*Playing with an Asterisk: Casey Martin Shoots a Hole-In-One at the United States Supreme Court

[*PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S. Ct. 1879 (2001)]

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> *It's with some irony that the word handicap, a method that evens out matches between uneven players on the golf course, is, in this Supreme Court decision, extended to designate special privileges for a professional golfer with a disability. Even if Casey Martin were able to win a championship, it would be with an asterisk.*[1]

I. Introduction

Before his stunning victory in the United States Supreme Court, Casey Martin was probably better known as Tiger Woods' college teammate.[2] While Woods has garnered considerable acclaim by winning on the Professional Golf Association (PGA) Tour, Martin has become famous in his own right by defeating the PGA Tour itself.[3] Martin's path to infamy began when he petitioned the PGA Tour to modify its longstanding rule that required players to walk during tournament play.[4] Martin claimed that he did not seek to be elevated to the level of the "able-bodied" through the Americans with Disabilities Act (ADA).[5] Rather, he sought the "removal of a barrier" that prevented him from using his talents in pursuit of a professional golf career.[6] When his request was denied, Martin sued the PGA, claiming that it must make reasonable accommodations for his disability under the ADA.[7] The PGA refused because it believed that waiving the walking rule would "fundamentally alter" the nature of its tourna-

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1. Suzanne Fields, *High Court Shanks One In Casey Martin Decision*, Ariz. Republic, June 4, 2001, at B7.
2. *See, e.g.*, Dave Williams, *With a Friend Like Tiger . . . Woods Hardly Stands Tall with Half-Hearted Support of Ex-college Teammate and Roommate Casey Martin*, Press Democrat, June 3, 2001, at C2.
3. *See generally* Terry Eastland, *Martin Case is Less About Golf Than Power*, Dallas Morning News, June 4, 2001, at 13A (stating that in early 2001 Casey Martin was the most famous golfer who was not named Tiger Woods).
4. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 121 S. Ct. 1879, 1886 (2001) (*United States Reports* pagination not available at time of publication).
5. Brief for Respondent at 49, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (No. 00-24).
6. *Id.* at 50.
7. *PGA Tour, Inc.*, 121 S. Ct. at 1886.

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ments.[8] In *PGA Tour, Inc. v. Martin*, the ADA clashed directly with the sovereignty of professional sports.[9]

The United States Supreme Court found that Title III of the ADA did apply to the PGA Tour as a "public accommodation" since Martin was a "client or customer" of the PGA Tour's privileges.[10] Further, the Court held that the fatigue induced by walking was insignificant to golf, and therefore, could not constitute a "fundamental alteration."[11]

In doing so, the Supreme Court ignored the difficulty in assessing such modifications in sports, as well as the "nature" of professional sports in general. As a result, in *PGA Tour, Inc. v. Martin*, the United States Supreme Court misapplied the ADA to require the PGA Tour to modify its walking rule to accommodate a disabled professional golfer. By allowing Martin use of a cart during tournament play, the Supreme Court fundamentally altered PGA golf.

II. Case Description

Martin is a professional golfer who achieved great amateur and collegiate success.[12] He also has a debilitating condition known as Klippel-Trenaunay-Weber Syndrome.[13] This progressive disorder affects the circulatory system's ability to pump blood effectively from Martin's right leg back to his heart.[14] Consequently, Martin experiences great pain when walking and runs the continued risk that his tibia will fracture while walking because his leg has atrophied to a great extent.[15]

While a collegian, Martin petitioned the governing bodies of collegiate golf to allow him the use of a cart during play, and these requests were granted.[16] Following graduation, Martin sought to join

8. *Id.*

9. *See generally id.* at 1884.

10. *See id.* at 1890-92.

11. *See id.* at 1896.

12. *See id.* at 1885. Martin won seventeen Oregon Golf Association junior events before he was fifteen and a state championship in his senior year of high school. *Id.* He also was a member of Stanford University's golf team that won the 1994 National Collegiate Athletic Association (NCAA) championship. *Id.*

13. Brief for Petitioner at 5, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (No. 00-24). Persons with Klippel-Trenaunay-Weber Syndrome must often limit their physical activities due to complications such as bleeding, blood clotting, bone anomalies, and pain. Brief for Amicus Curiae K-T Support Group at 2, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (No. 00-24).

14. *PGA Tour, Inc.*, 121 S. Ct. at 1885.

15. *Id.* at 1885-86. Amputation of Martin's right leg is possible if a tibia fracture occurs there. *Id.* at 1886.

16. *Id.* Martin petitioned both the Pacific 10 Conference and the NCAA. *Id.* Both organizations waived their rules that required Martin to walk the course and carry his own clubs. *Id.*

the PGA Tour and made similar requests to use a cart during the final stages of qualifying for the Tour.[17]

PGA Tour, Inc. is a non-profit organization that oversees several circuits of professional golf including the Buy.com Tour and the PGA Tour.[18] The most common way to gain initial entry onto the tours is through a series of qualification rounds at the PGA Tour's "Q-School."[19] Although carts are permitted in the preliminary stages of qualifying, carts are not allowed in the final stage.[20] The intent is for the final stage to approximate the rules and conditions on the actual Buy.com and PGA Tours.[21] Because the PGA Tour considered the walking requirement a substantive rule of its game, it denied Martin's request to use a cart in the final stage.[22]

Casey Martin filed suit against the PGA Tour in the United States District Court for the District of Oregon.[23] In *Martin v. PGA Tour, Inc.*,[24] Martin sought both temporary and permanent injunctive relief from the PGA Tour's walking requirement.[25] The court held that the

17. *Id.* Competitors are allowed to use carts on the first two qualifying stages of the PGA Tour. *Id.* at 1895. However, carts are prohibited in the final stage of qualifying. *See id.* at 1886.

18. Petitioner's Brief at 1 n.2, *PGA Tour, Inc.* (No. 00-24). Players could qualify for the PGA Tour from the Buy.com Tour by winning three Buy.com events in one year or by being among the top fifteen money winners from the Buy.com Tour in a given season. *PGA Tour, Inc.*, 121 S. Ct. at 1884. After this case began, the Nike Tour's name "was changed to the Buy.com Tour." *Id.* at 1884 n.1.

19. *Id*. To participate in Q-School a golfer had to pay $3,000 and provide two letters of reference. *Id.* The top qualifiers in Q-School were given slots on the PGA Tour while the next highest finishers were admitted to the Buy.com Tour. *See id*. Approximately 200 golfers were eligible to play on the PGA Tour and another 170 were eligible to play on the Buy.com Tour. Petitioner's Brief at 3, *PGA Tour, Inc.* (No. 00-24). Aside from Q-School, a golfer could also try to qualify for a single tournament by playing in qualifying rounds held the week before any particular event. *PGA Tour, Inc.*, 121 S. Ct. at 1884.

