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Viewing Angles Requirement in Stadium-Style Seating under the ADA

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The Viewing Angles Requirement in Stadium-Style Seating Under the ADA

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I. THE ADA AND ITS COMPARABLE LINES OF SIGHT REQUIREMENT

Title III of the Americans with Disabilities Act (ADA)[1] states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[2] After enacting the ADA, Congress charged the Attorney General with promulgating more specific regulations to clarify how public accommodations may meet the standard imposed by this general rule.[3] In doing so, Congress required these regulations "to be consistent with the minimum guidelines issued by the" Architectural and Transportation Barriers Board, also known as the Access Board.[4] The Access Board issued its ADA Accessibility Guidelines in 1991,[5] and the Attorney General subsequently adopted them as the "Standards for Accessible Design."[6] Section 4.33.3 of the Standards for Accessible Design deals with wheelchair seating in public assembly areas and reads as follows:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and *lines of*

1. 42 U.S.C. §§ 12181-89 (2006).
2. *Id.* § 12182(a).
3. U.S. v. AMC Entm't., Inc., 549 F.3d 760, 763 (9th Cir. 2008) (citing 42 § U.S.C. 12186(b)).
4. *AMC*, 549 F.3d at 763 (citing 48 U.S.C.A. § 12186(c)).
5. Americans With Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities, 56 Fed.Reg. 35,408 (July 26, 1991).
6. 28 C.F.R. § 36, appendix A (2009).

> *sight comparable to those for members of the general public.* They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.
>
> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies, and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.[7]

Shortly afterward, in the early half of the 1990s, movie theatres introduced and implemented stadium-style seating.[8] The earliest form of these stadium-style theatres were a hybrid of traditional sloped floor seating near the front of the room and stadium seating, accessible by stairs, near the back.[9] Moviegoers had the choice of either sitting in the front few rows of traditional seating or sitting in the new, preferable stadium-style seats.[10] While most people avoided the traditional seating, the fact that these new stadium-style seats were accessible only by stairs prevented disabled moviegoers from utilizing them altogether.[11] Instead, they were relegated to "the least desirable seats in the rows closest to the screen," which made viewing the movie both difficult and uncomfortable.[12]

The 1991 Standards for Accessible Design preceded the introduction of stadium-style seating by several years.[13] As a result, they did not adequately address the issue of whether the phrase "lines of sight comparable to those for members of the general public" meant that wheelchair seating for disabled moviegoers must provide viewing angles that are at least equivalent to those avail-

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7. *AMC*, 549 F.3d at 763-64 (quoting 28 C.F.R. § 36, appendix A § 4.33.3 (some emphasis removed)).
8. *Id.* at 762.
9. *Id.* at 762.
10. *Id.* at 762-63.
11. *Id.*
12. *AMC*, 549 F.3d at 763.
13. *Id.* at 764.

able to other, non-disabled patrons.[14] However, in 1999, the Access Board noted that the Department of Justice had interpreted the provision as mandating that wheelchair seating areas "provide viewing angles that are equivalent to or better than the viewing angles . . . provided by 50 percent of the seats in the auditorium."[15] Accordingly, the Access Board noted that it would consider whether or not it would include in its rules specific requirements consistent with the Department of Justice's interpretation of section 4.33.3, and whether it would provide guidance on determining whether sight lines are "comparable" in public assembly areas.[16] However, over ten years later, the Access Board has failed to follow through with this commitment.[17] This failure has led to a barrage of litigation and a split among several federal circuits. The circuit split exists over the question of whether section 4.33.3 requires that disabled patrons be provided with similar "viewing angles." This Comment will explore the circuit split and advocate for an affirmative answer to the question.

