No. 00-24

In the Supreme Court of the United States

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE UNITED STATES GOLF ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

LEE N. ABRAMS
JAMES C. SCHROEDER
ROBERT M. DOW, JR.
Mayer Brown & Platt
190 South LaSalle St.
Chicago, Illinois 60603
(312) 782-0600

ROY T. ENGLERT, JR.
Counsel of Record
Mayer Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

JOHN W. VARDAMAN
Williams & Connolly
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

Counsel for Amicus Curiae United States Golf Association

QUESTIONS PRESENTED

1. Whether Title III of the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq.*, regulates standards established for competitors (here, professional golfers) in athletic competitions held at places of public accommodation.

2. Whether, if so, Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition in order to accommodate disabled competitors.

RULE 29.6 STATEMENT

Amicus United States Golf Association is a private, not-for-profit association of member golf clubs and golf courses.

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INTEREST OF THE AMICUS CURIAE[1]

By the common and voluntary consent of the golf community, amicus United States Golf Association ("USGA") is regarded as the governing body of golf within the United States. The USGA is concerned with virtually every aspect of the game of golf, especially preserving the integrity of the game and the conditions under which it is played. Among other things, the USGA formulates and issues the Rules of Golf. Petitioner PGA Tour is a separate entity (unrelated to the USGA) that conducts a series of professional golf tournaments each year. Petitioner voluntarily follows the USGA's Rules of Golf.

Each year, the USGA conducts national championships in each of thirteen designated categories (*e.g.*, U.S. Open, U.S. Women's Open, U.S. Senior Open, U.S. Amateur). Among the many professional and amateur golf competitions held each year in the United States, the USGA's championships are unique. There is only one national championship annually for each category of competitors, and the rules of competition for each championship are uniform for all competitors.

The U.S. Open is the national championship of golf in the United States, and, as the Seventh Circuit noted in a case similar to this one, it is by "consensus * * * the greatest test in golf." *Olinger* v. *USGA*, 205 F.3d 1001, 1003 (2000), petition for cert. filed , 69 U.S.L.W. 3235 (U.S. Sept. 20, 2000) (No. 00-434). The USGA selects difficult golf courses for the U.S. Open, and compounds the difficulty by making the course conditions extremely challenging. Moreover, because the U.S. Open is always held in June, "Open week is very often hot and humid, the pressure builds each day, and every mistake is magnified, especially on Sunday afternoon," when the final round is played (unless there is a tie, which necessitates a playoff on Monday).

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the amicus curiae has made a monetary contribution to the preparation and submission of this brief.

JOHN FEINSTEIN, A GOOD WALK SPOILED 333 (1995). "It is often said that the toughest eighteen holes in golf are the last eighteen at a U.S. Open," because "[t]he combination of the heat, the rough, the greens, and the pressure leaves everyone drained even before the last round begins. Once it starts, it only gets worse." *Id.* at 352. In 31 of the 100 U.S. Opens played to date, two or more competitors were tied at the end of regulation play, so that a playoff was needed to determine the champion. Twenty-five other U.S. Opens have been won by a single stroke.

The U.S. Open is not a mere shot-making contest. Rather, at its core, it is athletic competition at the highest level. Walking the course is (and always has been) a condition of the competition in the U.S. Open and its Qualifyings; players have always walked during the competition, since the first U.S. Open in 1895.[2] The USGA requires the competitors in the U.S. Open (and in ten of its twelve other national championships) to walk the course because physical endurance and stamina are very important parts of the test to which the competitors are subjected in championship-level golf competitions.[3]

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[2] After the Oregon magistrate judge ruled in favor of respondent, the USGA, acting on an *ad hoc* basis through its Championship Committee, waived the walking requirement for respondent in the U.S. Open and its Qualifyings during the pendency of this case. The USGA chose this course of action out of deference to the magistrate judge's ruling. Although the ruling was not legally binding on it, the USGA believed that respect for the judicial system made voluntary deference appropriate pending further review. Except for this one instance, the USGA has never granted an individual waiver of the rule requiring walking during the U.S. Open and its Qualifyings.

[3] The USGA has permitted competitors to use golf carts in the Senior Amateur and the Senior Women's Amateur championships because of the limited availability of caddies during the school year (when those events are played) and the age of the competitors. All of the competitors in those two championships are allowed to use carts,

(continued...)

By virtue of its status as the governing body of golf in the United States, the USGA has a significant interest in the outcome of this case. The USGA's interest is heightened by its own involvement in litigating the very questions that are presented in this case. In *Olinger*, a disabled professional golfer sued the USGA, seeking to use a golf cart in the U.S. Open and its Qualifyings. The district court held that the USGA need not allow Olinger to use a golf cart, because doing so would fundamentally alter the nature of the competition and would impose an undue administrative burden on the USGA. *Olinger* v. *USGA*, 55 F. Supp. 2d 926 (N.D. Ind. 1999). The Seventh Circuit affirmed. *Olinger* v. *USGA*, 205 F.3d 1001 (7th Cir. 2000). Olinger then filed a petition for a writ of certiorari, in which the USGA acquiesced. That petition remains pending. In addition, in May 2000 (after the Ninth Circuit and the Seventh Circuit issued their respective decisions), another disabled professional golfer sued the USGA, seeking to use a golf cart in the U.S. Senior Open and its Qualifying. *Jones* v. *USGA*, No. A-00-CA-278 JN (W.D. Tex. Aug. 30, 2000) (granting permanent injunction compelling USGA to permit plaintiff to use a golf cart), appeal pending (5th Cir. No. 00-50850).