20. *Id.*

21. *See generally id.* at 1895 (stating that the golf offered by the PGA Tour, Nike Tour, and final stage of Q-School represent the "highest level" of golf). The rules that govern the PGA Tour and Buy.com Tour come from three sources. Petitioner's Brief at 4 n.3, *PGA Tour, Inc.* (No. 00-24). The *Rules of Golf*, developed jointly by the United States Golf Association (USGA) and the Royal and Ancient Golf Club of Scotland, apply broadly to the PGA Tour's competitions as well as amateur play. *PGA Tour, Inc.*, 121 S. Ct. at 1884. The source in contention is the "hard card," or Conditions of Competition and Local Rules, "which are explicitly intended to make competitions more exacting." Petitioner's Brief at 3, *PGA Tour, Inc.* (No. 00-24). The PGA Tour "hard card" rules state that "[p]layers shall walk at all times during a stipulated round unless permitted to ride by the PGA Tour Rules Committee." Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1249 (D. Or. 1998) (quoting PGA Tour, Conditions of Competition and Local Rules § A, ¶ 6). The Notice to Competitors, which contains tournament-specific rules, is the final source from which rules are derived. Petitioner's Brief at 4 n.3, *PGA Tour, Inc.* (No. 00-24).

22. *See* Petitioner's Brief at 5, *PGA Tour, Inc.* (No. 00-24). The walking requirement has been a part of the PGA Tour and Buy.com Tour since the inception of each. *Id.* at 4.

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

24. *Id.* United States Magistrate Judge Coffin issued his decision in two different opinions. In the first decision, Judge Coffin ruled on the parties' motions for summary judgment. *Id.* at 1327. The second *Martin* opinion dealt with the requested modifications to the PGA Tour's rules. *See Martin*, 994 F. Supp. at 1243.

25. *See* Petitioner's Brief at 5-6, *PGA Tour, Inc.* (No. 00-24). After receiving a temporary injunction, Martin scored well enough to earn a place on the Nike Tour. *See Martin*, 984 F. Supp. at 1322.

ADA did apply to the PGA Tour.[26] The court reasoned that the PGA Tour functioned as a "public accommodation" because its tournaments were held at golf courses, which are specifically listed as examples of public accommodations.[27] After weighing Martin's disability and its effect on his play against the need for the walking rule,[28] the court held that allowing Martin to use the cart would not fundamentally alter the nature of the PGA's programs.[29]

The PGA Tour appealed to the Ninth Circuit Court of Appeals,[30] which affirmed the district court ruling.[31] The United States Supreme Court granted certiorari.[32]

III. Background

In 1990 Congress enacted the ADA in response to the widespread discrimination against disabled persons.[33] Congress found that forty-three million Americans had "one or more physical or mental disabilities, and this number [was] increasing as the population as a whole [was] growing older."[34] In addition, Congress felt that discrimination had historically isolated and segregated disabled individuals and continued to be a "serious and pervasive social problem."[35]

Prior to the enactment of the ADA, protection of disabled individuals was primarily limited to section 504 of the Rehabilitation Act of 1973, which applied only to governmental agencies and entities that received federal funding or contracts.[36] The primary difference between the two laws is that the ADA extends protection for disabled persons into privately held entities.[37] It is important to note that the

26. *See id.* at 1327.

27. *See id.* The district court was not persuaded that public accommodations could have areas that are exempt from ADA guidelines. *See Martin*, 984 F. Supp. at 1326.

28. *See Martin*, 994 F. Supp. at 1251-52. Since injecting the element of physical fatigue was the goal of the walking rule, the court determined that Martin would still be subject to as much, if not more, fatigue than those who were able-bodied if he were allowed to use the cart. *Id.* at 1252. The court did, however, find that the purpose of the rule was "cognizable" under the ADA. *Id.* at 1250.

29. *See id.* at 1252. The court found that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances." *Id.* at 1250.

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

31. *See id.* at 1002.

32. PGA Tour, Inc. v. Martin, 530 U.S. 1306 (2000).

33. *PGA Tour, Inc.*, 121 S. Ct. at 1889. As a result, the ADA was seen as the "most significant civil rights legislation" in twenty-five years when passed. Laura F. Rothstein, Disabilities and the Law 23 (1997).

34. 42 U.S.C. § 12101(a)(1) (1994).

35. *Id.* at § 12101(a)(2). Additionally, Congress found that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society . . . ." *Id.* at § 12101(a)(7).

36. 29 U.S.C. § 794 (1994); Rothstein, *supra* note 33, at 33-34.

37. McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 460 (6th Cir. 1997).

ADA works in tandem with the Rehabilitation Act, and provisions from both laws generally apply in many cases.[38]

The ADA assists disabled persons by mandating "that services, programs, activities, employers, benefit providers, and other public opportunity providers may not discriminate against otherwise qualified individuals with disabilities."[39] In order to qualify as "disabled" under the ADA, one must have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[40]

The ADA is divided into specific titles that govern particular areas of physical access for the disabled.[41] Title I has guidelines that regulate the interaction between employers and disabled workers or job applicants.[42] Specifically, employers may not consider one's disability as a factor in hiring, promoting, or compensating workers.[43]

Title III addresses access to private facilities that operate as "public accommodations."[44] Prior to the ADA, there was no comprehensive regulation of public areas or activities.[45] Congress hoped that Title III would "bring individuals with disabilities into the economic and social mainstream of American life."[46]

Title III specifically 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 by any person who owns, leases (or leases to), or operates a place of public accommodation."[47] To further clarify its intentions, Congress defined a public ac-

38. ROTHSTEIN, *supra* note 33, at 26.

39. *Id.* at 23.

40. 42 U.S.C. § 12102(2)(A). A "major life activity" included "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities." H.R. REP. NO. 101-485, pt. 2, at 52 (1990).

41. *See* Molly Hughes, *Title III Of The ADA: More Than An Employment Statute*, S.C. LAW., Jan./Feb. 2001, at 15.

42. *See* JAMES WALSH, MASTERING DIVERSITY: MANAGING FOR SUCCESS UNDER ADA AND OTHER ANTI-DISCRIMINATION LAWS 21 (1995). In his initial suit, Martin claimed discrimination under both Titles I and III. *See* Martin v. PGA Tour, Inc., 984 F. Supp. 1320, 1323 (D. Or. 1998). The district court ruled that Title I did not apply to his case because Martin was an independent contractor. Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1245 n.2. (D. Or. 1998). *See also* Birchem v. Knights of Columbus, 116 F.3d 310, 312 (8th Cir. 1997) (holding that Title I of the ADA did not apply to private contractors).

43. WALSH, *supra* note 42, at 21. Under the specific guidelines of the ADA "[n]o 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).

44. *See* Hughes, *supra* note 41, at 15. Title II applies to governmental discrimination of the handicapped and was not applicable in this case. *See* ROTHSTEIN, *supra* note 33, at 28-29.

