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## Giving New Meaning to "Handicap": The Americans with Disabilities Act and Its Uneasy Relationship with Professional Sports in *PGA Tour, Inc. v. Martin*

William E. Spruill  
*University of Richmond*

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GIVING NEW MEANING TO “HANDICAP:”  
THE AMERICANS WITH DISABILITIES ACT AND ITS  
UNEASY RELATIONSHIP WITH PROFESSIONAL  
SPORTS IN *PGA TOUR, INC. V. MARTIN*

I. INTRODUCTION

Imagine that an all-star batter for the New York Yankees had a circulatory disease that made it difficult and painful for him to run. Would Major League Baseball be forced to permit a designated base runner to run for the disabled batter starting from home plate?<sup>1</sup> Consider Jim Abbott, the successful major league pitcher who was born without a right arm.<sup>2</sup> Under the Americans With Disabilities Act<sup>3</sup> (“ADA”), could Abbott, who pitched well for many years in the American League, which has the designated hitter rule, force the National League, which does not, to exempt him from its batting requirement? If so, does that mean that batting is not fundamental to the game of baseball, or that allowing Abbott a designated hitter is a reasonable modification to his disability?

Even the faintest of baseball fans agree that batting is fundamental to the game. After all, where would baseball be without Babe Ruth, Hank Aaron, and Mark McGwire? But the fact that one league allows for exemptions from the batting requirement—better known as the “designated hitter rule”—suggests that reasonable minds may differ over just how fundamental a fundamental rule of the game is.

The foregoing raises profound questions about the applications of the ADA to professional sports. If the ADA applies to sporting events and organizations, “are the most elite events and organi-

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1. See Ted Curtis, *‘Cart’ Blanche?: A Decision Requiring Accommodation for a Disabled Golfer Has Sports Lawyers Wondering What’s Next*, 84 A.B.A. J. 23 (1998).

2. See Doug Russell, *Casey v. Pandora Heads to Washington*, at <http://www.1on1sports.com/ftp/columnists/russell/russell20010122.html> (last visited Jan. 22, 2001).

3. 42 U.S.C. §§ 12101–12213 (1994).

zations . . . exempt from coverage?"<sup>4</sup> And if the ADA is applicable, what types of rules may be changed or "modified to accommodate a disabled competitor, or are the rules untouchable because any alteration of any rule would fundamentally alter the nature of the competitions?"<sup>5</sup>

The question of whether the ADA should apply to sports generally—and elite professional sports specifically—illuminates the tension between athletic competition and governmental accommodation.<sup>6</sup> Casey Martin, a disabled professional golfer, has recently brought this tension to the forefront.<sup>7</sup> Martin "can do everything well in the game of golf except walk to and from shots."<sup>8</sup> He suffers from a congenital, degenerative circulatory disorder that manifests itself in a severe malformation of the right leg.<sup>9</sup> In addition to causing Martin great pain while walking a round of golf, the disease poses the risk of fracture or hemorrhaging even while carrying out daily activities.<sup>10</sup>

After completing the third and final qualifying round of the Professional Golfers' Association's ("PGA") Nike Tour, Martin requested the use of a motorized cart.<sup>11</sup> When the PGA refused to exempt him from its "walking rule,"<sup>12</sup> Martin sued the organization in federal court.<sup>13</sup> Martin claimed that by denying him use of

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4. *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1243 (D. Or. 1998).

5. *Id.*

6. See generally W. Kent Davis, *Why Is the PGA Teed Off at Casey Martin? An Example of How the Americans with Disabilities Act (ADA) Has Changed Sports Law*, 9 MARQ. SPORTS L.J. 1 (1998).

7. See *Martin*, 994 F. Supp. at 1243.

8. *Id.*

9. *Id.*

10. See *id.*

11. *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 996 (9th Cir. 2000).

12. The PGA, in its brief, stated that:

The PGA TOUR "hard card" provides: "Players shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee." The Buy.com TOUR "hard card" contains virtually identical language. . . . The Rules Committee can permit players to ride only in those limited instances when, due to unusual course configuration or for safety reasons (e.g., crossing streets), it is deemed appropriate to shuttle all players short distances during an event. The Rules Committee cannot permit, and never has permitted, a competitor to use a golf cart in the competition itself.

Brief for Petitioner, *PGA Tour, Inc. v. Martin*, No. 00-24, (U.S. filed Nov. 13, 2000), available at 2000 WL 1706732, at \*5 n.5.

13. *Martin*, 204 F.3d at 996.

a cart, the PGA failed to make its tournaments accessible to individuals with disabilities in violation of the ADA.<sup>14</sup>

Both the United States District Court for the District of Oregon and the Ninth Circuit Court of Appeals found that the PGA and its tour events were places of public accommodation under the ADA,<sup>15</sup> and that forcing the PGA to permit Martin to use a motorized cart was a reasonable accommodation to his disability.<sup>16</sup> In addition, both courts held that Martin's use of a cart did not fundamentally alter the nature of the PGA and its tournaments.<sup>17</sup>

The United States Supreme Court granted the PGA's petition for writ of certiorari,<sup>18</sup> and heard oral argument in *PGA Tour, Inc. v. Martin*<sup>19</sup> on January 17, 2001.<sup>20</sup> The principal issues before the Court were whether a golf course is a place of public accommodation for the golfers during a professional competition, and whether making an exception to the "walking rule" is the kind of accommodation federal law requires.<sup>21</sup> The first question concerns the scope of the ADA, and the second concerns the law's application.<sup>22</sup>

This note argues that the United States Supreme Court should reverse the Ninth Circuit's decision. Professional sports inherently discriminate against persons with disabilities. Elite athletic competitions reward those who jump the highest, swim the fastest, and lift the heaviest. If it is true that professional sports test physical performance, then what is being tested is naturally what some will do better than others.

Casey Martin's suit represents the first time a physically disabled professional athlete has used the ADA to seek legal redress in the world of sports.<sup>23</sup> Application of the ADA to athletics raises serious questions about the limits to which professional sports or-

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14. See *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1322 (D. Or. 1998).

15. *Martin*, 204 F.3d at 999; *Martin*, 984 F. Supp. at 1327.

16. *Martin*, 204 F.3d at 999; *Martin*, 984 F. Supp. at 1327.

17. See *Martin*, 204 F.3d at 1002; *Martin*, 994 F. Supp. at 1251.

18. *PGA Tour, Inc. v. Martin*, 121 S. Ct. 30 (2000).

19. No. 00-24 (U.S. filed July 5, 2000).

20. Transcript of Oral Argument, *PGA Tour, Inc. v. Martin*, No. 00-24 (U.S. Jan. 17, 2001), available at 2001 WL 41011, at \*1.