The USGA receives applications from eligible golfers for each of its national championships. This year, the USGA received more than 8,400 applications for the U.S. Open, more than 3,000 applications for the U.S. Senior Open, and approximately 26,000 applications for its other eleven national championships combined. Most of the applicants for the U.S. Open and the U.S. Senior Open competed in Local and/or Sectional Qualifying for an opportunity to earn one of the non-exempt places in a field of 156 competitors. (Slightly more than one-third of the competitors in the field for the U.S. Open and the U.S. Senior Open are exempt from qualifying, based on past success as measured by published criteria.) For the U.S. Open,

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[3] (...continued)
because uniform rules are necessary for fair competition.

Local Qualifying takes place in mid-May, with one 18-hole round at each of nearly 100 qualifying sites around the country. Of the more than 8,000 competitors who participate in Local Qualifying, approximately 750 advance to Sectional Qualifying, which is conducted at 12 sites across the country in June; each competitor in Sectional Qualifying plays 36 holes in one day.

Moreover, because nearly 40,000 applicants seek entry into the USGA's national championships each year, the USGA would face an enormous administrative burden if the Ninth Circuit's ruling were upheld. Cardiologist Dr. James Rippe, founder and director of the Center for Clinical and Lifestyle Research and one of the nation's leading experts on the physiology of walking, testified in *Olinger*. He analyzed two hypothetical comparable golfers, one using a golf cart and the other walking, under conditions of heat and humidity analogous to those experienced in championship-level competitions. Dr. Rippe determined that the competitor who walked would expend more calories and suffer greater degradation of hand-eye coordination, dexterity, cognitive skills, and judgment than the one who used a golf cart, and that increases in heat, humidity, or hills would increase the physiological stress on the walker. Dr. Rippe's uncontroverted testimony also demonstrated that the specific inquiry required by the Ninth Circuit is literally impossible to perform: the only way to determine whether a particular individual competitor gains an advantage by using a golf cart is to run a battery of tests with that individual and his clone.[4] That

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[4] Dr. Rippe did not testify in *Martin*. Moreover, in *Olinger*, the district court excluded the proffered testimony of Dr. Gary Klug, the key expert on whose testimony the Oregon magistrate judge and the Ninth Circuit relied in ruling in favor of Martin. The district court excluded Dr. Klug's contemplated testimony regarding the physiological effects of walking versus using a golf cart as unreliable, under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999) — a case de-

(continued...)

manifestly cannot be done. Consequently, if the Ninth Circuit's decision is upheld, the entities conducting championship-level athletic competitions will be forced to render scientific judgments that the best trained scientists are not competent to make, and federal courts will be forced to review those judgments.

SUMMARY OF ARGUMENT

I. The threshold question in this case is whether Title III of the ADA applies to the rules of competition in championship-level golf competitions. Because there is not even a hint in the text or the legislative history of the ADA that Congress intended Title III to apply to championship-level athletic competitions, respondent has seized on the location of the competition — a golf course — to argue that the rules of competition are subject to Title III because the statute lists a "golf course" as a "place of public accommodation." But, as demonstrated below, a golf course is not a "place of public accommodation" at all times and for all purposes. Respondent does not seek access to the golf courses used in PGA Tour competitions as a spectator, or as a person playing a casual round of golf. To the contrary, respondent asserts that the PGA Tour must make an exception to the uniform rules of its competitions so that he may use a golf cart. Title III does not apply in this circumstance, because neither the competitions themselves, nor the competition areas of the golf courses used in those competitions, are "place[s] of public accommodation."

Title III of the ADA lists twelve categories of "place[s] of public accommodation," none of which includes the competition areas of championship-level golf competitions. The competitors in championship-level golf competitions are not using the golf courses as "place[s] of exhibition or entertainment" (42 U.S.C. § 12181(7)(C)), "place[s] of exercise or recreation" (*id.*

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[4] (...continued)
cided after the district court proceedings in the present case, but before the USGA moved to exclude Dr. Klug's proffered testimony in *Olinger*. See *Olinger* v. *USGA*, 52 F. Supp. 2d 947 (N.D. Ind. 1999).

§ 12181(7)(L)), or places of any other category covered by Title III. The mention of golf courses in 42 U.S.C. § 12181(7)(L) does not require the application of Title III to the *competition* areas of golf courses during championship-level competitions. This Court construes terms in a list according to their shared attributes, "to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). Here, Congress has identified the shared attribute that must guide construction of the statute: only a "place of exercise or recreation" (whether listed or unlisted) is covered.