45. ROTHSTEIN, *supra* note 33, at 357.

46. H.R. REP. NO. 101-485, pt. 2, at 99 (1990).

47. 42 U.S.C. § 12182(a). It is important to note that Congress specifically intended for Title III to have no governing power over employment conditions because such issues were addressed in Title I. *See* H.R. REP. NO. 101-485, pt. 2, at 99.

commodation to include privately owned facilities that fall within twelve exhaustive categories.[48] Included in these is the category in which "a gymnasium, health spa, bowling alley, golf course, [and] other place[s] of exercise or recreation" are enumerated as public accommodations.[49]

Under Title III, discrimination is "a failure to make reasonable modifications in policies, practices, or procedures" when modifications are necessary to accommodate disabled individuals "unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."[50] In *Martin v. PGA Tour, Inc.*,[51] United States Magistrate Judge Coffin illustrated the concept of fundamental alteration in a context other than golf. In a situation where a bookstore did not normally sell books in Braille, it would not have to begin stocking such books simply because a blind customer requested one.[52] Judge Coffin stated that such accommodation would fundamentally alter the business.[53]

Remarkably, the day after the Ninth Circuit decision in *Martin*, the Seventh Circuit handed down a contrary decision in *Olinger v. United States Golf Ass'n*.[54] Like Casey Martin, Ford Olinger is a golfer who has a degenerative condition that impairs his ability to walk.[55] He applied to the United States Golf Association (USGA) for a waiver of the walking rule to compete in the U.S. Open.[56] His request was denied, and he sued the USGA under the ADA.[57] Olinger lost his case on issues very similar to those raised by Casey Martin.[58]

48. *See* ROTHSTEIN, *supra* note 33, at 358. These categories include places of lodging, restaurants, places of entertainment or public gathering, retail or service establishments, public transportation stations, places of public display and collection, parks, places of education, social service centers, and places of exercise or recreation. 42 U.S.C. § 12181(7)(A)-(L).

49. 42 U.S.C. § 12181(7)(L).

50. *Id.* at § 12182(b)(2)(A)(ii).

51. 994 F. Supp. 1242 (D. Or. 1998).

52. Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1244-45 (D. Or. 1998).

53. *Id.*

54. 205 F.3d 1001 (7th Cir. 2000); *see also* Steven A. Holzbaur, *Driving into the Rough: Conflicting Decisions on the Rights of Golfers in Martin v. PGA Tour, Inc. and Olinger v. United States Golf Ass'n*, 46 VILL. L. REV. 171, 172-73 (2001). The Supreme Court's grant of certiorari in *PGA Tour, Inc.* included the conflict between the Seventh and Ninth Circuits. PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1889 (2001).

55. *Olinger v. United States Golf Ass'n*, 205 F.3d 1001, 1001 (7th Cir. 2000). Olinger's specific condition is bilateral avascular necrosis. *Id.* There was no disagreement that Olinger was "disabled" as outlined in the ADA. *Id.*

56. *Id.* The USGA sponsors thirteen championship tournaments annually, including the U.S. Senior Open and the U.S. Amateur. *Id.* at 1002. The USGA and the PGA Tour are two separate, unrelated entities that both sponsor golfing events. *Id.* at 1003.

57. *See id.* at 1001. Olinger originally petitioned for relief against the USGA in 1998, and he was granted a temporary restraining order that allowed him to use a cart during local qualifying rounds of the U.S. Open. *Id.* at 1004. In 1998, the USGA voluntarily allowed Martin to use a cart in the U.S. Open after he obtained a restraining order against the PGA from the district court. *See id.* at 1003-04.

58. *See, e.g.*, *Olinger*, 205 F.3d at 1005.

The Seventh Circuit held that use of a cart would fundamentally alter the nature of U.S. Open golf competition.[59] It agreed with the lower court that modification of the walking rule for Olinger would remove the importance of stamina from the game.[60] In particular, the district court found that "[t]he point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor."[61]

Other applications of the ADA to athletics are limited.[62] *McPherson v. Michigan High School Athletic Ass'n*,[63] a Sixth Circuit case, concerned a learning disabled student who involuntarily repeated the eleventh grade.[64] McPherson was barred from participating in varsity basketball during his twelfth grade year because doing so would violate the state athletic association's eight-semester rule.[65] The majority believed it was the passage of time, not McPherson's learning disability, that prevented him from playing.[66] The *McPherson* court further stated that the rule was necessary for the safety of younger participants and to provide fair opportunities for playing time.[67] Consequently, the court held that ADA protection was not warranted because modification of the rules would be a fundamental alteration of the school's programs.[68]

The difficulties encountered when determining whether a requested waiver would fundamentally alter a program were also addressed in *McPherson*.[69] The court felt that these determinations would impose an undue burden by "forcing [athletic associations] to make 'near-impossible determinations' about a particular student's physical and athletic maturity."[70]

59. *Id.* at 1006.

60. *Id.* The district court found that if the walking rule was eliminated from the U.S. Open it would "remove stamina (at least, a particular type of stamina) from the set of qualities designed to be tested in this competition." Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926, 937 (N.D. Ind. 1999).

61. *Id.* The district court also held that "[c]onditions that now affect a golfer's performance, but which lie beyond the golfer's ability to control-the fatigue born of hills, of heat, of humidity-would lessen in importance to the competition. Again, the nature of the competition would be fundamentally altered." *Id.* The lower court then found the requisite tasks of the U.S. Open to be not only striking the ball, but also doing it under "greater than normal mental and physical stress." *Id.* at 937-38.

62. Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1245 (D. Or. 1998).

63. 119 F.3d 453 (6th Cir. 1997).

64. *See* McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 456 (6th Cir. 1997).

65. *Id.*

66. *Id.* at 461.

67. *Id.*

68. *Id.* at 462.

69. *Id.*

70. *Id.* This court also worried that waiver requests could greatly increase if all learning disabled students could potentially request a waiver. *Id.*

The United States Supreme Court dealt with the application of related disability law in *Southeastern Community College v. Davis*.[71] In *Davis*, the Court determined that a professional school could mandate physical qualifications for its clinical training programs under the Rehabilitation Act.[72] Specifically, the Court believed that the Rehabilitation Act would not cover a handicapped individual who did not "meet all of a program's requirements in spite of his handicap."[73] This led the majority to decide that the college's nursing program was not required to make substantial modifications to accommodate a hearing impaired student.[74] Making substantial adjustments to the program beyond what was needed to prohibit discrimination would fundamentally alter the program.[75] With such drastic modifications, the Court believed that the law would be extended beyond permissible limits, and strong doubts about the program's validity would be raised.[76]

IV. Analysis

The first issue before the United States Supreme Court in *PGA Tour, Inc. v. Martin* was whether the Americans with Disabilities Act protected a qualified disabled golfer's access to professional golf tournaments.[77] The second issue under review was whether the same golfer could be denied use of a golf cart during tournament play because requiring such an accommodation would "fundamentally alter the nature" of the tournaments.[78]

A. *Parties' Arguments*

1. *Casey Martin*

Martin argued that the PGA Tour should be subject to the ADA because competitions are held on golf courses, which are public accommodations as outlined in the ADA.[79] In fact, Martin maintained

71. 442 U.S. 397 (1979).
72. Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 414 (1979).
73. *Id.* at 406.
74. *Id.* at 413.
75. *Id.* at 410.
76. *Id.* The Court also noted that the program was established to "train [nurses] who could serve . . . in all customary ways." *Id.* at 413. Davis might obtain benefits from this program, but the Court believed she would not receive the equivalent of what the program was intended to provide. *Id.* at 410. Since the program's requirements would have to be substantially lowered to accommodate Davis, the Court concluded that the Rehabilitation Act compelled no such alterations for handicapped individuals. *Id.* at 413.
77. PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1884 (2001).
78. *Id.*
79. *See* Brief for Respondent at 17, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (No. 00-24). Martin argued that not only was a "golf course" specifically included in the statute as a public accommodation, but Congress broadly defined public accommodation to include "any place where the public gathers," which surely included the PGA Tour's exhibitions for spectators. *Id.* at 18. He also argued that he should be considered a "client or customer" of the PGA

that every case applying Title III to "professional golf organizations" had found that ADA guidelines applied.[80]