21. Brief for Petitioner, *Martin*, No. 00-24, available at 2000 LEXIS 1706732, at \*1.

22. Linda Greenhouse, *Supreme Court Hears the Casey Martin Case*, N.Y. TIMES, Jan. 18, 2001, at D4.

23. See *Awarded, Casey Martin*, TIME, Feb. 23, 1998, at 29.

ganizations may set forth and govern their own rules of the game. At the very least, it calls into question the role of sports organizations versus the federal power in determining whether there is a level playing field in elite athletic competitions.

While *PGA Tour, Inc. v. Martin* is a case of first impression, lower courts have dealt with the application of the ADA to sports in cases involving learning-disabled amateur athletes.<sup>24</sup> In addition, just one day after the Ninth Circuit's decision in *Martin*, the United States Court of Appeals for the Seventh Circuit, in *Olinger v. United States Golf Ass'n*,<sup>25</sup> held that forced waiver of the "walking rule" under the ADA fundamentally alters the nature of golf competition at the U.S. Open level.<sup>26</sup>

This note examines the *Martin* case and discusses its implications for all professional sports. Part II discusses the ADA, the purposes for which it was enacted, and the case law dealing with its application to professional sports. Part III provides background of the parties to the suit and the claims and defenses asserted by each. Part IV examines the District Court and Ninth Circuit Court of Appeals decisions, and the reasoning undergirding their determination that waiver of the PGA's "walking rule" in *Martin's* case does not fundamentally alter the nature of championship golf. Part V analyzes and critiques the lower courts' opinions and argues for reversal of the Ninth Circuit's decision. Part VI discusses the potential ramifications should the Supreme Court affirm the Ninth Circuit decision. Finally, this note concludes that the *Martin* case is a misguided one—one that the Supreme Court will likely reverse.

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24. See, e.g., *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453 (6th Cir. 1997); *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994); *Tatum v. Nat'l Collegiate Athletic Ass'n*, 992 F. Supp. 1114 (E.D. Mo. 1998); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 974 F. Supp. 459 (D.N.J. 1997).

25. 205 F.3d 1001 (7th Cir. 2000).

26. *Id.* at 1006.

## II. THE ADA: ITS BACKGROUND AND UNEASY RELATIONSHIP WITH SPORTS

### A. Overview of Relevant Titles of the ADA

Congress enacted the ADA in 1990 to ensure that the federal government would play a significant role in protecting the rights of the disabled.<sup>27</sup> Noting that “some 43,000,000 Americans have one or more physical . . . disabilities,”<sup>28</sup> Congress expressly stated that the purpose behind the ADA was to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”<sup>29</sup>

While ultimately comprised of five titles, Titles I and III of the ADA are the two that are most relevant to sports law. Title I specifically states that “[n]o covered entity shall discriminate against a qualified individual . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”<sup>30</sup> One “qualifies” as a disabled person if she proves that she has a “physical or mental impairment that substantially limits one or more of the major life activities of such individual.”<sup>31</sup> Unlike Title III, discussed below, Title I of the ADA deals exclusively with employees and employment practices.<sup>32</sup>

Title III of the ADA provides that no person 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 by any person who owns, leases (or leases to), or operates a place of public accommodation.”<sup>33</sup> The plain language of the statute makes clear that a plaintiff wishing to prevail under a Title III claim

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27. 42 U.S.C. § 12101(b)(3)–(4) (1994).

28. *Id.* § 12101(a)(1).

29. *Id.* § 12101(b)(2).

30. *Id.* § 12112(a).

31. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(g)(1) (2000). “Major life activities” include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” *Id.* § 1630.2(h)(2)(i).

32. H.R. REP. NO. 101-485, pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 382.

33. 42 U.S.C. § 12182(a) (1994).

would have to demonstrate that the defendant operates a place of public accommodation. The statute provides ample guidance as to what constitutes a place of public accommodation by citing numerous entities that qualify, including but not limited to, inns, restaurants, bars, grocery stores, parks, zoos, bowling alleys, and golf courses.<sup>34</sup>

Once a plaintiff has established that the defendant operates a place of public accommodation, the defendant must show that it has not failed to “make reasonable modifications in policies, practices, or procedures . . . or accommodations to individuals with disabilities, *unless* the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations.”<sup>35</sup>

Thus, while Title I of the ADA deals with employees and em-

34. *See id.* § 12181(7). Section 12181(7) provides the following definition:

Public accommodation. The following private entities are considered public accommodations for purposes of this Title, if the operations of such entities affect commerce—

- (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
- (B) a restaurant, bar, or other establishment serving food or drink;
- (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
- (D) an auditorium, convention center, lecture hall, or other place of public gathering;
- (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
- (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
- (G) a terminal, depot, or other station used for specified public transportation;
- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

*Id.*

35. *Id.* § 12182(b)(2)(A)(ii) (emphasis added).

ployment practices, Title III is concerned with discrimination against persons seeking to obtain goods and services at places of public accommodation. Thus, just as employees bring Title I into play, it is customers who trigger Title III.

### B. *The ADA and Sports—Case Law*

A number of cases have dealt with the application of the ADA to high school programs that ban students over nineteen years of age from participating in athletics.<sup>36</sup> Such age requirements—often called “eight-semester rules”—are designed to protect younger, smaller players from injury, to ensure against competitive advantages by teams with older players, and to discourage “red-shirting”—the practice of schools “holding back” student athletes until they gain athletic maturity.<sup>37</sup> Naturally, these age restrictions have at times collided with the eligibility of students who have been “held back” because of learning disabilities.

*Pottgen v. Missouri State High School Activities Ass’n*<sup>38</sup> and *Sandison v. Michigan High School Athletic Ass’n*<sup>39</sup> reflect the majority view among the federal circuits that any modification or exception to the “eight-semester rule” works a fundamental alteration of the nature of interscholastic sports.<sup>40</sup> The circuit court in *Pottgen* held that waiver of the age requirement would fundamentally alter the nature of the high school’s athletic regime, which was designed to protect younger students from injury by older students and to prevent “red-shirting.”<sup>41</sup> As to what remedial measures were available to the student, the court in *Pottgen* stated flatly that, under the ADA, “no reasonable accommodation exists.”<sup>42</sup> The court also held that no individualized, case-by-case assessment is appropriate where the age requirement is a substantive rule of a sports program.<sup>43</sup>

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36. See Julia V. Kasperski, Comment, *Disabled High School Athletes and the Right to Participate: Are Age Waivers Reasonable Modifications Under the Rehabilitation Act and the Americans with Disabilities Act?*, 49 BAYLOR L. REV. 175, 186–92 (1997).

37. *Id.* at 186.

38. 40 F.3d 926 (8th Cir. 1994).

39. 64 F.3d 1026 (6th Cir. 1995).

40. *Id.* at 1034–35; *Pottgen*, 40 F.3d at 930.

41. *Pottgen*, 40 F.3d at 930.

42. *Id.*

43. *Id.* at 930–31.