To be sure, a golf course is covered by the ADA on days when golfers are using it as a "place of exercise or recreation." But during the U.S. Open or a PGA Tour event, the competition areas of the golf course are used for championship-level competition, with large amounts of prize money at stake. Title III does apply to the *spectator* areas of a championship-level golf competition, because those areas (*i.e.*, the areas outside the gallery ropes that separate the spectators from the competitors) properly may be described as "place[s] of exhibition or entertainment." But none of the categories of places listed in Title III encompasses the *competition* areas inside the gallery ropes.

As the Seventh Circuit explained in *Olinger*, under the Justice Department regulations implementing Title III, "an entity may simultaneously be both a place of public accommodation and a place that is not fully subject to Title III — in other words, a 'mixed use' facility." 205 F.3d at 1004. The regulations provide that "to the extent that a mixed use facility 'is not open to the general public,' it 'is not subject to the requirements for public accommodations.'" *Ibid*. (quoting 28 C.F.R. ch. 1, pt. 36, App. B, at 624). Just as "in a large hotel that has a separate residential apartment wing, the residential wing would not be covered by the ADA," 28 C.F.R. ch. 1, pt. 36, App. B, at 623, the golf courses used in championship-level competitions are mixed-use facilities: the competition areas, from which the public is excluded and to which Title III does not apply, are a private enclave that is separate from the place

of public accommodation subject to Title III (the spectator areas).

II. Even if Title III extends to the competition areas of championship-level athletic competitions, the statute does not require the PGA Tour or the USGA to grant a selective waiver of the uniform rule that all competitors must walk the course in championship-level competitions. Title III does not require entities to make accommodations that would "fundamentally alter the nature of" their enterprise (42 U.S.C. § 12182(b)(2)(A)(ii)), or that would impose an "undue financial and administrative burden" (*Olinger*, 205 F.3d at 1006 (citing *School Bd.* v. *Arline*, 480 U.S. 273, 287 n.17 (1987), and other authorities)). Respondent seeks an accommodation that would do both. The relevant enterprise here is championship-level golf competition. Skilled shotmaking, physical endurance and stamina, and the ability to overcome fatigue are fundamental to that competition. A set of rules, applied uniformly to all competitors, also is fundamental to the integrity of the competition.

The USGA and the PGA Tour have determined, reasonably and in good faith, that requiring all competitors to walk the course best accomplishes the objective of creating a rigorous and objectively fair championship-level golf competition. The Court should defer to that rational determination. See, *e.g.*, *NCAA* v. *Board of Regents*, 468 U.S. 85, 101-02 (1984); *Brookins* v. *International Motor Contest Ass'n*, 219 F.3d 849, 853 (8th Cir. 2000); *Gunter Harz Sports, Inc.* v. *United States Tennis Ass'n*, 665 F.2d 222, 223 (8th Cir. 1981).

Even if it were theoretically possible to determine accurately which competitors would gain an unfair advantage over the rest of the field by being allowed to use a cart — and it is not — a court-imposed mandate requiring such determinations would impose an extremely heavy burden. Amicus USGA, for example, receives a total of almost 40,000 applications every year for the thirteen national championships that it conducts annually. The USGA is not equipped to undertake the medical evaluations that would be required to process individual waiver

requests from even a small fraction of those applicants, and (as the *Olinger* courts held) the ADA does not require that the USGA "'develop a system and a fund of expertise'" to do so. *Olinger*, 205 F.3d at 1007 (quoting district court opinion).

III. Championship-level golf is the context in which this case arises, but this Court's decision undoubtedly will have broad ramifications for all championship-level athletic competitions. In holding that the ADA requires the PGA Tour to grant an individual waiver of a substantive rule of its competitions, the Ninth Circuit has extended the reach of the ADA radically. There is not even a hint in the text, history, or purposes of Title III that Congress intended that statute to apply to competitors in championship-level athletic competitions. At their core, those competitions test the ability of people of different physical abilities to compete against each other under uniform rules. Equalization of physical attributes cannot be the guiding maxim for championship-level athletic competitions. The very purpose of such competitions is to ascertain, recognize, and reward physical excellence in the skills being tested. If the Ninth Circuit's decision is upheld, federal courts will be called on in myriad contexts to make the kinds of determinations that not even physicians, much less sports governing bodies, are capable of making with any degree of confidence, let alone precision. There is no reason to inject the federal judiciary into the micromanagement of championship-level athletics, because there is no evidence that Congress intended such a result.

ARGUMENT

I. TITLE III OF THE ADA DOES NOT APPLY TO THE SUBSTANTIVE RULES OR THE COMPETITION AREAS OF CHAMPIONSHIP-LEVEL ATHLETIC COMPETITIONS.

A. Initially, this Court must determine whether Title III of the ADA applies to the substantive rules, or the competition areas, of championship-level golf competitions. "Congress enacted the ADA to ensure that individuals with disabilities fully enjoy the goods, services, privileges, and advantages

available indiscriminately to other members of the general public." *Olinger*, 205 F.3d at 1004; accord *Carparts Distrib. Ctr., Inc.* v. *Automotive Wholesaler's Ass'n*, 37 F.3d 12, 20 (1st Cir. 1994). The ADA's mandate extends to three broad, yet distinct, areas: employment (Title I), public services (Title II), and places of public accommodation (Title III). This case involves only Title III.