Because the PGA did not individually assess the "nature and extent" of his disability, Martin argued that the PGA Tour could not know if the requested waiver of the walking rule was unreasonable.[81] Alternatively, Martin contended that walking was not fundamental to PGA golf because the *Rules of Golf* define shot-making as the major element of the game.[82] Martin further asserted the walking rule could not be considered fundamental to PGA golf when many exceptions to the rule are allowed.[83] For example, competitors seeking entry into a single PGA tournament by playing in its qualifying rounds are allowed to use a cart.[84]

Martin claimed that while significant on its face, the walking rule did not fulfill its stated purpose.[85] There was ample evidence to conclude walking was not the primary factor in causing fatigue during PGA tournaments.[86] For example, a former USGA president testified that "obviously [golf is] not a major endurance contest, because otherwise we'd require players to run between shots."[87]

Finally, Martin downplayed the significance of the possible future impact of the Ninth Circuit's decision.[88] Martin contended that the PGA Tour was not ill-equipped to handle future requests for accommodation since such determinations were already being made under current rules.[89]

Tour. *Id.* at 30. Because the PGA Tour coordinated things such as tournament play, sponsors, and spectator viewing, Martin contended that he could concentrate on his game while others worried about the logistics of the tournaments. *Id.* at 30-31. Therefore, he claimed to be a consumer of what the PGA Tour offered its members. *Id.* at 31.

80. *Id.* at 24 n.13. Martin pointed out that the *Olinger* district court agreed that the ADA applied to professional golf organizations. *Id.*; *see also* Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926, 933 (N.D. Ind. 1999). Martin later distinguished the *Olinger* decision as being decided on different facts than those present in this case. Respondent's Brief at 40 n.21, *PGA Tour, Inc.* (No. 00-24); *see also Olinger*, 55 F. Supp. at 933 n.4.

81. *See* Respondent's Brief at 32, *PGA Tour, Inc.* (No. 00-24). Martin relied in part on Congress' finding that "public accommodations are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do." *Id.* (quoting H.R. REP. No. 101-485, pt. 2, at 102 (1990)).

82. *Id.* at 35. Martin highlighted that the *Rules of Golf* did not forbid the use of carts, nor were players compelled to walk. *Id.*

83. *Id.*

84. *Id.* at 36 (citing J.A. 161, 262-64).

85. *See id.* at 37.

86. *Id.* Because of the volume of evidence from golfers, experts, and golfing association officials alike, the conclusion of the Court of Appeals, that walking was insignificant to causing fatigue, was not clearly erroneous. *See id.* at 37.

87. *Id.* at 38 (quoting J.A. 242). Martin also found compelling that, when given a choice, professional golfers still walked in tournaments. *Id.* at 39. Consequently, it was difficult for the PGA to assert that riding could be such an overwhelming advantage because professionals, who understand one shot could be determinative, still chose to walk. *See id.*

88. *Id.* at 40.

89. *Id.* at 43. For example, the *Rules of Golf* already provided for determinations of whether a modification for a disabled golfer with an artificial limb would result in a competitive advantage. *Id.* Likewise, the PGA already reviewed doctor statements to determine if a player's absence from a tournament would be excused. *Id.* By allowing these "temporarily dis-

2. *The PGA Tour*

The PGA Tour contended that Martin was not a client or customer as envisioned by the legislation.[90] According to the PGA Tour, Martin participated in tournaments as a provider of entertainment, not a customer or client.[91] Therefore, it felt that Martin's claim should have been brought under Title I of the ADA, which governs workplace discrimination.[92] Accordingly, since the district court held that Martin was an independent contractor and not an employee of the PGA, his claim could not fall under the auspices of the ADA.[93]

In its second argument, the PGA Tour claimed that a modification of its substantive rules of play for a disabled competitor would "fundamentally alter the nature" of its events.[94] The PGA Tour argued that the Ninth Circuit overlooked the fact that professional sports rules are intended to affect competitors differently since "[athletes] come to the competition with unequal physical attributes."[95] According to the PGA Tour, "[elite athletic] competitions reward superior physical performance, without adjusting the standards from competitor to competitor to allow for more equal results."[96] Hence, modification was not warranted under the ADA.[97]

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abled" golfers to resume playing on the tour without making them re-qualify at Q-School, Martin asserted that these players were given advantages over those who must qualify. *Id.*

90. *See* PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1891. The PGA Tour claimed that 42 U.S.C. § 12182(b)(1)(A)(iv) defined those covered by the Title III as "clients or customers." Brief for Petitioner at 19, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (No. 00-24). While the thrust of this section was to show that public accommodations could not indirectly discriminate by contract, the PGA Tour asserted that public accommodations had obligations to "individuals," which were defined as "clients and or customers." *Id.* at 20.

91. *See id.* at 19. "It is, after all, the persons patronizing a business, not the persons working for it, who distinguish an entity that is a public accommodation from an entity that is not." *Id.* at 18.

92. *Id.* at 16. "This claim, on its face, is nothing more than a straightforward discrimination-in-the-workplace complaint . . . . As such, it might be expected to fall within the province of Title I of the Act, which directly and comprehensively addresses workplace bias." *Id.*

93. *Id.* at 17. Because independent contractors were not covered by the ADA, the PGA Tour asserted that Martin's case should have ended with no further analysis under the ADA whatsoever. *Id.*

94. *See PGA Tour, Inc.*, 121 S. Ct. at 1893. The PGA Tour defined "substantive rule" as "a rule that is intended to, and potentially does, affect the outcome of a particular competitive event. The term is used to distinguish those rules from various rules that are not intended to affect the outcome-for example, rules of decorum." Petitioner's Brief at 10 n.12, *PGA Tour, Inc.* (No. 00-24). In order to know whether waiver of the walking rule would constitute a fundamental alteration to PGA Tour golf, the PGA Tour claimed that the court must closely examine the "basic nature" of the its competitions. *Id.* at 31. The PGA Tour asserted that the Seventh Circuit, in *Olinger*, properly assessed the fundamental importance of uniform rules in "elite sports competitions." *Id.*

95. *Id.* at 33.

96. *Id.* at 34.

97. *See id.* at 30. Just as a bookstore should not be compelled to stock Braille books if such books were not stocked in its "normal course of business", the PGA Tour contended that it should not be compelled to change when uniform competition under uniform rules were mandated in its "normal course of business." *See id.* at 32-33 (citing 28 C.F.R. ch. 1, pt. 36, App. B, at 641 [sic] (2000)).

Changing the walking rule for any competitor could potentially affect the outcome of the tournaments.[98] The walking rule was promulgated to "'inject the element of fatigue into the skill of shot-making.'"[99] Because fatigue and walking affect golfers in different ways, the PGA Tour claimed there was no plausible way to evaluate Martin's potential advantage over the "able-bodied" golfer.[100]

B. *Majority Opinion*

Justice John Paul Stevens, writing for a seven-justice majority, found that the PGA Tour was subject to the ADA as a public accommodation because its events are held on golf courses.[101] As a result, the PGA Tour could not discriminate against Martin's pursuit to enjoy the "privileges" of the PGA Tour, including competing in the Q-school and actual tour play.[102] Martin should be considered a "client or customer" of the PGA Tour because he paid three thousand dollars for the opportunity to compete at the Q-school.[103]

In its analysis of the walking rule, the majority defined golf as essentially making shots to get a ball into a distant hole.[104] With this backdrop, the Court held that the walking requirement was a peripheral rule, and modification of it would not fundamentally alter the

98. Petitioner's Brief at 37, *PGA Tour Inc.* (No. 00-24). As a result, the PGA Tour claimed the fatigue induced by walking a golf course over the span of four rounds may "routinely" have some effect on the outcomes. *Id.*

99. *Id.* (quoting from J.A. 65). The PGA Tour illustrated that its history was replete with examples of players who overcame great "physical exhaustion and discomfort" to win, as well as players who were unable to succeed in the face of such conditions. *Id.* at 38 (citing Olinger v. United States Golf Ass'n., 205 F.3d 1001, 1006-07 (2000)).