Similarly, in *Sandison*, the United States Court of Appeals for the Sixth Circuit held that “[r]emoving the age restriction injects into competition students older than the vast majority of other students, and the record shows that the older students are generally more physically mature than younger students. Expanding the sports program to include older students works a fundamental alteration.”<sup>44</sup> The court then held that the student-plaintiffs were not subjected to discrimination on the basis of disability.<sup>45</sup>

The debate over the application of the ADA to sports has not been confined to the high school level. In *Bowers v. National Collegiate Athletic Ass’n*,<sup>46</sup> Bowers, a learning-disabled freshman at Temple University, was denied eligibility to play college football under the bylaws of the National Collegiate Athletic Association (“NCAA”).<sup>47</sup> The NCAA bylaws require student-athletes to have graduated from high school and to have passed “at least thirteen classes in what the NCAA defines as ‘core courses.’”<sup>48</sup> Because Bowers had taken primarily special education courses in high school—courses that did not constitute “core courses” under the terms of the bylaws—the NCAA denied him eligibility to play football.<sup>49</sup>

Bowers sued under Title III of the ADA, claiming the NCAA discriminated against him on the basis of disability.<sup>50</sup> The court in *Bowers* held that “complete abandonment of the ‘core course’ requirement would *fundamentally alter* the nature of the privilege of participation in the NCAA’s intercollegiate athletic program.”<sup>51</sup>

Thus, while there was no ADA case law with respect to professional athletics prior to the *Martin* case, courts had dealt with the ADA’s application to interscholastic sports. The majority theory articulated in *Pottgen*, *Sandison*, and *Bowers*, however, did not sway the federal courts in *Martin v. PGA Tour, Inc.*

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44. *Sandison*, 64 F.3d at 1035.

45. *Id.*

46. 974 F. Supp. 459 (D.N.J. 1997).

47. *Id.* at 462–63.

48. *Id.* at 461. The NCAA bylaws also require that the athlete maintain “a minimum grade-point average that varies based on the strength of the student’s standardized test score.” *Id.*

49. *Id.* at 463.

50. *Id.* at 460.

51. *Id.* at 467 (emphasis added).

### III. THE PARTIES—GIVING NEW MEANING TO “HANDICAP”

Of Casey Martin, one *Sports Illustrated* journalist wrote, “It is impossible not to like [him]—he’s the clean-cut, courteous, articulate, God-fearing young man we all want our daughters to marry.”<sup>52</sup> Indeed, Martin has lived something of a charmed life, notwithstanding his disability. He earned a golf scholarship to Stanford University where he played piano at fraternity houses (he is an accomplished pianist), studied economics and the Bible, and mentored a Hispanic youth.<sup>53</sup> He was a two-time NCAA academic All-American<sup>54</sup> and led his team to a national championship in 1994, but not without the use of a cart.<sup>55</sup> In fact, the NCAA not only permitted Martin to use a cart during the national championship, it did so for the remainder of his college career.<sup>56</sup>

Formed in 1968, the PGA is a private nonprofit entity whose mission is to promote golf competitions and tournaments at the highest levels.<sup>57</sup> The PGA sponsors competitions on three professional golf tours: the PGA Tour, the Nike Tour (now the Buy.com Tour), and the Senior PGA Tour.<sup>58</sup>

The primary means of becoming eligible to compete in PGA tournaments is by a competition known as the “qualifying school.”<sup>59</sup> The best-scoring players in the qualifying school are allowed to compete on the PGA Tour, and the next-best players are permitted to play on the Nike Tour.<sup>60</sup> Of the approximately twenty-five million golfers in the United States, only about 200 are eligible to

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52. Alan Shipnuck, *As Casey Martin Made His Debut As a PGA Tour Pro at the Hope, Reporters Hung on His Every Word, but the Fans Had Moved On*, SPORTS ILLUSTRATED, Jan. 31, 2000, at G4.

53. John Garrity, *Out on a Limb: His Parents Hoped Casey Martin Would Lead a Normal Life. Instead He’s Living an Extraordinary One*, SPORTS ILLUSTRATED, Feb. 9, 1998, at G10.

54. Brief for Respondent, *PGA Tour, Inc. v. Martin*, No. 00-24, (U.S. filed Dec. 13, 2000), available at 2000 WL 1846091, at \*1.

55. See Davis, *supra* note 6, at 32.

56. *Id.*

57. Brief for Petitioner, *PGA Tour, Inc. v. Martin*, No. 00-24 (U.S. filed Nov. 13, 2000), available at 2000 WL 1706732, at \*3 n.2.

58. *Id.*

59. *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 996 (9th Cir. 2000).

60. *Id.*

compete in the PGA Tour, with an additional 170 allowed to compete on the Nike Tour.<sup>61</sup>

The qualifying school is conducted in three stages of tournament rounds.<sup>62</sup> During the first and second stages of the competition, golfers are allowed to use carts.<sup>63</sup> In the final stage of the qualifying school, golfers are required to walk.<sup>64</sup> The “walking rule,” which has been part of all PGA tour events since their beginning, is intended to inject an element of physical stress and fatigue into the competition.<sup>65</sup> Indeed, the Nike Tour is, by design, intended to be among the most difficult and challenging golf tournaments in the world.<sup>66</sup>

After two years competing—and walking—on the Hooters mini-tour, Casey Martin sought to become eligible for the PGA’s Nike Tour.<sup>67</sup> He successfully completed the first two rounds of the qualifying school, using a cart as the PGA rules allow.<sup>68</sup> When, however, the PGA denied Martin’s requested waiver of its “walking rule” in the third and final round of the qualifying school, he sued the organization, seeking an injunction under the ADA.<sup>69</sup>

Specifically, Martin alleged that the PGA’s refusal to accommodate his disability violated Titles I and III of the ADA.<sup>70</sup> With respect to his Title I claim, Martin asserted that he was a “qualified individual”<sup>71</sup> for purposes of the ADA and that the PGA discriminated against him because of his disability in regard to “job

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61. Brief for Petitioner, *Martin*, No. 00-24, available at 2000 WL 1706732, at \*3.

62. Brief for Respondent, *Martin*, No. 00-24, available at 2000 WL 1846091, at \*2.

63. *Martin*, 204 F.3d at 996.

64. *Id.*

65. Brief for Petitioner, *Martin*, No. 00-24, available at 2000 WL 1706732, at \*4.

66. *Id.* at \*3.

67. See Davis, *supra* note 6, at 32.

68. See *id.*

69. *Id.*

70. *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1323 (D. Or. 1998).