II. LEGAL LANDSCAPE SURROUNDING SECTION 4.33.3

The first case involving section 4.33.3, *Paralyzed Veterans of America v. D.C. Arena L.P.*,[18] involved the MCI Center, an arena which was then under construction in downtown Washington, D.C.[19] The arena was intended to house NBA games, NHL games, concerts, and other special events.[20] Wheelchair users, understanding that the excitement elicited in these types of events often results in people standing to cheer on their favorite teams and performers, became concerned that the designated wheelchair seats may not allow them to see the most dramatic moments of games and other events.[21] The central issue in the case, then, became whether or not the "lines of sight" language in section 4.33.3 required that wheelchair seating allow its occupants to have

14. *Id.*
15. *Id.* (quoting 64 Fed.Reg. 62,248, 62,278 (Nov. 16, 1999)).
16. *Id.*
17. *AMC*, 549 F.3d at 764.
18. 117 F.3d 579 (D.C. Cir. 1997).
19. *D.C. Arena*, 117 F.3d at 580.
20. *Id.* The arena, now known as the Verizon Center, plays host to the NBA's Washington Wizards, the WNBA's Washington Mystics, the NHL's Washington Capitals, the Georgetown University men's basketball team, concerts, and numerous other events. Verizon Center Facts, http://www.verizoncenter.com/about (last visited June 11, 2010).
21. *Id.*

sightlines over the heads of standing spectators.[22] Paralyzed Veterans of America ("the Veterans") argued that it did, while D.C. Arena L.P. ("the Arena"), argued that it did not.[23] The district judge agreed generally with the Veterans, but found that section 4.33.3 did not require that *every* wheelchair seat have a line of sight over standing spectators.[24] Instead, the judge found that "substantial compliance" with section 4.33.3 was sufficient to avoid liability.[25] Both sides challenged the ruling.[26] The Arena claimed that the court erred in reading section 4.33.3 to require *any* sightlines over standing spectators, while the Veterans argued that the judge erred in not requiring that *all* wheelchair seats have such sightlines.[27]

The Arena began by arguing that "lines of sight comparable to those for members of the general public" means only that wheelchair seating must be dispersed throughout the entirety of the arena, rather than concentrated in a particular section or area of the facility.[28] The Veterans, joined by the government, responded by pointing out that the regulation, by requiring facilities with over 300 seats to provide wheelchair seating in more than one location and requiring that wheelchair users have a choice of admission prices, already provides for a dispersal of wheelchair seating throughout the facility.[29] Therefore, the Veterans argued, the "lines of sight" language must have another meaning in order to avoid redundancy.[30]

The Arena also argued that "lines of sight comparable" had taken on a specific meaning, which did not involve temporary obstructions like those caused by standing spectators, by the time it was used in the regulation.[31] While the court did not elaborate on what this specific meaning was alleged to be, it dismissed the Arena's notion that the language had developed any type of "un-

22. *Id.* at 581.
23. *Id.* at 582.
24. *D.C. Arena*, 117 F.3d at 582.
25. *Id.* The district judge found the appellant's original plan insufficient to meet the standard of "substantial compliance," but approved a subsequent plan which would provide lines of sight over standing spectators in 78-88% of the wheelchair seating areas, depending upon the arena's seating configuration, which could be changed for different types of events. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 583.
29. *D.C. Arena*, 117 F.3d at 583.
30. *Id.*
31. *Id.*

iversally accepted linguistic meaning," let alone one contrary to that asserted by the Veterans.[32]

The court went on to state that although the phrase "is easily read as [requiring] a view no more obstructed than would be available to non-wheelchair users," whether it refers only to permanent obstructions rather than the temporary obstructions caused by standing spectators, is ambiguous.[33] As a result of this ambiguity, the court was faced with the issue of whether the interpretation found in the Department of Justice's *Americans with Disabilities Act Title III Technical Assistance Manual,* which requires lines of sight over standing spectators, was entitled to any deference.[34] Given that Congress charged the Department of Justice was charged with promulgating the regulations, the court determined that the Department's interpretation of those regulations was entitled to deference.[35]

On the other hand, the court disagreed with the Veterans regarding the required degree of compliance with section 4.33.3. The court determined that the district judge "was more than justified in concluding there was a good deal of wiggle room in the degree of compliance contemplated by the regulation and manual, and that he, as a judge sitting in equity, had ample discretion to fashion the remedial order that he did."[36] As a result, the lower court ruling was affirmed.[37]

Two years later, in *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*,[38] the United States Court of Appeals for the Third Circuit was called upon to examine the

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32. *Id.* The court explained:

> The [lines of sight] language had its genesis apparently in guidance issued by the American National Standards Institute, a private body, in 1980. Appellants contend that there is no contemporary manifestation—not even a hint—that the Institute meant the phrase to reach the standing spectator problem. That may be so. Still, as appellees and the government correctly insist, there was no uniformly understood construction of the language prior to the time it was picked up by the Board and the Department. Although there is no indication that the words were intended to address sightlines over standing spectators, neither is there any evidence to the contrary. The words simply had not taken on a well-understood meaning.