Title III provides 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." 42 U.S.C. § 12182(a). The text of the statute, its implementing regulations, and the case law all help in resolving the question whether, and to what extent, Title III applies to the substantive rules, or to the competition areas, of a championship-level golf competition.

The ADA defines the following entities as "place[s] of public accommodation" under Title III (42 U.S.C. § 12181(7)):

> (A) an inn, hotel, motel, or other place of lodging * * *;
> (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.

None of these categories even remotely suggests that Congress intended Title III to apply to the substantive rules, or the competition areas, of championship-level athletic competitions. Indeed, only two categories conceivably could apply to *any* aspect of a championship-level golf competition such as the U.S. Open or a PGA Tour event. Title III applies to some venues that are sometimes used to conduct championship-level athletic competitions — including gymnasiums, bowling centers, and golf courses — when those venues are used as "place[s] of exercise or recreation." 42 U.S.C. § 12181(7)(L). But the mere reference to a "golf course" in this subsection does not mean that Title III requires the PGA Tour or the USGA to make an exception to the uniform rules of a championship-level golf competition. Although a golf course at which a U.S. Open or a PGA Tour event is played may be a place of "exercise or recreation" during most of the year, it is *not* such a place on the days when it is being used for the conduct of the U.S. Open or a PGA Tour event. On those days, the competitors (including respondent) are not using the course to play a casual round of golf. Rather, they are using the course to compete for a championship, and for very substantial amounts of prize money. The fact that the competition takes place on a golf course, where spectators are present, does not convert the competition itself,

or the competition areas of the golf course, into a "place of public accommodation."

This case would be open and shut if subsection (7)(L) referred to "a gymnasium, health spa, bowling alley, golf course, or other place *to the extent that it is used as a place* of exercise or recreation." Although the italicized words do not appear in the statute, settled principles of statutory construction counsel that the statute should be so interpreted. "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied * * * to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). With or without invoking the Latin phrase, this Court has used that principle to give limiting constructions to such broad and seemingly unqualified terms as "injunction," "manipulative," and "any plan, fund, or program * * * maintained for the purpose of providing * * * vacation benefits."[5]

The Court's technique in interpreting statutory lists is to determine the shared attribute of the items in the list: "That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."

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[5] *Third Nat'l Bank* v. *Impac Ltd.*, 432 U.S. 312, 322-323 & n.16 (1977) (preliminary injunction against bank's foreclosure on real property was not an "injunction" within the meaning of a statute prohibiting an "attachment, injunction, or execution" against a national bank); *Schreiber* v. *Burlington Northern, Inc.*, 472 U.S. 1, 8 (1985) (action that allegedly distorted the market for a stock was not, in the absence of misrepresentation or nondisclosure, "manipulative" within the meaning of a statute prohibiting "fraudulent, deceptive, or manipulative acts or practices"); *Massachusetts* v. *Morash*, 490 U.S. 107, 114-115 (1989) (policy of paying discharged employees for unused vacation time is not a "plan, fund, or program * * * maintained for the purpose of providing * * * vacation benefits"). *Morash* reiterated that the Court is not "guided by a single sentence or member of a sentence" in a statute. *Id.* at 115 (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987)). See also *Dole* v. *Steelworkers*, 494 U.S. 26, 36 (1990).

Beecham v. *United States*, 511 U.S. 368, 371 (1994). Here, Congress itself has identified the shared attribute: subsection (7)(L) is intended to reach only "place[s] of exercise or recreation." When respondent is competing for prize money and a championship, he is not using the golf course for "exercise or recreation."

Title III also applies to "place[s] of exhibition or entertainment," and thus covers persons who attend sporting events as spectators. 42 U.S.C. § 12181(7)(C). But even if a golf course being used for a championship-level competition is a place of "exhibition or entertainment" for the spectators, that is not its function *for the competitors*. The spectators are separated from the competitors by the gallery ropes, and the spectators are not permitted to enter the competition areas of the golf course — any more than they are permitted on stage during the performance of a concert or an opera. The area inside the ropes is off limits to spectators. This, of course, is true with respect to any championship-level athletic competition or professional entertainment — whether it is an NFL game at Texas Stadium, a baseball game at Wrigley Field, a basketball game at Madison Square Garden, or a performance of *Ariadne auf Naxos* at the Kennedy Center. Title III does not require a change in the structure of a theatrical performance or in the rules of a competition. Even if the Folger Elizabethan Theatre must install ramps so that patrons in wheelchairs may view a performance, Title III does not require the theater to omit the sword fight from *Hamlet* in order to accommodate an actor in a wheelchair. Likewise, Title III does not affect the criteria by which the actors are selected or the requirements of the roles that they perform. During a PGA Tour event, respondent is using the competition areas of golf courses not as a "place of exhibition or entertainment," but rather as a place of championship-level athletic competition. Consequently, subsection (7)(C) does not apply here.