71. See 42 U.S.C. § 12111(8) (1994). Section 12111(8) of Title I reads:

The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such position holds or desires. For the purposes of this title, consideration shall be given to the employer’s judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

*Id.*

application procedures, hiring, advancement, employment compensation, job training and other terms, conditions, and privileges of employment."<sup>72</sup>

Martin's Title III claim alleged that the PGA had failed to provide him with an "accommodation or other opportunity" that was as effective to other members of the Nike and PGA Tours.<sup>73</sup> Finally, Martin alleged that "[b]ecause of his disability, [he could not] effectively compete in the Nike Tour or the PGA Tour or obtain compensation, benefits, privileges or advantages from [those tours] unless . . . permitted to use a golf cart."<sup>74</sup>

#### IV. THE FEDERAL COURTS

##### A. *The District Court*

At its hearing for summary judgment, the PGA lodged a two-fold defense against Casey Martin's claims. "First, it assert[ed] that the ADA does not apply to its professional tournaments."<sup>75</sup> Second, the PGA argued that the walking requirement is a substantive rule of its tournaments, that waiver of the rule fundamentally alters its competitions, and that the ADA specifically forbids such alteration.<sup>76</sup>

With respect to the application of the ADA to the PGA's tournaments, the PGA armed itself with three principal defenses. First, it asserted that the PGA is a private nonprofit establish-

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72. Brief for Petitioner, *Martin*, No. 00-24, available at 2000 WL 1706732, at \*6. Section 12112(a) reads:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (1994).

73. *Martin*, 984 F. Supp. at 1323. Section 12182(a) of Title III reads:

No 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 by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a) (1994).

74. Brief for Petitioner, *Martin*, No. 00-24, available at 2000 WL 1706732, at \*7.

75. *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1244 (D. Or. 1998).

76. *Id.*; see also 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

ment exempt from the ADA.<sup>77</sup> Second, the PGA argued that its Nike Tour, along with all of its tour events, do not constitute places of public accommodation.<sup>78</sup> Finally, the PGA claimed that Casey Martin was not an employee of the PGA and that Title I was therefore not implicated.<sup>79</sup>

As to whether the PGA was entitled to Title I's private club exemption, the district court judge found flatly that it was not.<sup>80</sup> The court ruled first that the PGA Tour was a commercial enterprise whose principal purpose was generating revenue.<sup>81</sup> As to the PGA's defense that, because its eligibility requirements were so selective, it could not be a public accommodation, the court held that "such . . . selectivity . . . does nothing to confer 'privacy' to the organization."<sup>82</sup> The district court went on to hold that the PGA's nonprofit status did little to bolster the PGA's private club exemption claim since such status did not alter the organization's fundamental purpose—generating revenue.<sup>83</sup>

Second, the district court concluded that the PGA's courses are places of public accommodation within the plain meaning of the ADA.<sup>84</sup> The PGA argued that since the public gallery is not allowed inside the playing area, its fairways and greens are not places of public accommodation.<sup>85</sup> The district court found this argument flawed since it was founded on the principle "that an operator of a place of public accommodation [could] create private enclaves within its facility . . . and thus relegate the ADA to hopscotch areas."<sup>86</sup>

In one cursory sentence, the district court rejected Martin's Title I claim, finding that he was not an "employee" of the PGA Tour, but rather an independent contractor.<sup>87</sup>

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77. See *Martin*, 984 F. Supp. at 1323. With respect to Title I claims, an "employer" does not include a bona fide private membership club. 42 U.S.C. § 12111(5)(B)(ii) (1994). Similarly there is an exemption under Title III for claims where the so-called public accommodation is operated by a private entity. See *id.* § 12187.

78. See *Martin*, 984 F. Supp. at 1323.

79. *Id.*

80. *Id.* at 1324.

81. *Id.* at 1323.

82. *Id.* at 1325.

83. *Id.*; see also 42 U.S.C. § 12181(2) (1994).

84. See *Martin*, 984 F. Supp. at 1325.

85. *Id.* at 1326.

86. *Id.* at 1326–27.

87. See *Martin*, 994 F. Supp. at 1247.

The PGA's second defense—that the ADA does not require a covered entity to make an accommodation to a “qualified” person if the alteration results in an undue hardship to the entity—consumed most of the court's attention.<sup>88</sup> Specifically, the PGA urged that the principal question before the court was whether its “walking rule” is a “substantive” rule determinative of the outcomes of competitions.<sup>89</sup> If it is, the PGA asserted, then “the ADA consequently [did] not require any modification to accommodate the disabled.”<sup>90</sup>

The district court characterized the PGA's argument as suggesting that *any* modification of *any* of its rules would fundamentally alter the nature of PGA tournaments.<sup>91</sup> The court reasoned that this was a misguided syllogism, holding that the PGA's stance was “simply another version of [the] argument that the PGA Tour is exempt from the provisions of the ADA. It is not.”<sup>92</sup>

The district court gave full notice to the limited case law concerning the application of the ADA to sports, concluding that *Sandison*, *Pottgen*, and *Bowers* dictated that courts must only examine the purpose of each rule of the competition in question to determine whether the requested modification is reasonable.<sup>93</sup>

As to the question presented in the introduction to this note—whether elite professional events are exempt from ADA coverage—the district court supplied a succinct answer.<sup>94</sup> The court held that “[a]lthough the PGA Tour is a professional sports organization and professional sports enjoys [sic] . . . a much higher profile and display of skills than collegiate or other lower levels of competitive sports, the analysis of the issues does not change from to the next.”<sup>95</sup>

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88. *See id.* at 1244.

89. *Id.* at 1245.

90. *Id.* at 1246.

91. *Id.*

92. *Id.*

93. *Id.* The district court stated that:

In *Sandison* . . . the eligibility requirements imposed were closely-fitted with the purpose of high school athletics—to allow students of the same group to compete against each other. . . . Similarly, in *Bowers*, the issue was the “core course” requirement for student athletes at the collegiate level. . . . A complete waiver of the academic requirement would obviously alter the fundamental nature of the program.

*Id.*; *see also supra* Part II.B.

94. *See Martin*, 994 F. Supp. at 1246.

95. *Id.*

Determining that shot-making alone lay at the heart of golf, the court failed to find logical the PGA's claim that the "walking rule" was intended to inject an element of fatigue into its competitions and that waiver of the rule would give Casey Martin an unfair advantage over his competitors.<sup>96</sup> The court relied in large measure on the testimony of an expert witness, who calculated that approximately 500 calories are expended walking a golf course.<sup>97</sup> This energy expenditure, the expert testified, was "nutritionally . . . less than a Big Mac."<sup>98</sup>

Moreover, the court noted, when given the option of walking or using a cart on the PGA's Senior Tour or Tour Qualifying Tournament, the vast majority of the competitors opted to walk.<sup>99</sup> The court glibly held that "the proof of the pudding is in the eating."<sup>100</sup> In addition, the court noted that the PGA permits the use of carts in the first two stages of the qualifying school and on the Senior Tour.<sup>101</sup> The court found that this was "certainly compelling evidence that even the PGA Tour does not consider walking to be a significant contributor to the skill of shot-making."<sup>102</sup>

Finally, the court rejected the PGA's claim that an individualized inquiry into the necessity of the "walking rule" was inappropriate.<sup>103</sup> The PGA relied on *Pottgen* for support.<sup>104</sup> The *Pottgen* court held that before a court reaches the question of whether a plaintiff is a "qualified individual" under the terms of the ADA, it must first determine whether the particular rule at issue is an essential eligibility requirement.<sup>105</sup> If the rule or requirement is essential, it is only then that a court determines whether a plaintiff meets the requirement, with or without a modification.<sup>106</sup>

The district court in *Martin*, however, relied on a narrow line of cases that hold otherwise.<sup>107</sup> The court held that an individualized

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96. *Id.* at 1250-51.