Id.

33. *Id.*

34. *D.C. Arena*, 117 F.3d at 584. The Department of Justice first published the *Manual* in 1994. *Id.* at 582-83. Although it initially said nothing about sight lines over standing spectators, a later supplement explicitly stated that "lines of sight comparable" required lines of sight over standing spectators. *Id.*

35. *Id.* at 585-87.

36. *Id.* at 589.

37. *Id.*

38. 193 F.3d 730 (3d Cir. 1999).

"lines of sight" language. Like *D.C. Arena*, however, *Caruso* dealt only with determining whether section 4.33.3 simply required a "dispersal" of wheelchair seating areas that would allow wheelchair-bound patrons a choice of a variety of viewpoints, or if it required lines of sight that would be unobstructed when other patrons stood.[39] While the court held that section 4.33.3 required nothing more than a "dispersal,"[40] the court did not address, nor did it need to address, the "viewing angles" question.

In *Lara v. Cinemark USA, Inc.*,[41] the United States Court of Appeals for the Fifth Circuit was faced with a section 4.33.3 suit, this time involving a newly-built movie theatre. The movie theatre in question was a "Tinseltown" complex in El Paso, Texas, which had incorporated the then-new "stadium style" seating into its design.[42] Tinseltown had designated wheelchair areas; however, they were not located in the stadium-style portion of the theatre.[43] Instead, they were designated in a flat portion of the theatre, near the front of the seating area, and surrounded by traditional, non-stadium-style public seating.[44] City and state inspectors had reviewed and approved the Tinseltown plans prior to construction and, after it was built, again approved the seating configurations.[45]

The plaintiffs in the case, a group of disabled individuals and advocacy groups, brought suit shortly after the theatre opened, claiming that, in a number of the theatres in the Tinseltown complex, the wheelchair areas were too close to the screen and too far below it to provide wheelchair-bound moviegoers with a comfortable viewing experience.[46] They alleged that, while the theatre gave non-disabled moviegoers improved sight lines, it forced its

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39. *Caruso*, 193 F.3d at 732-37.

40. *Id.* at 736-37.

41. 207 F.3d 783 (5th Cir. 2000).

42. *Lara*, 207 F.3d at 785. As the court explained: "Stadium-style theaters roughly emulate the seating configuration of a typical sports stadium, providing stepped-seating that rises at a slope of well over five percent. This elevated seating configuration eliminates the line-of-sight problems that typically occur, for example, when a tall individual sits in front of a shorter individual." *Id.*

43. *Id.*

44. *Id.*

45. *Id.* More specifically, during construction, Cinemark submitted the Tinseltown architectural plans to the Texas Department of Licensing and Regulation (TDLR) and to the City of El Paso. *Id.* After reviewing the plans, the city inspectors granted conditional approval to move forward with construction. *Id.* Once the construction was completed in 1997, the city and state inspected the facilities. *Id.* Inspectors from both entities approved the seating configurations, including the wheelchair placements. *Id.*

46. *Id.*

wheelchair-bound patrons to sit in inferior viewing areas where they had to crane their necks in order to see the screen.[47]

The district court granted summary judgment in favor of the plaintiffs, finding that, since wheelchair-bound moviegoers would have to uncomfortably crane their necks to see the screen, they were denied "the full and equal enjoyment of the movie going experience in these [sic] theatres."[48] Accordingly, the court ordered damages and injunctive relief in the form of an order requiring modification of the theatre's seating and screen layout.[49] Cinemark appealed, arguing that the district court had improperly interpreted and applied the ADA and its guidelines.[50]