B. The Seventh Circuit properly viewed with skepticism the concept that the inclusion of a "golf course, or other place of exercise or recreation," in the statutorily enumerated categories of places of public accommodation evinced Congress's intent to

extend the ADA to the competition areas of championship-level athletic competitions. As the Seventh Circuit noted, under the Justice Department regulations implementing Title III, "an entity may simultaneously be both a place of public accommodation and a place that is not fully subject to Title III — in other words, a 'mixed use' facility." 205 F.3d at 1004. In addition, as the Seventh Circuit further observed, the Justice Department has determined that, "to the extent that a mixed use facility 'is not open to the general public,' it 'is not subject to the requirements for public accommodations.'" *Ibid*. (quoting 28 C.F.R. ch. 1, pt. 36, App. B, at 624).

Although the Seventh Circuit ultimately decided *Olinger* without resolving this issue, both the regulations implementing the ADA and the decisions applying the ADA support the proposition that a golf course is a mixed-use facility when it is used for a championship-level competition. The regulations — which are entitled to controlling weight unless they are arbitrary and capricious (*Chevron U.S.A. Inc*. v. *NRDC*, 467 U.S. 837, 844 (1984)) — provide expressly for a private enclave in a place of public accommodation. Under Title III, "a private entity that meets the regulatory definition of public accommodation could also own, lease or lease to, or operate facilities that are not places of public accommodation." 28 C.F.R. ch. 1, pt. 36, App. B at 616. As the regulations also make clear, the mandates of Title III "obligate a public accommodation only with respect to the operations of a place of public accommodation." *Ibid*.

The Justice Department regulations provide examples of "[m]any facilities" that are classified as "mixed use" facilities. 28 C.F.R. ch. 1, pt. 36, App. B at 623. For example, "in a large hotel that has a separate residential apartment wing, the residential wing would not be covered by the ADA." *Ibid*. If the apartment wing in a hotel is closed to the general public, that wing is not subject to Title III, even though the rest of the hotel is. *Ibid*. Such a facility is predominantly a place of public accommodation (the hotel) containing a private enclave ("the residential apartment wing") that is not covered by Title III.

Other examples drawn from the same regulations further illuminate the commonsense proposition that a single facility

can be a place of public accommodation for some purposes and private for other purposes. The regulations state that a movie studio that provides public tours is a mixed-use facility:

> If a tour of a commercial facility that is not otherwise a place of public accommodation, such as * * * a movie studio production set, is open to the general public, the route followed by the tour is a place of public accommodation and must be operated in accordance with the rule's requirements for public accommodations. The place of public accommodation defined by the tour does not include those portions of the commercial facility that are merely viewed from the tour route. * * * If the tour is not open to the general public, but rather is conducted, for example, for selected business colleagues, partners, customers, or consultants, the tour route is not a place of public accommodation and the tour is not subject to the requirements for public accommodations.

Id. at 624. The upshot of these regulations, of course, is that only those portions of a mixed-use facility that are open to the public come within the scope of Title III of the ADA.

C. Notwithstanding the plain text and commonsense construction of these regulations, the Justice Department's amicus brief to the Ninth Circuit contended that "there is no basis for carving out a 'private' zone of a place of public accommodation that would fall outside the coverage of Title III." Brief for the United States as Amicus Curiae in *Martin* v. *PGA Tour, Inc.*, No. 98-35309, at 12 (9th Cir.) ("DOJ 9th Cir. Br."). That brief asserted that, "[a]lthough the regulations provide that portions of a non-covered entity may be covered by Title III, no such regulations provide that portions of a covered entity may be exempt from coverage." *Id*. at 23-24. The brief also asserted that the hotel "facility" described in the regulations "is really two separate entities; they are not 'zones' of a single place of public accommodation." *Id*. at 23-24 n.16.

The Justice Department's effort, in effect, to promulgate new regulations in a brief cannot be credited. Informal agency interpretive positions are not entitled to *Chevron*-style deference. See *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1662

(2000) ("[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all * * * lack the force of law," unlike agency interpretations "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking"). *Christensen* makes clear that even if an agency is interpreting its own regulation, the agency's interpretation is not entitled to deference if the regulation is clear. To the contrary, if the regulation is clear, it must govern. Any other rule would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.* at 1663 (citing *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)).

As Chief Judge Posner has written, a position advanced in a brief "cannot claim much democratic legitimacy to set over against the intent of Congress so far as it can be gleaned from the usual interpretive sources," even when the agency has *not* formally addressed an issue on which it takes a position in litigation. *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999), cert. denied, 120 S. Ct. 845 (2000). The agency's litigation position is entitled to even less consideration when it contradicts the plain meaning of a regulation and the construction of a statute that is strongly indicated by settled canons. Even though (i) the Justice Department's own regulations refer to a "residential apartment wing" of a large hotel and (ii) the plain and ordinary meaning of the term "wing" is a "*part of a building*, etc., extended in a certain direction" (THE OXFORD DESK DICTIONARY AND THESAURUS 923 (American ed. 1997) (emphasis added)), the Department's brief in the Ninth Circuit insisted that the "facility is really two separate entities." DOJ 9th Cir. Br. 24 n.16. This interpretation cannot be squared with the regulations as written. If the Department wishes to rewrite the applicable regulations, it must use the required formal procedures to do so; only then can courts be certain that the new regulatory commands are not merely the agency's "convenient litigating position" (*Bowen* v. *Georgetown Univ. Hosp.*,