97. *Id.* at 1250.

98. *Id.*

99. *Id.* at 1251.

100. *Id.*

101. *Id.* at 1248.

102. *Id.*

103. *Id.* at 1250.

104. *Id.* at 1249.

105. *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994).

106. *See id.* at 930-31.

107. *See Martin*, 994 F. Supp. at 1249 (citing *Crowder v. Kitagawa*, 81 F.3d 1480 (9th

assessment to determine what constitutes a reasonable modification is “highly fact-specific, requiring case-by-case inquiry.”<sup>108</sup> Thus, the court found that the ultimate question before it was whether allowing Martin, given his individual circumstances, the requested modification would fundamentally alter PGA events.<sup>109</sup> The district court held that walking had little, if any, effect on shot-making, and Martin’s request to use a motorized cart was “eminently reasonable in light of [his] disability.”<sup>110</sup>

### B. *The Ninth Circuit*

Holding that “[t]here is nothing ambiguous about [Title III]” and that “golf courses are public accommodations,”<sup>111</sup> the United States Court of Appeals for the Ninth Circuit affirmed the lower court on all fronts.<sup>112</sup>

The PGA asserted four defenses against its tournaments being classified as public accommodations. First, the PGA claimed that if the area “behind the ropes” where the gallery is permitted to spectate and roam is a public accommodation, then the area “inside the ropes” is not since the gallery is not permitted to enter that area.<sup>113</sup> Second, the PGA argued that the restricted areas are not being used as places of “exercise or recreation” within the meaning of the ADA since the golfers are trying to win money.<sup>114</sup> Third, the PGA argued that its competitions are like “mixed use facilities,” such as hotels that have separate residential wings not covered by the ADA.<sup>115</sup> Finally, the PGA launched its blanket defense—namely that there is nothing public at all about its competitions.<sup>116</sup>

The court of appeals found fault with all four defenses. First, the Ninth Circuit held that the PGA could not construe the

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Cir. 1996); *Stillwell v. Kan. City, Mo. Bd. of Police Comm’rs*, 872 F. Supp. 682 (W.D. Mo. 1995)).

108. *Martin*, 994 F. Supp. at 1249 (quoting *Crowder*, 81 F.3d at 1486).

109. *Id.*

110. *Id.* at 1253.

111. *See Martin v. PGA Tour, Inc.*, 204 F.3d 994, 997 (9th Cir. 2000).

112. *Id.* at 1002.

113. *Id.* at 997.

114. *Id.*

115. *Id.* at 998.

116. *Id.*

meaning of public accommodation so narrowly as to permit an event or facility to carve out separate private enclaves immune from the ADA.<sup>117</sup> In other words, “a public accommodation could not be compartmentalized in the fashion” the PGA wished.<sup>118</sup>

Second, the court held that even if the restricted area was not used for “exercise or recreation” within the meaning of the ADA, the statute also includes in its definition of public accommodations a “theater, . . . stadium or other place of exhibition or entertainment.”<sup>119</sup> The court held simply that “[i]f a golf course during a tournament is not a place of exercise or recreation, then it is a place of exhibition or entertainment.”<sup>120</sup>

The claim that a golf course during a PGA tournament is a “mixed use facility” in the form of a large hotel with a separate residential wing was flawed in the court’s eyes for one principal reason:<sup>121</sup> “The non-public residential wing (which would be covered by the Fair Housing Act) . . . has never functioned as a hotel;” whereas, “[a] golf course during a tournament . . . is serving as a golf course.”<sup>122</sup>

Finally, the court found troubling the PGA’s blanket defense that there is nothing at all public about its competitions. The PGA asserted that because its tournaments are restricted to the nation’s best golfers, the courses on which they play cannot be places of public accommodation.<sup>123</sup> The court found that this assertion foundered on one basic ground. Specifically, the ADA covers “secondary, undergraduate, or postgraduate private school[s].”<sup>124</sup> Like the PGA Tours, gaining entry to the most elite private colleges and universities is highly competitive and intense. The mere fact that there is a high degree of selectivity governing admission to these schools, however, does not remove them from the provisions of the ADA.<sup>125</sup> Plainly put, the court of appeals saw no justification in drawing a line “beyond which the

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117. *Id.* at 997.

118. *Id.*

119. *Id.* (quoting 42 U.S.C. § 12181(7)(C) (1994)).

120. *Id.*

121. *Id.*

122. *Id.* at 998.

123. *Id.*

124. *Id.* (quoting 42 U.S.C. § 12181(7)(J) (1994)).

125. *Id.* at 999.

performance of athletes becomes so excellent that a competition restricted to their level deprives its situs of the character of a public accommodation."<sup>126</sup>

Of greater importance to the court was the issue of whether permitting Martin to use a golf cart would "fundamentally alter" the nature of the PGA tour events.<sup>127</sup> Arguing steadfastly that such a modification indeed would occur, the PGA relied on two principles. First, the PGA asserted that the kind of balancing of interests in which the district court and the Ninth Circuit engaged was wholly illegitimate because any modification of a rule intended to affect the outcome of competition cannot be waived under the ADA.<sup>128</sup> The PGA argued that once a rule is determined to be "substantive," such as its "walking rule," the rule may not be subject to exceptions in order to accommodate disability, and no "fact-specific" balancing is warranted.<sup>129</sup>

The circuit court rejected this argument, noting that the PGA's position "reads the word 'fundamentally' out of the statutory language, which requires reasonable accommodation unless the PGA can demonstrate that the accommodation would 'fundamentally alter the nature' of its competition."<sup>130</sup> By the PGA's own logic, the court reasoned, any and all modifications of its rules would be "fundamental."<sup>131</sup> The court went on to find that it could not determine whether permitting Martin's use of a golf cart would fundamentally alter PGA events without first inquiring into whether walking was fundamental to the competition.<sup>132</sup>

Second, the PGA asserted "that it was wholly improper for the district court to consider whether Martin's condition was such that riding would not give him an unfair advantage over competitors who walked."<sup>133</sup> Relying again on *Sandison* and *Pottgen*, the PGA argued that before a court determines whether a plaintiff is a "qualified individual" under the ADA, it must first determine

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126. *Id.*

127. *Id.*

128. *Id.* at 1000.

129. *Id.*

130. *Id.* at 1000-01 (quoting 42 U.S.C. § 12182(b)(2)(A)(ii) (1994)).