100. *See id.* at 40. Medical experts testified at trial that fatigue was controlled by too many variables, and it was "impossible" to compare how fatigue affected one person over another. *Id.* at 39 n.27. Additionally, the district court compared Martin with the "able-bodied" golfer when determining whether he would have a competitive advantage by using a cart. *See* Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1252 (D. Or. 1998). The primary objection to this comparison was that many golfers have "injuries or other ailments" but are hampered nonetheless by walking the course. *See* Petitioner's Brief at 40 n.28, *PGA Tour, Inc.* (No. 00-24). Because these "nondisabled" golfers under the ADA would not be able to use a cart as Martin could, he would certainly have an advantage over them. *Id.*

101. PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1890 (2001). The majority found that PGA events "fit comfortably" within the parameters established by the ADA for public accommodations when the PGA used golf courses for its tournaments. *Id.* at 1890.

102. *Id.* The majority went on to hold that the privilege of playing in Q-School was one "for which thousands from the general public pay," while tour play was the privilege for which they sought. *Id.*

103. *Id.* at 1892. The Court held that it did not need to determine whether the PGA Tour correctly interpreted 42 U.S.C. § 12182(b)(2)(A)(iv) to limit Title III coverage to "clients or customers." *See id.* at 1891-92. The PGA Tour simultaneously serviced and owed duties to dual sets of clients or customers: the competitors and the spectators. *Id.* at 1892. Therefore, Martin was covered under Title III of the ADA as a customer of the PGA Tour. *See id.* The tour offered two privileges to the general public: watching and competing in PGA Tour events. *Id.* Even though competition was more difficult to achieve, the PGA offered the privilege through its Q-School to anyone from the general public who paid a fee and had the required letters of recommendation. *Id.*

104. *Id.* at 1893-94. Specifically, the majority held that "[f]rom early on, the essence of the game has been shot-making using clubs to cause the ball to progress from the teeing ground to a hole some distance away with as few strokes as possible." *Id.*

game.[105] Further, the Court noted that the PGA Tour could not insure that all competitors played under the same conditions anyway because weather and pure luck were uncontrollable factors.[106]

The Court relied upon the district court's finding that the fatigue endured while walking the golf course during a tournament was insignificant.[107] This finding made the very basis for the walking rule insignificant.[108] The majority added that because Martin likely endures much more physical fatigue than "able-bodied" golfers, waiving the walking rule for him would not eliminate the fatigue factor envisioned by the PGA Tour.[109]

Finally, the Court noted that the PGA Tour's refusal to look at Martin's individual circumstances was inappropriate.[110] The Court agreed with Martin that until such an examination was conducted, the PGA Tour could not know if the modification was reasonable or would fundamentally alter the game.[111] Additionally, the majority held that these individual inquiries would not unduly burden the PGA Tour.[112] Overall, the Court believed that Congress intended for organizations such as the PGA to make individualized assessments of disabled athletes and make appropriate accommodations or waivers whenever possible.[113]

C. *Dissenting Opinion*

Justice Antonin Scalia, joined by Justice Clarence Thomas, felt that public accommodation law was based upon application to customers.[114] Accordingly, the language in Title III is clear that those

105. *See id.* at 1895. The Court noted that carts were very popular, and there was nothing in the official *Rules of Golf* to forbid the use of carts. *Id.* at 1894. The Court also noticed the "hard card" rule relied upon by the PGA Tour was "buried in the appendix to the Rules of Golf." *Id.* at 1895. Finally, the Court highlighted the PGA's allowance for carts in the preliminary rounds of Q-School and the Senior PGA Tour as support that the walking rule was not indispensable in playing high caliber golf. *Id.*

106. *Id.* The Court found pure chance had the potential to affect the game more than the fatigue injected into the game from the walking rule. *Id.*

107. *Id.* at 1895-96. Dr. Gary Klug, a professor in physiology at the University of Oregon, testified that the "energy expenditure" from walking a golf course during a round of golf was "nutritionally . . . less than a Big Mac." Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1250 (D. Or. 1998). Dr. Klug noted that golfers had ample intervals for rest and refreshment during the round. *Id.*

108. *See PGA Tour, Inc.*, 121 S. Ct. at 1895-96. Factors other than walking, such as humidity and dehydration, were viewed by the majority as much more significant predicates for fatigue. *Id.* at 1896.

109. *Id.* at 1897. "A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament." *Id.*

110. *Id.* at 1896.

111. *See id.*

112. *See id.* at 1898 n.53. The Court believed that the PGA Tour overstated the potential burden in assessing requests for modification, especially considering that in the three years during which this case worked through the courts, no one had sued the PGA to use a cart. *Id.*

113. *Id.* at 1897-98.

114. PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1898 (2001) (Scalia, J., dissenting).

who "enjoy" public accommodation are intended to be customers.[115] In addition, Justice Scalia stated that Martin did not use golf courses for recreation or exercise, which was what Congress envisioned when golf courses were mentioned as a public accommodation.[116] More importantly, Justice Scalia noted that Martin did not "buy" anything as a customer; rather he sold entertainment and earned money, which is what made him a professional golfer.[117]

Justice Scalia emphasized that the ADA requires public accommodations to provide equal access to its goods and services, but an entity is not required to modify its offerings to the extent that its goods or services would be fundamentally altered.[118] Just as a store owner may decide whether or not to sell shoes in pairs, Justice Scalia suggested that the PGA Tour could offer "walk-around golf" if it wished.[119] He opined that "[t]he PGA Tour cannot deny respondent *access* to that game because of his disability, but it need not provide him a game different (whether in its essentials or in its details) from that offered to everyone else."[120]

Justice Scalia found it incredible that the United States Supreme Court was now deciding what was to be considered "fundamental aspects of golf."[121] He felt it was within the prerogative of the PGA Tour to offer a game that differed from other versions of golf just as baseball had done with the designated hitter rule in the American League.[122] Justice Scalia noted that all game rules are arbitrary, and it is not the proper function of the Supreme Court to second-guess rule makers on what is essential for their game.[123] Justice Scalia claimed

115. *Id.* at 1898-99 (Scalia, J., dissenting). "To be sure, professional baseball players *participate* in the games, and *use* the ballfields, but no one in his right mind would think that they are *customers* of the American League or of Yankee Stadium." *Id.* at 1900 (Scalia, J., dissenting). Additionally, Justice Scalia asserted that "[p]rofessional golfers on the tour are no more 'enjoying' (the statutory term) the entertainment that the tour provides, or the facilities of the golf courses on which it is held, than professional baseball players 'enjoy' the baseball games in which they play or the facilities of Yankee Stadium." *Id.* (Scalia, J., dissenting).