488 U.S. 204, 213 (1988)), but instead are the product of its "fair and considered judgment"(*Auer*, 519 U.S. at 462).[6]

D. In view of the plain text of the Justice Department regulations, it is not surprising that case law under the ADA recognizes that a mixed-use facility can exist. For example, in *Jankey* v. *Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174 (C.D. Cal. 1998), aff'd, 212 F.3d 1159 (9th Cir. 2000), the plaintiff sued a movie studio under the ADA, alleging that certain facilities at the studio's production lot were inaccessible to disabled persons. The court held that the production lot itself, a commissary, a store, and an automated teller machine located on the lot were *not* "places of 'public accommodation.'" *Id*. at 1184. In reaching that conclusion, the court quoted extensively from the Justice Department regulations, observing that

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[6] In addition to attempting to rewrite its own regulations, the Justice Department tried to justify its radical proposed extension of Title III by invoking "the ADA's broad remedial purpose and the well-settled rule that such statutes are interpreted expansively." DOJ 9th Cir. Br. 19; see also *id*. at 23 (attempting to justify the Department's argument that a predominantly private place may have a public enclave, while a predominantly public place may not have a private enclave, on the ground that such a conclusion "is fully consistent with the broad reach of a remedial statute"). That "rule" — which this Court has described as the "last redoubt of losing causes" (*Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995)) — has no application if the statute and the regulations are clear. Indeed, this Court has stressed that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987); see also *East Bay Mun. Util. Dist.* v. *Department of Commerce*, 142 F.3d 479, 484 (D.C. Cir. 1998) ("We have recently expressed our general doubts about the canon that 'remedial statutes are to be construed liberally,' since virtually any statute is remedial in some respect."); *Bushendorf* v. *Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir. 1993) ("Remedial statutes like other statutes are typically compromises, and a court would upset the compromise if it nudged such a statute closer to the victim side of the line than the words and history and other indications of the statute's meaning pointed").

> "[m]ixed use" facilities can also exist, consisting of an exempt facility of which a portion is a public accommodation. That portion, and only that portion, will therefore be subject to the ADA. * * * Conversely, a public accommodation may contain within itself a portion which is an "exempt area."

Id. at 1179. The court then addressed the question whether the facilities to which the plaintiff sought access were "'available indiscriminately to other members of the general public,' as required for a public accommodation" (*id*. at 1181), and answered in the negative in each instance. *See id.* at 1181-84.[7]

Similarly, in *Louie* v. *Ideal Cleaners*, 1999 WL 1269191 (N.D. Cal. Dec. 14, 1999), the court recognized that the "mixed use" facility concept encompasses private enclaves within a public accommodation as well as public enclaves within an otherwise private facility. In *Louie*, the plaintiffs sought access to the restroom at a dry cleaning establishment. The court stated that "[i]t is undisputed that the dry cleaners itself is a public accommodation" under § 12181(7)(F) of the ADA, but ruled that, "[u]nder the 'mixed use' analysis of *Jankey*, the employee-only restroom in the back of the dry cleaners is not a public accommodation even though the dry cleaners itself is a public accommodation." 1999 WL 1269191, at *1. As the court

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[7] In addition to being fully consistent with the ADA and its implementing regulations, the *Jankey* court's holding — that a primarily exempt facility with a limited public component and a primarily public facility with a limited private component are flip sides of the same coin for purposes of Title III analysis — also comports with common sense. Whether the public/private division within a given mixed-use facility is 60/40, 40/60, or any other ratio does not change the overarching principle under the ADA, pursuant to which compliance is mandated "only with respect to the operations of a *place* of *public* accommodation." 28 C.F.R. § 36.102(b)(2) (emphasis added). For a championship-level golf competition, the area from which spectators are excluded often will be larger than the area that is open to spectators.

noted, "the restrooms are not made available to the public and are only for the use of employees." *Id*. at *2.

E. Under the principles discussed above, the competition areas of a championship-level athletic competition are not a place of public accommodation within the meaning of Title III. At a championship-level golf competition, there is a clear delineation between the competition areas and the spectator areas. Spectators are not allowed inside the gallery ropes that separate the competitors, and the competition areas, from the spectators. Because access to the competition areas is not "available indiscriminately to * * * members of the general public," *Olinger*, 205 F.3d at 1004, those areas are not subject to Title III.