131. *Id.* at 1001.

132. *Id.*

133. *Id.*

whether the particular rule at issue is an essential and necessary eligibility requirement.<sup>134</sup>

The court rejected the PGA's argument, finding that *Pottgen* and *Sandison* involved age restrictions that were "necessary to protect the competition of the lower age group, and to prevent 'red-shirting.'"<sup>135</sup> The court held that the record in *Martin* was quite distinct from *Sandison* and *Pottgen*, especially since the district court found that the fatigue factor injected into the competition by walking was insignificant and unnecessary.<sup>136</sup> Moreover, the court flatly held that it did not agree with *Sandison* and *Pottgen*.<sup>137</sup>

Thus affirming the lower court, the circuit court left the PGA nowhere to turn but the court of last resort, the United States Supreme Court, which granted certiorari on September 26, 2000.<sup>138</sup>

#### V. WHY THE PGA HAS EVERY RIGHT TO BE "TEED OFF"— ANALYSIS

The Ninth Circuit's decision in *Martin v. PGA Tour, Inc.* should be reversed for at least three reasons. First, golf courses at PGA events are not places of public accommodation. Second, Title III of the ADA does not apply since Casey Martin is not a "client or customer" of a commercial public accommodation. And finally, even if it does apply, Title III would never require the PGA to fundamentally alter the nature of its competitions at the championship level by permitting a disabled golfer to play by a different set of rules than his or her competitors.

#### A. *Golf Courses at PGA Events Are Not Places of Public Accommodation*

The Ninth Circuit held that nothing about Title III was am-

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134. *Id.*; see also *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994).

135. *Martin*, 204 F.3d at 1001-02.

136. *Id.* at 1002.

137. *Id.*

138. *PGA Tour, Inc. v. Martin*, 121 S. Ct. 30 (2000).

biguous and that “golf courses are public accommodations.”<sup>139</sup> Indeed, a “golf course, or other place of exercise or recreation” is specifically listed among the examples of covered entities.<sup>140</sup> But because Title III is concerned with discrimination against persons seeking to obtain goods or services—“customers and clients”—from public accommodations,<sup>141</sup> Congress could not conceivably have intended the scope of Title III to extend to professional golfers at elite PGA tour events.

The circuit court noted that stadiums are also listed among the ADA’s examples of public accommodations.<sup>142</sup> Would the court permit a wide receiver during the Super Bowl to use a motorized cart on the field if the wide receiver suffered from the same disease as Casey Martin, even if the wide receiver could do everything else in the game of football superbly? One would think not. However, the operator of the stadium would be obligated, under Title III, to provide ramps where appropriate for wheelchair-bound spectators, since failing to do so would discriminate against “customers” seeking to enjoy the “goods and services”—a football game—the public accommodation—the stadium—has to offer. To be sure, the field at the center of a stadium during the Super Bowl does not fall within the ADA’s ambit.

The court’s reading of the statutory language regarding public accommodations is simply too broad. For instance, it strains logic to read the ADA as decreeing an “all-or-nothing” standard with respect to entities that may or may not be public accommodations. Put another way, there is nothing in Title III to suggest that an entity must be either completely private, or else be a public accommodation.<sup>143</sup>

Similarly, there is substantial authority in the ADA to support the fact that the PGA satisfies its “private club” exemption. The PGA provides no services to the public whatsoever; it is a private nonprofit entity that merely organizes sporting events.<sup>144</sup> Its com-

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139. See *Martin*, 204 F.3d at 997.

140. 42 U.S.C. § 12181(7)(L) (1994).

141. *Id.* § 12182(a).

142. See *Martin*, 204 F.3d at 997.

143. See generally *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 28 C.F.R. ch. 1, pt. 36, App. B, at 623–26 (2000).

144. See Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc.*, 18 LAW & INEQ. 131, 158 (2000).

petitors are independent contractors who seek to win prize money furnished by outside corporate sponsors.<sup>145</sup>

The district court focused extensively on the fact that the PGA's "purpose" was generating revenue,<sup>146</sup> finding that the revenue generated by ticket sales from the non-member public weighed heavily against the PGA's contention that it fell within the ADA's "private club" exemption.<sup>147</sup> The court relied on *Smith v. YMCA*<sup>148</sup> for support, a case that held that a YMCA club that generates a substantial amount of revenue from the general public is not a private club.<sup>149</sup> The PGA, however, does not allow its non-members access "inside the ropes," unlike the YMCA, which allows the public access to all of its goods and services. With respect to the PGA, the area of revenue generation "is the same area that is unquestionably subject to the ADA"—the area "behind the ropes" where the public gallery is free to spectate and roam.<sup>150</sup>

### B. *Title III Does Not Apply*

As discussed in Part II.A., Title III of the ADA deals with the marketplace.<sup>151</sup> It is designed to prevent discrimination against customers and clients seeking the goods and services of commercial entities, such as hotels or law firms.<sup>152</sup> Thus, it is the *customer* who triggers Title III, just as it is the *employee* who triggers Title I.<sup>153</sup> Indeed, the legislative history of Title III confirms that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations."<sup>154</sup>

It is difficult indeed to regard Casey Martin as being a "customer or client" of the PGA within the meaning of Title III. The PGA Tour is part of the entertainment industry, and Martin is

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145. *See id.*

146. *See Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1323 (D. Or. 1998).

147. *Id.*

148. 462 F.2d 634 (5th Cir. 1972).

149. *Id.* at 648.

150. *See Hentges*, *supra* note 144, at 159.

151. *See* 42 U.S.C. § 12182(a) (1994).

152. *See id.*

153. *See id.* § 12112(a).

154. H.R. REP. NO. 101-485, pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 382.

merely helping supply the PGA's entertainment, much like a classical pianist at a Carnegie Hall concert, or an actor in a Broadway play. In the pianist and actor analogies, the audience would be covered by Title III, the pianist and actor by Title I. Here, Casey Martin is not seeking to enjoy the entertainment supplied by the golf competition—at least not within the context of Title III. The audience in attendance is.

C. *The ADA Does Not Require a Fundamental Alteration of Golf at PGA Events*

The Ninth Circuit failed to recognize at least two fundamental truths about elite athletic competitions. First, all competitors in all sports are required to play by the same sets of rules.<sup>155</sup> Second, elite athletic competitions are designed to test physical performance.<sup>156</sup> Taken together, these two oversights raise grave implications about the *Martin* decision and the future of professional golf. Moreover, these oversights demonstrate that the lower courts failed to apprehend a fundamental truth about professional sports: certain requirements or rules will affect some competitors more adversely than others. Simply put, while there is a level playing field in sports, in the end there is seldom no winner—or loser.

