.* § 12111 (10).

<sup>241</sup> See *supra* text accompanying note 44.

<sup>242</sup> *Id.*

<sup>243</sup> 42 U.S.C. § 12111(10)(A) (2009).

<sup>244</sup> *Id.*

significant.<sup>245</sup> Finally, factor four focuses on the social value of the goods provided. Public Accommodations cover a broad range of facilities,<sup>246</sup> but one could reasonably find a significant difference between being excluded from a donut shop, and being excluded from a live theatrical production. Under this analysis, the more socially significant the goods provided are, the higher the bar should be for a public accommodation to prove an excusable “undue burden.” Re-defining “undue burden” in this way would close the legislative loopholes of the ADA by refusing to accept shortcut compliance measures as sufficient.

### B. Disability Trust

The House of Representatives has recently voted to pass a bill, which will amend the ADA.<sup>247</sup> The proponents of the bill allege that under the current framework of the ADA, small business owners are under attack from overly litigious lawyers looking for large settlements.<sup>248</sup> Their argument claims that because the ADA allows lawyers to recover legal fees from noncompliant businesses, it encourages exploitation of small businesses which are unable to reasonably make their facilities accommodating.<sup>249</sup> To remedy this perceived problem the ADA Education and Reform Act of 2017 would require disabled individuals to put businesses on “notice” of a violation, and then allow those businesses upwards of six months to make “substantial progress towards accessibility.”<sup>250</sup> This bill runs contrary to the legislative purpose of the ADA by neglecting the needs of the disabled and instead promotes the convenience of business owners. The answer is not to lower the bar of accommodation for business, but rather to make it easier for

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<sup>245</sup> See *supra* Section IV.B.

<sup>246</sup> 42 U.S.C. § 12181(7) (1990).

<sup>247</sup> ADA Education and Reform Act of 2017, 115 H.R. 620, 115th Cong. (2017) <https://www.congress.gov/bill/115th-congress/house-bill/620?q=%7B%22search%22%3A%5B%22HR+620%22%5D%7D&r=1>.

<sup>248</sup> An ironic assertion when you consider that “ADA lawsuits are already one of the lowest categories of lawsuits filed against businesses.” Mizner, *supra* note 50.

<sup>249</sup> Hershberg, *supra* note 12.

<sup>250</sup> Mizner, *supra* note 50 (quotations omitted).

businesses to bring themselves into compliance with the ADA.<sup>251</sup> Anything less would severely undermine the act's ability to function as a protection for the rights of the disabled.

In order to make implementing accessibility measures more "readily achievable" for public accommodations a disability trust could be implemented to make sure that there is always money to make necessary accommodations. Currently, the Internal Revenue Code offers numerous tax cuts for businesses that are in compliance with the ADA to incentivize businesses to make their facilities more accessible for the disabled.<sup>252</sup> Although these tax cuts are a good start, many eligible businesses "are unaware that these incentives exist."<sup>253</sup> In contrast, a disability trust would be something that all owners of public accommodations would be aware of as a requirement of conducting business, thereby serving the dual function of keeping accessibility needs at the forefront of business owners' concerns and making it easier for them to make their facilities accessible and accommodating.

Unemployment insurance works by having employers pay a tax into an unemployment insurance trust, which provides money for employees who make a valid claim for unemployment insurance benefits.<sup>254</sup> The same principle could be applied to create a disability trust for public accommodations under the ADA. Large public accommodations such as Broadway theaters would be taxed, and that money would be held in a disability trust to be used annually to make incremental modifications to their facilities to increase accessibility. This money will be earmarked for accessibility requirements, and would make modifications readily

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<sup>251</sup> As it stands now there is "no absolute, unequivocal requirement for universal accessibility to all parts of a public facility under [the] ADA." Hershberg, *supra* note 12.

<sup>252</sup> *ADA Quick Tips-Tax Incentives*, ADA NATIONAL NETWORK, <https://adata.org/factsheet/quicktips-tax> (last visited Dec 1, 2017).

<sup>253</sup> *Id.*

<sup>254</sup> See *Employer's Guide to Unemployment Insurance, Wage Reporting, and Withholding Tax*, New York State Department of Taxation and Finance (Jan. 2014), <https://www.tax.ny.gov/pdf/publications/withholding/nys50.pdf>; *Unemployment Benefits & Contesting a Claim*, WOLTERS KLUWER, <https://www.bizfilings.com/toolkit/research-topics/office-hr/the-unemployment-benefits-system-how-it-works-and-when-to-contest-a-claim> (last visited Nov. 8, 2018).

achievable because it would ensure that there is always a financial reserve to support needed modifications. Although the idea of an additional tax on private businesses would likely meet strong opposition, the concept of a disability trust could be more financially feasible for businesses because it would spread out costs over long periods of time, as opposed to expecting facilities to pay for modifications in one lump sum when a complaint is raised.

*C. The Disabled, A Discrete and Insular Minority*

Contrary to the narrative of the proponents of the ADA Education and Reform Act, ADA lawsuits are few and far between.<sup>255</sup> As explained by the American Civil Liberties Union (“ACLU”) there are “no real incentive[s] to [hassle] businesses with [ADA] lawsuits”<sup>256</sup> and most “people with disabilities are too busy leading their lives to file endless [and expensive] lawsuits.”<sup>257</sup>

In 2008, an Amendment of the ADA deleted a paragraph that categorized the disabled as a “discrete and insular minority.”<sup>258</sup> If disabled Americans were categorized as such under the ADA, they would be entitled to strict scrutiny.<sup>259</sup> This amendment should be undone, and the text of the ADA should formally recognize the disabled as entitled to heightened scrutiny. This higher standard would encourage public accommodations to make their facilities more wheelchair-accessible to avoid potentially costly litigation and the social stigma associated with a discrimination lawsuit against a historically disadvantaged group.

CONCLUSION

The federal government may have passed the ADA with the intent of ending discrimination against the disabled, but it gutted

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<sup>255</sup> Mizner, *supra* note 50.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> 42 U.S.C.S. § 12101 (2008).

<sup>259</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–40 (1985).

the legislation through the numerous exceptions to its provisions.<sup>260</sup> Public Accommodations under Title III such as Broadway theaters have been allowed to take shortcuts to meet the requirements under the act that undermine the spirit of the law.<sup>261</sup> Such pervasive shortcut compliance should not be allowed under the ADA if the statute is to fulfill its legislative purpose.<sup>262</sup> Shortcut compliance has raised multiple concerns, chief among them, constitutional concerns pertaining to freedom of expression<sup>263</sup> and equal protection.<sup>264</sup> Shortcut compliance also has financial consequences for the theaters themselves, which are required to provide discounted seats to wheelchair-bound patrons in the most expensive sections of their facilities.<sup>265</sup>

With the ADA, the government took an affirmative step to pass legislation on behalf of a historically disadvantaged segment of the population, the disabled. The continued discrimination against this vulnerable group undermines the significance of “landmark legislation,” and insults the idea that America is a nation where no class of people is held in subjugation of another.

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<sup>260</sup> *See supra* Section I.A.

<sup>261</sup> *See supra* Part II.

<sup>262</sup> *See supra* Introduction.

<sup>263</sup> *See supra* Section IV.A.i.

<sup>264</sup> *See supra* Section IV.A.iii.

<sup>265</sup> *See supra* Section IV.B.