116. *See id.* (Scalia, J., dissenting).

117. *Id.* (Scalia, J., dissenting). Ballplayers were the entertainment watched by professional baseball's customers, and Justice Scalia believed professional golf was no different. *Id.* (Scalia, J., dissenting).

118. *Id.* at 1901 (Scalia, J., dissenting). For example, a shoe store would not have to stop selling shoes in pairs because it would discriminate against one-legged persons. *See id.* at 1901-02 (Scalia, J., dissenting).

119. *Id.* at 1902 (Scalia, J., dissenting). According to Justice Scalia, "[n]owhere is it writ that PGA Tour golf must be classic 'essential' golf." *Id.* (Scalia, J., dissenting).

120. *Id.* (Scalia, J., dissenting).

121. *See id.* (Scalia, J., dissenting). He believed the Framers of the Constitution could not have wanted the Supreme Court to decide the "age-old jurisprudential question" of whether "someone riding around a golf course from shot to shot is *really* a golfer? The answer, we learn, is yes. The Court ultimately conclude[d], and it will henceforth be the Law of the Land, that walking is not a 'fundamental' aspect of golf." *Id.* (Scalia, J., dissenting).

122. *Id.* (Scalia, J., dissenting). If people did not think the designated hitter represented "real baseball" they could stop supporting it. *Id.* (Scalia, J., dissenting).

123. *Id.* (Scalia, J., dissenting). Rules such as a one hundred-yard football field or eighteen-hole golf courses were arbitrary, and none were essential. *Id.* at 1903 (Scalia, J., dissenting).

that the only way a rule becomes essential is through the processes promulgated by the professional organizations, as well as tradition.[124]

Justice Scalia feared the floodgates would be opened if individual inquiries were required to determine whether requested modifications would alter the competition when balanced with the athlete's capabilities.[125] "The [ADA] seeks to assure that a disabled person's disability will not deny him *equal access* to (among other things) competitive sporting events—not that his disability will not deny him an *equal chance to win* competitive sporting events."[126]

D. *Commentary*

As Congress pointed out, the ADA was enacted "to provide clear, strong, consistent, enforceable standards [to address] discrimination against individuals with disabilities."[127] The problem with *PGA Tour, Inc.* was the lack of clarity and consistency that could result because an individualized analysis must be conducted to determine whether an accommodation in tandem with a disabled person's unique abilities amounts to a "fundamental alteration." When making these assessments on such uncertain factors, it is very difficult to know whether an accommodation is appropriate, or if the line is crossed to give the disabled athlete an unfair advantage. As a consequence, any number of outcomes could result.

As the *McPherson v. Michigan High School Athletic Ass'n* court found, there are too many independent variables in the equation to determine whether an alteration gives a person with a disability a competitive advantage.[128] In assessing whether McPherson would have had an unfair advantage because of his age, the court had evi-

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124. *Id.* (Scalia, J., dissenting). The fact that the majority justified waiver of the walking rule because luck and pure chance could play a part in golf was insupportable, according to Justice Scalia. *Id.* (Scalia, J., dissenting). He guessed that this was why people considered players such as Jack Nicklaus and Tiger Woods to be some of the "luckiest" players around. *Id.* (Scalia, J., dissenting). "'Pure chance' is randomly distributed among the players, but allowing respondent to use a cart gives him a 'lucky' break every time he plays." *Id.* (Scalia, J., dissenting). Simply because there were "nonhuman variables" that could affect results, he found no reason to justify adding another that favored Martin every time. *Id.* (Scalia, J., dissenting).

125. *See id.* at 1903-04 (Scalia, J., dissenting). Because this inquiry would be intensely fact-based, he could foresee this becoming a "lucrative" area of litigation. *Id.* at 1904 (Scalia, J., dissenting). Justice Scalia also believed there were not two sets of rules envisioned by the ADA: one set for able-bodied competitors and one individualized set for talented disabled competitors. *Id.* (Scalia, J., dissenting).

126. *Id.* (Scalia, J., dissenting). He opined that the ADA should not attempt to give Martin an equal chance to win.

> [T]he very *nature* of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence. This unequal distribution is precisely what determines the winners and losers – and artificially to 'even out' that distribution, by giving one or another player exemption from a rule that emphasizes his particular weakness, is to destroy the game.

Id. (Scalia, J., dissenting).

127. 42 U.S.C. § 12101(b)(2) (1994).

128. *See* McPherson v. Michigan High Sch. Athletic Ass'n, 119 F.3d 453, 462 (6th Cir. 1997).

dence that five factors figured into the calculation: "chronological age, physical maturity, athletic experience, athletic skill level, and mental ability to process sports strategy."[129] Once the value of these variables was determined, the court noted that the formula became more complex since the factors must be adjusted to accommodate the relative skills of the opposition.[130] The *McPherson* majority could plainly see that these calculations were "near impossible."[131] On the other hand, the majority in *PGA Tour, Inc.* asserted that the PGA must make an individual inquiry; however, the Court provided no basis for conducting such an analysis.[132] The Court simply maintained that the walking rule was peripheral to PGA Tour golf, and it did not discuss the possibility that Martin could potentially gain advantage from using a cart.[133]

To further demonstrate the precarious nature of these calculations, two different Circuit Courts arrived at opposite conclusions when presented with waiving the walking rule in professional golf. Instead of attempting the "near impossible," the *Olinger* decisions stressed the nature of the accommodation and its impact on the game.[134] The *Olinger* line of decisions followed the same process as the *McPherson* court; it examined the effect of the accommodation on the activity, rather than trying to ascertain the unascertainable. As the *Olinger* district court found, the analysis should be confined to whether the accommodation fundamentally altered the nature of the specific program under consideration.[135] When placing the program in the forefront of the analysis, the court held that waiving the walking rule for Olinger removed a desired quality, stamina, to be measured by the U.S. Open.[136] Therefore, changing this requirement would be a fundamental alteration of the nature of the activity.[137]

The majority in *PGA Tour, Inc.* spent very little time analyzing the "nature" of PGA Tour golf. Much of the opinion was devoted to explaining the game of golf, but most of it was irrelevant because "ge-

129. *Id.*
130. *See id.*
131. *Id.*
132. *See generally* PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1896 (2001).
133. *See generally id.* at 1897.
134. *See generally* Olinger v. United States Golf Ass'n, 205 F.3d 1001, 1006 (7th Cir. 2000); Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926, 934-35 (N.D. Ind. 1999).
135. *Olinger*, 55 F. Supp. 2d at 934. In *Olinger*, this meant specifically assessing U.S. Open golf. *Id.*
136. *Id.* at 937.
137. *Id.*

neric" golf was not at issue.[138] The specific game offered by the PGA Tour is what should have been analyzed.[139]

No one would likely discount the importance of shot-making on the PGA Tour, or at the public golf course for that matter. The key difference is that the PGA Tour envisioned shot-making influenced by the fatigue of walking.[140] The majority categorically dismissed the significance of walking-induced fatigue while playing golf, yet the district court testimony that it used for support gave an interesting qualification: "under normal circumstances."[141] One would think the circumstances of playing in a high-caliber professional sport would create an atmosphere somewhat less than "normal." For example, on the PGA Tour, the range of players' scores has historically been very narrow.[142] With little margin for error, a PGA Tour golfer could have to walk and make shots in all types of weather for seventy-two holes when his money, fame, and career are on the line. Those circumstances are starkly different from what the average golfer encounters on the local country club links. Even if fatigue from walking is insignificant in isolation, that does not dismiss the fact that fatigue, when combined with other circumstances, could affect outcomes on the PGA Tour, where the narrowest margins are often significant.[143] The *Olinger* district court analyzed the competitive advantage of using a cart, and it found "a strong possibility exist[ed] that on any particular day, such a competitive advantage might exist, and that it might be substantial."[144]

Such potential for advantage was considered a paramount issue in *Kuketz v. MDC Fitness Corporation*,[145] decided by a Massachusetts

138. *See PGA Tour, Inc.*, 121 S. Ct. at 1893-94. The majority discussed at length how the *Rules of Golf* did not prohibit the use of carts. *Id.* at 1894. These rules, however, were not at issue. Instead, the PGA Tour rules should have been the focus because carts were forbidden during tournament play.