While the Act requires entities operating places of public accommodation to make reasonable modifications in order to accommodate disabled persons, it contains one critical limitation: public accommodations need not make any modifications that would “fundamentally alter” the nature of its goods or services.<sup>157</sup> The appropriate question before the court, then, was whether the waiver of a rule—here, the “walking rule”—for one competitor in an elite athletic competition would fundamentally alter the nature of the competition.<sup>158</sup> The Ninth Circuit applied a fact-specific analysis to this question, giving weight to the relative significance of the “walking rule” versus Casey Martin’s “individ-

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155. Brief for Petitioner, *PGA Tour, Inc. v. Martin*, No. 00-24 (U.S. filed Nov. 13, 2000), available at 2000 WL 1706732, at \*13.

156. *Id.*

157. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).

158. *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 1001 (9th Cir. 2000).

ual circumstances.”<sup>159</sup> But this approach “misapprehends the proper inquiry.”<sup>160</sup> Before a court can determine whether the waiver of a substantive rule would fundamentally alter the nature of the competition, it must first look to the nature of the “goods or services” being offered.<sup>161</sup>

The “fundamentalness” inquiry, in this author’s view, strikes at the heart of the controversy surrounding the facts of the *Martin* case. Many, if not most, baseball fans will likely bristle at the suggestion that allowing a disabled All-Star batter a pinch-runner starting from home plate would not fundamentally alter the game of baseball. Indeed, these fans will argue, base-running is as fundamental to the game as hitting. But why, then, does the American League have the designated hitter rule while the National League does not? Viewed in the context of the ADA, it is hard to see how the hitting requirement is fundamental, if the requirement may be modified in one league to accommodate, say, a one-armed pitcher.

To the extent that Martin and his supporters feel that the “walking rule” is simply arbitrary, one might reasonably contend that nearly all rules of athletics are to some degree arbitrary and, to borrow Justice Scalia’s word of choice, “silly.”<sup>162</sup> For instance, why, in Major League Baseball, is the strike zone from the chest to the knees as opposed to from the eyes to the hips?<sup>163</sup> What if the hypothetical batter mentioned at the outset of this note had a blood deficiency that caused him to have an excessively long torso. Could he demand that the umpire call strikes from his eyes to his hips?<sup>164</sup>

At the very least, professional sports may be said to be an amalgam of subsets of arbitrary rules which, measured by their sum, amount to well-defined tests of physical performance. What the Court seemed to be suggesting at oral argument was that the entire notion of “fundamentalness” with respect to professional

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159. *See id.*

160. Brief for Petitioner, *Martin*, No. 00-24, available at 2000 WL 1706732, at \*31.

161. *Id.*

162. *See* Transcript of Oral Argument, *PGA Tour, Inc. v. Martin*, No. 00-24 (U.S. Jan. 17, 2001), available at 2000 WL 41011, at \*31.

163. *Id.*

164. *Id.* at \*26-27.

sports is misguided, if not wholly inappropriate.<sup>165</sup> Put another way, the Court was careful to make light of the dilemma raised when the ADA applies to professional sports.<sup>166</sup>

The Seventh Circuit, in *Olinger v. United States Golf Ass'n*,<sup>167</sup> gave proper attention to the nature of championship-level golf and determined that all elite tour competitions must be able to test the physical capabilities of all competitors under a uniform set of substantive rules.<sup>168</sup> The *Olinger* case involved facts identical to the *Martin* case, and the Seventh Circuit held that the waiver of the “walking rule” to accommodate a disabled player at the championship level, “while reasonable in a general sense, would alter the fundamental nature of [the] competition.”<sup>169</sup>

The *Olinger* case, and Martin’s understanding of it, seemed especially worrisome to Justice Ginsburg.<sup>170</sup> When asked to distinguish *Olinger* from the *Martin* case, counsel for Martin stated plainly: “That case was decided on a different record from this record.”<sup>171</sup> Justice Ginsburg properly exposed the infirmity in Martin’s logic by asking that, if it is true that the *Olinger* record and the *Martin* record are different, then “[w]ho is the judge of whether a person is sufficiently disabled to get a dispensation from the nonfundamental walking requirement? Is it up to the lawyers and the quality of the record they make?”<sup>172</sup>

The Court, in perhaps its most challenging question to Martin’s counsel, asked whether Martin believed the walking rule is never fundamental, or “that with respect to Casey Martin, it’s not fundamental because his disability has the same impact on his abil-

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165. See *id.* at \*26. The oral argument before the Supreme Court proceeded as follows: “Mr. Reardon [Casey Martin’s counsel]: [W]alking is not indeed fundamental because [the PGA Qualifying School] doesn’t require it.

Question: All that demonstrates . . . is that you can play the game under a different rule. . . . I don’t understand the whole meaning of fundamentalness with regard to sport.” *Id.*

166. See *id.* at \*26–27.

167. 205 F.3d 1001 (7th Cir. 2000).

168. See *id.* at 1006.

169. *Id.* (quoting *Olinger v. United States Golf Ass’n*, 55 F. Supp. 2d 926, 938 (N.D. Ind. 1999)).

170. Transcript of Oral Argument, *Martin*, No. 00-24 (U.S. Jan. 17, 2001), available at 2001 WL 41011, at \*29.

171. *Id.* at \*28.

172. *Id.* at \*29.

ity to play as walking has on other people.”<sup>173</sup> This Catch-22 makes light of the conundrum raised when the ADA applies to professional sports, and Martin’s counsel was at a loss as to how to properly couch his answer.<sup>174</sup>

Finally, in failing to acknowledge that high-level sports test physical performance, the Ninth Circuit confused discrimination with varying degrees of challenges faced by all competitors in elite athletic competitions.<sup>175</sup> Put another way, any disadvantage Martin faces is not discrimination in any meaningful sense. It would be perverse to sanction modification of *any* rule of *any* elite athletic competition to ensure more equal results.

## VI. THE SUPREME COURT: PREDICTIONS AND POTENTIAL RAMIFICATIONS

In its brief to the Supreme Court, counsel for Martin correctly pointed out that “[t]he PGA has never attempted to show that the district court’s findings were clearly erroneous. Instead, the PGA is largely reduced to platitudes to defend its choice—which is a matter of taste, not the essentials of golf . . .”<sup>176</sup> One might read this language to suggest that the PGA’s defense is nothing more than a proxy for preserving a sacrosanct golfing tradition.<sup>177</sup>

The ADA, however, was enacted to change Americans’ tradi-

173. *Id.* at \*33–34.

174. *See id.* at \*34 (“Mr. Reardon: . . . I’m trying to live with both theories.”).

175. Brief for Petitioner, PGA Tour, Inc. v. Martin, No. 00-24 (U.S. filed Nov. 13, 2000), available at 2000 WL 1706732, at \*33–34.

176. Brief for Respondent, PGA Tour, Inc. v. Martin, No. 00-24 (U.S. filed Dec. 13, 2000), available at 2000 WL 1846091, at \*45.