Cinemark argued that it had not violated section 4.33.3 because the lines of sight it offered its wheelchair-bound patrons were comparable to those available to members of the general public.[51] The wheelchair areas were comparable, Cinemark explained, "because they are located in the midst of general seating and do not suffer from any obstructions."[52]

The Fifth Circuit began its analysis by explaining that, while existing case law in other circuits had previously addressed the issue of viewer obstruction, it had not yet considered the related issue of "whether theaters are required to provide wheelchair seating areas with 'viewing angles' that are as comfortable as those enjoyed by the general public."[53] It further noted that, neither the *Manual* nor the Access Board addressed the viewing angles issue.[54] The court pointed out that, while the Access Board was, at that time, proposing modifications to section 4.33.3, those proposed changes "define[d] 'line of sight' problems only in the context of obstructed views."[55] The court explained additionally that although "lines of sight" lacked a clear meaning at the time section

47. *Lara*, 207 F.3d at 785.

48. *Id.* (quoting Lara v. Cinemark USA, No. EP-97-CA-502-H, 1998 WL 1048497, at *2 (W.D. Tex. Aug. 21, 1998)).

49. *Id.* at 785-86.

50. *Id.* at 786.

51. *Id.* at 788.

52. *Lara*, 207 F.3d at 788.

53. *Id.* (citing *D.C. Arena*, 117 F.3d at 583-4 (holding that section 4.33.3 does require auditorium-owners to provide wheelchair areas with lines of sight unobstructed by standing spectators); *Caruso*, 193 F.3d at 736 (holding that section 4.33.3 does not reach issue of sightlines over standing spectators); Indep. Living Resources v. Oregon Arena Corp., 982 F.Supp. 698, 743 (D.Or.1997) (holding that section 4.33.3 "does not purport to decide whether lines of sight over standing spectators are—or are not—necessary in order to comply with the ADA")).

54. *Id.*

55. *Id.*

4.33.3 was adopted, the phrase meant "unobstructed view" in a number of other contexts, including FCC regulations regarding antennae,[56] the meaning of "direct supervision,"[57] and snowmobile driving regulations.[58]

The court therefore concluded that the phrase "lines of sight comparable" did not require that a theatre provide its wheelchair-bound patrons with anything more than unobstructed views of the screen, regardless of any discomfort that may result.[59] As the court pointed out, "To impose a viewing angle requirement at this juncture would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled moviegoers."[60] This would be in clear conflict with Congress's intent, in granting the Department of Justice and the Access Board the authority to promulgate regulations under the ADA, to provide clear disability-related guidelines to those operating theatres and other places of public accommodation.[61] As a result, the court held that section 4.33.3 did not require theatres to provide the same viewing angles available to the general public and reversed the district court's judgment.[62]

The United States Court of Appeals for the Ninth Circuit, when faced with a similar set of facts in *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*,[63] provided a different result. In that case, the defendants owned and operated six movie theatres that had stadium-style seating.[64] As in *Lara*, the stadium-style seats were inaccessible to wheelchair-bound moviegoers, who were instead relegated to seats in the first few rows of the theatre, close to the screen.[65] Viewing movies from the resulting angle created discomfort for those patrons.[66]

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56. *Id.* (citing 47 C.F.R. § 73.685 (2000) (requiring that antennae have unobstructed lines of sight of the communities which they serve)).

57. *Lara*, 207 F.3d at 789 (citing 46 C.F.R. § 13.103 (2000) (defining "direct supervision" as supervision allowing a line of sight of the individual being supervised)).

58. *Id.* (citing 36 C.F.R. § 2.18 (2000) (forbidding children under age 16 from operating snowmobiles unless they are within the line of sight of someone over 21)).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Lara*, 207 F.3d at 789.

63. 339 F.3d 1126 (9th Cir. 2003).

64. *Regal*, 339 F.3d at 1127.