139. The Court also discussed how carts were allowed in amateur golf and other professional golf tours. *Id.* at 1894-95. The majority reasoned that walking was not viewed as essential in these venues, so it was implausible for the PGA Tour to assert the contrary for its events. *See id.*

140. *See* Brief for Petitioner at 37, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (No. 00-24). The PGA Tour contended that the cumulative effect of fatigue induced by the walking rule often impacted a player's concentration, shot-making, and overall performance in a tournament. *Id.* at 4.

141. *PGA Tour, Inc.*, 121 S. Ct. at 1895-96. *See also* Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1250 (D. Or. 1998). It was also telling, yet ignored by the majority, that the foundational evidence used by the Ninth Circuit for its conclusions on fatigue was excluded by the *Olinger* trial court "for want of sufficient showing of reliability of underlying scientific principles." *Olinger*, 55 F. Supp. 2d at 933 n.4. In addition, the majority did not address the considerable evidence submitted by the USGA in *Olinger* that also suggested fatigue was indeed significant while golfing. *See id.* at 934-36.

142. *See* Petitioner's Brief at 37 n.25, *PGA Tour, Inc.* (No. 00-24). In 1997 the PGA Tour reported that the average score differential of the top one hundred players was 2.32 strokes per round for the whole year. *Id.*

143. *See id.* at 36-37.

144. *Olinger*, 55 F. Supp. at 936.

145. No. Civ. A. 98-0114-A, 2001 WL 993565 (Mass. Super. Ct. Aug. 17, 2001).

court after the ruling in *PGA Tour, Inc.*[146] In *Kuketz*, a disabled racquetball player who uses a wheelchair sued a fitness club under the ADA for not providing accommodation that would allow him to play in a league of non-disabled players.[147] Kuketz proposed that he be given two bounces of the ball before hitting it instead of the customary one bounce.[148] The court ruled that the essence of racquetball was to hit the ball before the second bounce, so changing this would create a fundamental alteration to the game.[149] The court upheld the club's right to have leagues governed by the sport's official rules whenever a disabled person wanted to participate with non-disabled persons.[150]

The *Kuketz* court further stated that even if the number of bounces was a peripheral part of the game, as the *PGA Tour, Inc.* majority had asserted with the walking rule in PGA golf, Kuketz could get an unfair advantage over non-disabled competitors because the modification could offset the disadvantage of using a wheelchair.[151] Accordingly, if such a modification was allowed, "no one could know whether [Kuketz] won because he was the superior player or because the allowance of two bounces more than offset his disadvantage in mobility."[152]

This same uncertainty will follow Casey Martin when he plays professional golf with the assistance of a cart. Martin requested the cart waiver to allow participation with non-disabled players. In the end no one will really know if the cart is more helpful than accommodating. The *Kuketz* court was willing to deny the accommodation on the mere chance that the disabled player could gain an advantage, but the *PGA Tour, Inc.* majority never broached this aspect because it believed the accommodation was reasonable.[153]

Both *Southeastern Community College v. Davis* and *PGA Tour, Inc.* raised the issue of whether organizations should be compelled to modify substantive requirements of established programs for disabled individuals.[154] The Court took dramatically different positions on the issue in each case. In *Davis*, the college provided a particular type of nursing preparation that required a certain set of skills.[155] Davis was

146. *See generally* Kuketz v. MDC Fitness Corp., No. Civ. A. 98-0114-A, 2001 WL 993565, at *2 (Mass. Super. Ct. Aug. 17, 2001).
147. *Id.* at *1.
148. *Id.*
149. *See id.* at *3.
150. *Id.* at *4. "The law permits leagues and clubs to organize baseball, golf, and basketball leagues that play their respective games in accordance with the game's official rules without running afoul of the ADA." *Id.*
151. *Id.* at *3. The court determined that Kuketz requested the second bounce because he did not have the same speed or mobility with his wheelchair as non-disabled players. *Id.*
152. *Id.*
153. *See generally* PGA Tour, Inc. v. Martin, 121 S. Ct. 1879, 1897 (2001).
154. Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979).
155. *See generally id.* at 413.

deaf and could not meet these requirements.[156] Although she had the ability to lip-read, Davis still could not safely perform many nursing functions.[157] Instead of mandating substantial modifications of the nursing program for her benefit, the Court stated that the college did not have to lower its standards to accommodate her.[158]

In *PGA Tour, Inc.*, the PGA Tour decided that walking between shots was an additional requirement needed to make its brand of golf more rigorous.[159] Martin's disability prevented him from fulfilling the walking requirement, which to the casual observer could be viewed as unnecessary. PGA Tour golf, however, assumes this requisite ability in order to meet the substantive requirements of its elite golf competitions. The cumulative effect of walking may impact the golfer's chance for success.[160] As a result, the requirement of walking was arguably as necessary to the PGA Tour as the requirement of hearing was to the college.

Davis could not perform all the requirements of the nursing program despite her handicap, and accordingly she was not allowed to complete the program. In *Davis*, the Court rejected the Fourth Circuit's analysis that the Rehabilitation Act applied to individuals such as Davis when one "would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap."[161] Instead, the Court sided with the district court's determination that the Rehabilitation Act only covered disabled individuals who could perform all requirements in spite of one's disability.[162] The *Davis* majority did not couch its determination on whether the standards at issue were substantial or peripheral; it was clear that no modification of standards was appropriate.[163]

It appears that the Court may now be endorsing the Fourth Circuit's approach because Martin could meet the PGA Tour's requirements in every respect but for his disability. He sought accommodation because his condition limited his ability to meet the

156. *See id.* at 401-02.

157. *See id.* at 401. To overcome this difficulty, Davis requested to have individual supervision when dealing directly with patients. *Id.* at 407. She further suggested that she should not be required to take certain mandatory courses due to her hearing problem. *Id.*

158. *See generally id.* at 413.

159. The PGA Tour estimated that a typical tour golfer walked about twenty-five miles during the four days of competition. Brief for Petitioner at 4, *PGA Tour Inc. v. Martin*, 121 S. Ct. 1879 (2001) (No. 00-24).

160. *See id.*

161. *Davis*, 442 U.S. at 406.