177. As Martin points out in his brief, there is “nothing in the legislative history that suggests that Congress intended to exempt the sports world from the ADA.” *Id.* at \*46; *see Joint Hearing on S. 2345 Before the Sen. Subcomm. on the Handicapped of the Comm. on Labor and Human Resources and the House Subcomm. on Select Educ. of the Comm. on Educ. and Labor*, 100th Cong. 15 (1988). A sponsor of the ADA, then-House Majority Whip Tony Coelho, stated:

Society has neglected to challenge itself and its misconceptions about people with disabilities. When people don’t see the disabled among our [fellow citizens] . . . at the sports field . . . most Americans think it’s because they can’t. It’s time to break this myth. The real reason people don’t see the disabled . . . at the sports field . . . is because of barriers and discrimination. Nothing more.

*Id.*

*tional* attitudes toward disability.<sup>178</sup> Indeed, the ADA's broad scope reflects Congress's desire to help prevent discrimination against the many millions of disabled Americans.<sup>179</sup> Thus, a victory for Martin at the Supreme Court would seem to comport with the ADA's aim, all the while incorporating within its scope an activity traditionally thought to be predicated on benignly discriminatory rules.

If the Supreme Court finds persuasive the argument that the overarching scope of the ADA must extend to golf, the Court will have inched closer to the question of whether waiver of the "walking rule" fundamentally alters professional golf. It is likely that this is precisely the determination the PGA hopes to forestall by prevailing on its theory that Title III does not apply. If Title III applies, the Court must then determine whether allowing Martin to use a cart fundamentally alters PGA tour events. On the surface, it is unlikely the PGA will be able to successfully demonstrate to the Justices that such a waiver alters its tournaments in any meaningful way. As Casey Martin recently put it: "I have never heard anyone talk about what a great *walker* Tiger Woods is."<sup>180</sup>

Put simply, a ruling in Martin's favor will likely rest on the premise that the PGA's entire argument is a proxy for preserving a time-honored golfing tradition. Such a ruling, however, would raise serious questions about the role professional sports organizations, such as the PGA, the National Football League, and Major League Baseball, have in setting forth and regulating their own rules. Affirmance of the Ninth Circuit decision would curtail these organizations' autonomy in regulating the rules of their competitions.

Moreover, a finding for Martin would call into question just how and to what extent the PGA must evaluate future disability claims. Specifically, what would be the standard by which to determine whether a modification of a rule is "reasonable?" Would the PGA have only the courts to turn to for each instance that an ADA claim is brought? If so, the PGA may expect future financial burdens, though just how steep remains unclear since there appear to be very few disabled professional athletes.

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178. See 42 U.S.C. § 12101(a)-(b) (1994).

179. See *id.* § 12101(a)(1).

180. *Outside the Lines* (ESPN television broadcast, Jan. 14, 2001) (interviewing Casey Martin) (emphasis added).

A decision in favor of the PGA, on the other hand, would signal to Congress that the ADA is not without limits, specifically where testing “physical ability” is a particular activity’s modus operandi. Such a ruling would leave open to debate the parameters of those limits, and might seem to some “formalists” to run counter to the legislative intent of the ADA. To be sure, a ruling for the PGA would likely prompt Congress to rewrite portions of the statute to expressly include “professional athletics” within the ADA’s scope.

It is more likely, however, that the *Martin* decision will have little practical effect on the game of golf, irrespective of which party prevails. As Casey Martin’s lawsuit represents the first time a professional athlete has raised a disability claim under the ADA,<sup>181</sup> waiver of the “walking rule” would not change PGA tour events in any meaningful sense.

The graver implications arising from a decision for Martin, however, lie in the fact that professional sports would not be the paramount authority with respect to evaluating which rules of the game are fundamental. This seemed most troubling to the Court.<sup>182</sup> Justice Kennedy, for example, questioned the practicality of requiring professional sports organizations to evaluate whether an athlete warrants an exemption from a particular rule of the game.<sup>183</sup> Justice Kennedy asked whether the Court should perhaps give great deference to sporting organizations, much the way the Court routinely defers to agencies since it is the agencies who have the best expertise over their subject matter supervision.<sup>184</sup>

Finally, to borrow a legal metaphor, one might liken Martin’s claim to any routine Fourteenth Amendment equal protection challenge. His case smacks of the discriminatory impact one set of rules places upon him. Viewed in this light, the Supreme Court might harken back to its decision in *Personnel Administrator v.*

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181. As discussed in this note, after Casey Martin first filed suit against the PGA, Ford Olinger, another professional golfer who suffers from a disease that makes it difficult for him to walk, brought an ADA action against the United States Golf Association, seeking waiver of the “walking rule.” Unlike Casey Martin, Olinger lost his court battle. *See Olinger v. United States Golf Ass’n*, 205 F.3d 1001 (7th Cir. 2000); *see also supra* Part V.C.

182. *See* Transcript of Oral Argument, *PGA Tour, Inc. v. Martin*, No. 00-24 (U.S. Jan. 17, 2001), *available at* 2001 WL 41011, at \*32.

183. *See id.*

184. *Id.* at \*33.

*Feeney*,<sup>185</sup> in which the Court held that “the Fourteenth Amendment guarantees equal laws, not equal results.”<sup>186</sup>

## VII. CONCLUSION

If it is true that professional sports test physical performance, then what is being tested is naturally what some competitors will do better than others. Professional sports, by their very nature, discriminate against disability.

The United States Court of Appeals for the Ninth Circuit should be reversed for three reasons. First, PGA events are not places of public accommodation during tournaments. Second, Title III of the ADA does not apply since Casey Martin is not a “customer or client” of a public accommodation by the terms of the ADA. Finally, even if Title III applied, it would not require the PGA to fundamentally alter the nature of its competitions at the championship level by permitting a disabled golfer to play by a different set of rules.

It is likely the United States Supreme Court will find that PGA tour events are not places of public accommodation, since one can only imagine the precedent such a ruling would set. For instance, a ruling in Martin’s favor would certainly mean that a football field during the Super Bowl is a place of public accommodation. Moreover, by ruling that PGA events are not public accommodations, the Court will not have to wrestle with the PGA’s far more difficult claim—namely, that to permit Martin’s use of a cart would fundamentally alter the nature of professional golf. While this may or may not be true, a ruling for Martin would likely invite future challenges in other professional sports, thus hampering the very nature of top-level competition.

It is more likely, however, that the Supreme Court will confront the realities of professional sports and find that application of the ADA to them undermines the very nature of these events, irrespective of degree. The “walking rule” may be arbitrary, but so too are the vast majority of rules of professional athletics. Extending the ADA to sports at the professional level makes little sense because elite competitions inherently discriminate against disability.

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185. 442 U.S. 256 (1979).

186. *Id.* at 273.

Finally, any disadvantage Casey Martin faces is not discrimination in any meaningful sense. Indeed, it would be perverse to sanction modification of any substantive rule of professional competition in order to ensure more equal results. This could not have been what Congress had in mind when enacting the ADA.

*William E. Spruill*