65. *Id.* at 1127-28. In all six of the theatres, seating for disabled customers was only available in the first five rows. *Id.* at 1127. In five of those theatres, wheelchair-accessible seating was only available only in the sloped section of the theatre floor, and not in the area of the theatre which housed stadium-style seating. *Id.* at 1127-28. In those five theatres, over half of the wheelchair-accessible seating was in the very first row. *Id.* at 1128. There-

The United States District Court for the District of Oregon granted the defendants' motion for summary judgment, holding that the "lines of sight" language did not require that wheelchair-accessible seating provide its occupants with viewing angles comparable to those in the general seating areas.[67] The district court relied heavily on *Lara*, which was, at that time, the only federal appeals court decision that directly addressed the viewing angle question.[68]

The Ninth Circuit began its analysis by determining that the central question of the case was "whether it is unreasonable for [the Department of Justice] to interpret 'comparable line of sight' to encompass factors in addition to physical obstructions, such as viewing angle."[69] Based on the plain meaning of the language of section 4.33.3, both generally and in the theatre industry, the court determined that the answer to that question was "no."[70] The court admitted that, since stadium-style seating had not yet come into use when section 4.33.3 was promulgated, the Department of Justice likely did not have it in mind at that time.[71] However, the court held that this fact alone was not dispositive since "a broadly-drafted regulation—with a broad purpose—may be applied to a particular factual scenario not expressly anticipated at the time

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fore, wheelchair-bound patrons had "no choice but to sit in the first few rows" of these theatres, and deal with the resulting discomfort. *Id.*

66. *Id.* at 1128. The court elaborated on the nature of this discomfort, explaining:

> Plaintiffs' experts, who visited the theaters and conducted research there, found that the vertical lines of sight for the wheelchair seating locations ranged from 24 to 60 degrees, with an average of approximately 42 degrees, as compared with the average median line of sight of 20 degrees in the non-wheelchair seating—a difference the experts termed a "tremendous disparity." In reality, however, the disparity is even greater, because wheelchair-bound patrons cannot slump in their seats and recline their bodies in order to adjust for the unfavorable viewing angle, as can able-bodied patrons sitting in the same part of the theater.
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> In its engineering guideline for movie theaters, the Society of Motion Picture and Television Engineers ("SMPTE") concluded that, for most viewers, physical discomfort occurs when the vertical viewing angle to the top of the screen exceeds 35 degrees, and when the horizontal line of sight measured between a perpendicular to the viewer's seat and the centerline of the screen exceeds 15 degrees. Thus, not only do the wheelchair seats themselves have, on average, highly unfavorable viewing angles relative to the rest of the theater, but the patrons sitting in them will be less able than other patrons to adjust for those angles by shifting position in their seats.

Id. (citations omitted).

67. *Id.* at 1129 (citing Or. Paralyzed Veterans of Am. v. Regal Cinemas, *Inc.*, 142 F. Supp.2d 1293, 1297-98 (D. Or. 2001)).

68. *Id.* (citing *Regal*, 142 F. Supp. at 1297).

69. *Regal*, 339 F.3d at 1132.

70. *Id.*

71. *Id.* at 1132-33.

the regulation was promulgated."[72] One of the main goals of the ADA, as the court pointed out, is to ensure that individuals with disabilities can access "the full and equal enjoyment" of all aspects of any place of public accommodation.[73] However, requiring disabled moviegoers to have to crane their necks and sit in uncomfortable seats hardly constitutes such "full and equal enjoyment."[74] As a result, the court found that section 4.33.3 requires viewing angles within the range of angles available to the general public.[75]

Later that same year, the United States Court of Appeals for the Sixth Circuit also examined the stadium-style seating question in *United States v. Cinemark USA, Inc.*[76] The Sixth Circuit rejected the Fifth Circuit's reasoning in *Lara* and instead held that the plain meaning of "lines of sight comparable to those for members of the general public" found in section 4.33.3 required more than just an unobstructed view.[77] The court noted that the word "comparable" was obviously intended to mean "similar," and that similarity would undoubtedly include similarities in viewing angles.[78] Additionally, the court held that deference should generally be given to an agency's interpretation of its own regulation.[79] Therefore, the court remanded the case and charged the district court with determining the extent to which lines of sight must be similar for disabled moviegoers beyond just an unobstructed view.[80]

The next appellate decision regarding section 4.33.3 and stadium-style seating was *United States v. Hoyts Cinemas Corp.*,[81] which was heard by the First Circuit the following year. As in *Cinemark*, the court began by looking at the language of the regulation itself.[82] While the court admitted that the phrase "lines of sight" was general enough to be interpreted with equal support either way, it found that the underlying policy of the statute tipped the scales in favor of an interpretation which would include similar viewing angles.[83] The court noted that the ADA "places