In rejecting petitioner's argument that the golf courses used in PGA Tour events are mixed-use facilities, the Ninth Circuit analogized the competition for entry to the field in a PGA Tour event to the competition for admission to elite private universities. Pet. App. 7a. On the basis of that comparison, the Ninth Circuit concluded that "the fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation." *Ibid*. The Ninth Circuit's analysis was incomplete, however, because it failed to analyze the comparison in light of the language of Title III itself. Whether a particular facility is a public accommodation, a mixed-use facility, or a purely private facility is governed first and foremost by the relevant statutory language. Title III, by its terms, covers "secondary, undergraduate, or postgraduate private school[s], or other place[s] of education." 42 U.S.C. § 12181(7)(J). Just as golf courses are covered only as places of exercise or recreation, private schools are covered only as places of education. Thus, Title III applies unambiguously to students who seek access to private schools as a place of education, even if those students have been selected on the basis of rigorous criteria. However, the Ninth Circuit did not consider the possibility that, depending on the circumstances, a private school facility could be a mixed-use facility for ADA purposes — if, for example, it included both classrooms (which would be covered as "place[s] of education") and living quarters for faculty (which would not be cov-

ered). This configuration would be precisely analogous to the hotel with a private residential wing, or to a golf course with separate spectator areas and competition areas.

Moreover, the cases on which the Ninth Circuit based its holding that Title III applies to the competition areas of championship-level athletic competitions do not support that holding. In fact, *Independent Living Resources* v. *Oregon Arena Corp.*, 982 F. Supp. 698 (D. Or. 1997), modified, 1 F. Supp. 2d 1159 (D. Or. 1998) (cited at Pet. App. 5a), is fully consistent with the USGA's reading of Title III and its implementing regulations. In that case, the court held that executive suites in a sports arena were places of public accommodation. The executive suites, as the court recognized, are "merely an updated version of the 'box seats' that have long been available at many ballparks." *Id*. at 759. Such executive suites are used by spectators, not competitors, and thus are analogous to the spectator areas outside the ropes at the U.S. Open. The NCAA cases cited by the Ninth Circuit — *Bowers* v. *NCAA*, 9 F. Supp. 2d 460 (D.N.J. 1998), *Tatum* v. *NCAA*, 992 F. Supp. 1114 (E.D. Mo. 1998), and *Ganden* v. *NCAA*, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (cited at Pet. App. 5a) — also are inapposite. Those cases concerned eligibility requirements, rather than conditions of a competition. The plaintiffs there sought waivers of threshold GPA or test score requirements, not changes in the actual rules of athletic competitions. In other words, those cases had nothing to do with what happened once the competitions began "inside the ropes." Respondent is eligible to compete under the same rules that apply to all of the competitors — and altering those rules for respondent's benefit would fundamentally alter the competition, as we show next.

II. PERMITTING AN INDIVIDUAL COMPETITOR TO USE A GOLF CART WOULD FUNDAMENTALLY ALTER THE NATURE OF A CHAMPIONSHIP-LEVEL GOLF COMPETITION.

A. Even where the ADA applies, it does not require a defendant to modify its "policies, practices, or procedures" if the proposed modification would "fundamentally alter the nature of" the defendant's "goods, services * * * or

accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii). Thus, "the ADA does not require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination." *Olinger*, 205 F.3d at 1005.

The Ninth Circuit's approach to the fundamental alteration question is inherently flawed. The Ninth Circuit requires the PGA Tour to show that the level of fatigue that respondent would experience using a cart would be less than that experienced by hypothetical "able-bodied competitors" who walk the course. See Pet. App. 10a; see also *id*. at 36a. No other court of appeals has even remotely suggested that the ADA requires this type of purportedly precise calibration.

The Ninth Circuit's decision forces the PGA Tour to change its basic nature by applying different rules to different competitors in a championship-level golf competition. There is no statutory basis for the Ninth Circuit's determination that the PGA Tour must change its rules in a way that the PGA Tour reasonably believes would give one competitor an advantage over others. As Dr. Rippe, a nationally recognized expert in the physiology of walking, testified in *Olinger*, a competitor who uses a golf cart suffers less fatigue and less degradation of his small motor skills during a round of golf than a competitor who walks — and these advantages are magnified in hot, humid weather or on a hilly golf course. Moreover, the Ninth Circuit's approach is completely unworkable in practice, because it requires an entity conducting a championship-level golf competition to make scientific comparisons between (i) golfers with various disabilities and (ii) hypothetical "able-bodied competitors" — comparisons that highly credentialed scientists believe are literally impossible to make. As Dr. Rippe testified in *Olinger*, the only way to know for certain whether a disabled golfer would get a physiological advantage from using a golf cart would be to test the disabled golfer and his clone on a golf course, with one walking and the other using a cart. Neither the ADA nor any other law requires such an impossible inquiry. See *Perry* v. *Local Lodge 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983) ("the law does not require the impossible"); cf. *Rosen* v.

Ciba-Geigy Corp., 78 F.3d 316, 319 (7th Cir. 1996) ("Law lags science; it does not lead it").