162. *Id.*

163. Again, the contrast between nursing and professional golf should be emphasized. Safety issues were an obvious concern in *Davis*, and lower standards could have jeopardized patient health. Given that fact, however, the Court did not categorize what standards could or could not be altered based on any type of importance scale. *See id.* Therefore, reliance by the *PGA Tour, Inc.* majority on a peripheral or substantial determination was misplaced by comparison.

specific walking requirements of the PGA Tour. According to Martin, he could not perform this task due to his disability.[164] Therefore, it would make sense under *Davis* that the PGA Tour should not be required to adjust its substantive requirements merely because Martin could not meet all of the requirements. The Court denied Davis' participation to protect the Rehabilitation Act from unauthorized extension.[165] Even though different statutes are involved, this desire to protect against over-expansion of legislation is apparently lessened now. By allowing Martin use of a cart, the Court arguably stretches the ADA to unauthorized limits, a practice previously rejected by the Court in *Davis* with the Rehabilitation Act.

Altering the substantive rules of a game goes against the very nature of professional sports competitions.[166] Every golfer has uneven skills and abilities, but giving Martin an accommodation for his because it is severe enough to be called a disability is unjust. Most professional golfers must perform through pain and malady at some point in their career.[167] Twisted knees, asthma, or bad backs are just some of the temporary ailments that can hamper a golfer's performance, but do not normally rise to the level of disability.[168] Golfers who suffer from these temporary physical problems could benefit from a cart, but must walk or withdraw from tournaments because short-term conditions are not covered by the ADA.[169] In these situations, allowing Martin to use a cart potentially gives him a competitive advantage.

Rules are rules. After all, games are "nothing but a set of manufactured rules."[170] Professional and amateur organizations have an obligation to ensure that competitions are fair and equal to everyone playing under those rules.[171] However, when the courts step in and decide a rule is not essential and may be modified for a disabled athlete, an organization is stripped of its power to govern the activities. In contrast, the *Kuketz* court gave legitimacy to an organization's ability to enforce the rules as contemplated in a competitive situation, even when considering someone with a disability.[172] Likewise, in *Davis*, the Court was willing to accept the college's determinations of

164. *See PGA Tour, Inc.*, 121 S. Ct. at 1885.
165. *See Davis*, 442 U.S. at 410.
166. *See* Brief for Amicus Curiae ATP Tour, Inc. & Ladies Prof'l Golf Ass'n at 7, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (No. 00-24).
167. Brief for Petitioner at 40, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (No. 00-24).
168. *See id.*
169. 42 U.S.C. § 12102(2) (1994).
170. Brief for Amicus Curiae ATP Tour, Inc. & Ladies Prof'l Golf Ass'n at 5, *PGA Tour, Inc.* (No. 00-24).
171. *See id.* at 8.
172. Kuketz v. MDC Fitness Corp., No. Civ. A. 98-0114-A, 2001 WL 993565, at *4 (Mass. Super. Ct. Aug. 17, 2001).

what standards were appropriate for its program.[173] The Court deferred to the college's expertise that lower standards could endanger patient safety.[174]

In *PGA Tour, Inc.* oral arguments, Justice Anthony Kennedy raised the question of whether the Court should give substantial deference to the PGA.[175] He stated that "we give deference to agencies all the time . . . . It's just an acknowledgement of who has the best expertise, who knows the most about it, who is best equipped to make the decision."[176] The majority opinion ignored information concerning the importance of walking in tournament golf supplied by the PGA Tour and the testimony of prominent professional golfers in *Olinger*.[177] The majority substituted its own determination of what constitutes the game of golf, and abandoned any hint of deference as was exhibited in *Davis*.

Many sports' rules could now potentially be subject to question.[178] Fairness may also be diminished because the playing field becomes a little more uneven as each rule falls by the wayside. *Kuketz* demonstrates that these challenges are inevitable and organizations should beware. The *Olinger* trial court correctly predicted that when the alteration inquiry moves past Ford Olinger (or Casey Martin), "the issue broadens and becomes far more difficult."[179] Courts are left in a quandary as the majority's only guidance is "surely . . . Congress intended" the courts to undertake such a superhuman task.[180] This guesswork cannot be the enforceable standards Congress envisioned.

Sports organizations must view every claim for waiver seriously and undertake the difficult task of balancing the athlete's skills and the modification required.[181] If an athlete does not like the result, he or she can ask a court to undertake the same impossible Herculean effort. The deference to an organization and its rules demonstrated by the *Kuketz* court hopefully gives organizations some assurance that courts may look seriously at the impact a modification could have on

173. *See generally* Southeastern Cmty. Coll. v. Davis, 442 U.S. 397, 413 (1979).

174. *See generally id.* at 407.

175. Official Tr. at 25, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (No. 00-24). Justice Kennedy posited that "we get into a lot of unexpected areas around here . . . . [so] don't we have to give substantial deference to the sporting authority?" *Id.*

176. *Id.* at 25-26.

177. *See* Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926, 934-35 (N.D. Ind. 1999).

178. *See* Robert Robb, *PGA Case Puts All Sport and All Rules in Jeopardy*, ARIZ. REPUBLIC, June 10, 2001, at V5.

179. *Olinger*, 55 F. Supp. 2d at 937.

180. *PGA Tour, Inc.*, 121 S. Ct. at 1897-98. A USGA expert stated that the only true way to tell if an accommodation would give a competitive advantage to the disabled was to have the golfer walk and his clone ride in a cart. Brief for Amicus Curiae United States Golf Ass'n at 20, PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001) (No. 00-24).

181. *See* Robb, *supra* note 178, at V5.

the activity. If this deference were to continue, organizations could still ensure fair competition under common rules for all. Uncertainty remains, however, because organizations will not know whether or not to defend a rule as "essential" because *PGA Tour, Inc.* has neutered their judgment. Professional and amateur sports organizations are left wondering what future modifications will be envisioned by disabled athletes or mandated by the courts to level the playing field under the power of the ADA.[182]

V. Conclusion

Casey Martin's condition is serious, tragic, and evokes sympathy, but his claim simply was not cognizable under the ADA because the requested accommodation potentially affects the outcome of PGA tournaments. Professional sports organizations should be allowed to regulate their activities under uniform rules to ensure fairness to all competitors. In *PGA Tour, Inc.* the United States Supreme Court misapplied the Americans with Disabilities Act to require the PGA Tour to modify a substantive rule of play to accommodate a disabled professional golfer.[183]

Following his Supreme Court victory, Martin stated, "[n]ow I'm prepared to play golf, just like everybody else."[184] The only problem is that he does not play the game like everyone else; he uses a cart. Whatever success Martin may enjoy from this point forward will face scrutiny along with celebration. As a result, use of a cart has the potential to punctuate his entire career. Martin may be ready to play, but is he ready to face the inevitable asterisk that many will place beside any accomplishment he achieves?

182. *See* George F. Will, *Killing Standards with Kindness: The Supreme Court Ruling that Meddles in Golf Shows the Court is Drunk on "Compassion"*, Pittsburgh Post-Gazette, June 4, 2001, at A11.

183. It is important to remember that the thrust of the arguments in this case was whether the ADA compelled the PGA Tour to allow Martin use of a cart. An altogether different question was whether the PGA Tour should allow him use of the cart. That question is just as uncertain, but surely the humane and compassionate answer is yes.

184. *See Golf Cart Ruling Oversteps ADA*, Chicago Sun-Times, June 3, 2001, at 33.