72. *Id.* at 1133 (citing Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 212 (1998)).
73. *Id.* (citing 42 U.S.C. § 12182(a)).
74. *Regal*, 339 F.3d at 1133.
75. *Id.*
76. 348 F.3d 569 (6th Cir. 2003).
77. *Cinemark*, 348 F.3d at 576-78.
78. *Id.* at 576.
79. *Id.* at 578.
80. *Id.* at 579.
81. 380 F.3d 558 (1st Cir. 2004).
82. *Hoyts*, 380 F.3d at 566.
83. *Id.* at 566-67.

substantial emphasis on equality of access" and, while absolute equality between disabled and non-disabled viewing experiences could never truly be achieved, such a goal should be pursued to the greatest extent possible.[84]

III. "VIEWING ANGLES": THE ONLY PROPER INTERPRETATION OF SECTION 4.33.3

The conversion to stadium-style seating in movie theatres across the country, its subsequent failure to properly modify the regulatory language in order to more clearly accommodate the "viewing angles" interpretation, particularly in light of the litigation explored above, is deserving of less sympathy. However, even in spite of this failure, it remains the case that the "viewing angles" interpretation of section 4.33.3 is the only proper interpretation for a number of reasons.

First, as the Sixth Circuit stated in *Cinemark*, the phrase "comparable lines of sight" obviously means "similar" lines of sight.[85] The word "comparable," in general parlance, is a near synonym of "similar,"[86] and the Access Board undoubtedly had this common sense meaning in mind when it drafted section 4.33.3. While the regulation does not explicitly list the criteria for establishing similarity between lines of sight,[87] it is unreasonable to assume that the list of criteria would only include unobstructed views. In fact, if all the Access Board was concerned about were unobstructed views, it would have said so in a more direct and explicit manner. By using the term "comparable," without providing any specific criteria for judging similarity, the Access Board was likely acknowledging the difficulty inherent in developing any such list of criteria and providing inspectors, agencies, and courts with the flexibility necessary to apply the regulation to the wide range of public accommodation facilities across the country. Judging similarity or comparability in such a broad context is, by its nature, a fact-intensive exercise which involves weighing a number of factors in a somewhat subjective analysis. What points of similarity are most important in each specific situation likely vary by venue, and any attempt to capture all the relevant distinctions and dif-

84. *Id.* at 567.

85. 348 F.3d at 575.

86. *See* ROGET'S II: THE NEW THESAURUS 261 (3d ed. 1996). The citation for "like" states: "Possessing the same or almost the same characteristics: alike, analogous, *comparable*, corresponding, equivalent, parallel, *similar*, uniform." *Id.* (emphasis added).

87. *Id.* at 576.

ferences in one regulation would undoubtedly create a confusing and burdensome system. For example, while seats near the very front of a stadium-style movie theatre would be extremely undesirable, a seating area placed similarly close to a basketball court or hockey rink would be among the most desirable seats in the arena. Multi-use facilities amplify these issues, since a particular seat can be considered excellent for one event and terrible for another. On a more specific level, each public accommodation facility is different, and many stadiums and arenas have quirks and visibility issues unique to them. Attempting to draft a blanket regulation which would account for all of these different issues would be an impossible task. By using the term "comparable," the Access Board allowed for these numerous variations among venues and events which could not be adequately captured in a more specifically drawn regulation.

Additionally, reading the regulation to require comparable or similar viewing angles, rather than just an unobstructed view, is clearly more in line with the central goals and underlying policy of the ADA. Both the *Hoyts* and *Cinemark* courts have acknowledged that the ADA requires that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."[88] "Full and equal enjoyment" means more than just being allowed admission to the venue or event in question. Obviously, by relegating disabled theatre patrons not only to the least desirable areas of the theatre in terms of visibility, but also to those seats which actually cause physical discomfort, the goals of "full and equal enjoyment" are not reached. As the First Circuit admitted in *Hoyts*, it is unreasonably difficult, if not impossible, to provide disabled patrons with a theatre or arena experience identical to that of their non-disabled counterparts.[89] However, such difficulty does not excuse the owners and operators of theatre facilities from having to make any efforts whatsoever to provide its disabled patrons with a reasonably similar and enjoyable movie-going experience. Forcing a group to sit in the worst seats, in terms of both viewing ability and comfort, based on race, gender, religious affiliation or other similar criteria would be considered "discriminatory" in nearly any context. To consider the same behavior, in the context

88. 42 U.S.C. § 12182(a). *See Hoyts*, 380 F.3d at 567; *Cinemark*, 348 F.3d at 576.
89. 380 F.3d at 567.

of disabled patrons, as anything less than discriminatory and therefore in violation of the ADA would be erroneous.

There is, undoubtedly, a financial interest at stake for many of the venues affected by section 4.33.3, which goes beyond the potential construction or retrofitting of the venues themselves. Wheelchair accessible seating areas typically need to be larger per individual than those reserved for non-disabled patrons, and sometimes may require additional ramps or elevators to provide access, which can also reduce the space available for non-disabled patrons.[90] This would seem to be insignificant in most movie theatres, since it is arguably only during the opening night of the most highly-anticipated movies that this "lost space" would have any noticeable financial effect on the theatre. Admittedly, the financial impact of "losing" this space might be felt more strongly in arenas and stadiums used for sports and concerts, particularly for events which are nearly filled to capacity, since every inch of potential seating space is a potentially valuable commodity.[91] The impact is even greater when considered in the context of an entire sports or concert season.[92] Still, however, in an era of massive profits and massive venues, the overall financial impact must be relatively insignificant. More importantly, when balanced against the rights of disabled patrons to enjoy the same events and shows as their non-disabled counterparts, this financial impact, even if not entirely negligible, is hardly compelling.

It is also true, as has been argued, that the Department of Justice and the Access Board issued section 4.33.3 before the advent of stadium-style seating. Therefore, they could not have known of the specific issues that it would create in terms of viewing angles and could not have drafted regulations to address them specifically. This, however, does not mean that these entities lacked the foresight to anticipate eventual changes in the public accommodation facility industry. As hinted at above, the drafters may have inserted flexibility into the language of section 4.33.3 to allow for issues that they may not have thought of or anticipated them-

90. *See, e.g.*, Robert P. O'Quinn, *The Americans With Disabilities Act: Time for Amendments*, CATO Institute Policy Analysis no. 158, Aug. 9, 1991, *available at* http://www.cato.org/pubs/pas/pa-158.html (using this information to argue against the ADA as a whole).

91. James Kurack, *Standing in Front of the Disabled: Judicial Uncertainty Over Enhanced Sight Lines in Sports Arenas*, 8 VILL. SPORTS & ENT. L.J. 161, 184 (2001) (citing, inter alia, *Ind. Living Resources v. Or. Arena Corp.*, 982 F. Supp. 698, 718 (D. Or. 1997).

92. *Id.*

selves.[93] The fact that the basic floor plan of the modern movie theatre underwent a major change in the early 1990s, creating new issues in terms of viewing angles and lines of sight, does not render the regulation ineffective. The central, larger issue of similarity and comparability of lines of sight has remained. All that is changed is that a new way in which those lines of sight can differ has emerged in the years since the regulation was first drafted.

IV. PRESERVING THE FLEXIBILITY OF SECTION 4.33.3

Section 4.33.3 is, admittedly, ambiguous. However, that ambiguity is at least partly intentional. The ambiguity inherent in the phrase "comparable lines of sight" allows for flexibility and adaptability in applying the regulation to the numerous types of public accommodation facilities across the country. Moreover, it allows for a similar flexibility and adaptability when it comes to new construction and layout methods, which will inevitably emerge as newer, more modern facilities are designed and constructed. To narrow such a regulation to cover only "unobstructed views," a phrase so concise and simple that the drafters could have included it in the regulation themselves had they so desired, not only destroys this intended flexibility and adaptability, but flies in the face of the larger goals of the ADA and the entities charged with enforcing its provisions.

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93. *Regal*, 339 F.3d at 1132-33.