B. As the *Olinger* courts correctly observed, the purposes underlying the rule requiring that all competitors walk the course in a championship-level golf competition are to inject stamina as an element of the competition and to preserve uniform rules for all competitors. See *Olinger*, 205 F.3d at 1006 (quoting district court opinion). It is clear that forcing the PGA Tour or the USGA to waive the walking requirement for selected competitors would fundamentally alter the nature of championship-level competitions. Most significantly, petitioner and the USGA have reasonably determined, in good faith, that a competitor who uses a golf cart might gain a substantial competitive advantage over a golfer who walks. The courts generally have permitted sports governing bodies "to create and define the competition" (*NCAA* v. *Board of Regents*, 468 U.S. 85, 101 (1984)), provided that they promulgate rules that are rational and not a pretext for unlawful activity. See, *e.g.*, *Brookins* v. *International Motor Contest Ass'n*, 219 F.3d 849, 853 (8th Cir. 2000) (noting that "the few courts to consider antitrust challenges to rules defining a sports activity have given the rule-makers considerable discretion to achieve their sporting objectives"); *Gunter Harz Sports, Inc.* v. *United States Tennis Ass'n*, 665 F.2d 222, 223 (8th Cir. 1981) (noting that governing body of tennis "legitimately functions * * * to ensure that competitive tennis is conducted in an orderly fashion and to preserve the essential character of the game as played in organized competition" and that its "regulation of racket characteristics is rationally related to these goals"). Such deference is entirely appropriate in the present context. As the Seventh Circuit held in *Olinger*, a competitor who uses a golf cart could obtain a "'tremendous advantage'" over a competitor who walks the course, and the riding golfer's advantage would be greater under certain conditions that frequently are present in championship-level golf competitions (heat, humidity, hilly terrain). 205 F.3d at 1006. In addition, the Ninth Circuit's approach injects an element of non-uniformity into what has always been a uniform set of rules for all competitors.

Championship-level golf, like all other championship-level athletic competitions, is designed to produce a champion from among a group of competitors who perform under exactly the same rules. For more than 100 years, the USGA has required the competitors in the U.S. Open to walk during each round, often for more than 4½ hours a day under a broiling sun, to make the ability to overcome fatigue an essential part of the gauntlet that the champion must endure. See Pet. App. 32a ("the purpose of the walking rule is to inject the element of fatigue into the skill of shot-making") (magistrate judge's opinion below); FEINSTEIN, A GOOD WALK SPOILED 332-33, 341-42 (discussing the brutal weather conditions during the 1994 U.S. Open at Oakmont, outside Pittsburgh); CURT SAMPSON, HOGAN 139-47 (1996) (describing Ben Hogan's victory in the 1950 U.S. Open even though Hogan was barely able to walk at times; before each round, Hogan had to soak in a tub of hot water and Epsom salts for an hour and wrap his legs from ankles to crotch in elastic bandages to minimize swelling, because of injuries that he had suffered in a near-fatal car accident).[8]

In holding that allowing an individual competitor to use a cart would "fundamentally alter the nature of" the U.S. Open, *Olinger*, 205 F.3d at 1005-07, the Seventh Circuit understood the critical importance of walking the course in championship-level golf, as a means of formulating an appropriately difficult test for determining the national champion and ensuring that the test is administered uniformly to all competitors. In particular, the Seventh Circuit agreed with the commonsense conclusion that someone who walks for 4½ hours on a hot, humid day will be more fatigued than someone who rides in a cart. The court

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[8] The amount of time spent in hot, humid conditions is greater if the golfers are required to play more than 18 holes in a day, as they must during sectional qualifying for the U.S. Open (36 holes in one day) or if weather problems delay play. See Gary Reinmuth, *Struggle to Make Field Goes Overtime*, CHICAGO TRIBUNE, July 4, 2000, § 4, at 5 (describing a golfer who had to play 34 holes on the second day of the 2000 U.S. Open).

found "particularly persuasive" the experience of Ken Venturi, a professional golfer who for the last 31 years has been the golf analyst for CBS Sports. *Id.* at 1006. In 1964, Venturi won the U.S. Open in "grueling conditions" that included near-100 degree temperatures and 97 percent humidity. *Ibid.* As Venturi testified in *Olinger*, he combined a regimen of practice shots with walking up to five miles a day in training for the U.S. Open — and hitting practice shots at the end of the day, when he was most fatigued. Despite this preparation, Venturi "battl[ed] dehydration" in the "stifling heat and humidity." *Ibid.* Nevertheless, "Venturi walked the course and, on the verge of collapse, won the tournament." *Ibid.* Venturi testified that any competitor who would have been permitted to use a cart in those conditions would have had a "'tremendous advantage.'" *Ibid.* The Seventh Circuit concluded that Venturi's experience, "by itself, supports the golf community's insistence that all players play all tournaments under the same conditions and rules." *Ibid.*

The effect of heat and humidity is especially important because of the narrow margins that often separate competitors. In 30 of the 100 U.S. Opens played to date, two or more competitors were tied at the end of regulation play. Twenty-five other U.S. Opens have been won by a single stroke. Even for those who do not win, the difference of one stroke in the final standings can be worth tens of thousands of dollars.[9]

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[9] Respondent's first victory on the Nike Tour illustrates why granting individual requests for waivers of the substantive rules of a competition leads down a slippery slope. Respondent used a golf cart in winning the 1998 Lakeland Classic by a single stroke. The second-place finisher in that tournament was suffering from an ingrown toe-nail that caused him to suffer intense pain. He received novocaine shots the day before the tournament started. He had the toenail surgically removed the next day, and played the last two rounds of the tournament with the top of his golf shoe cut off. If that competitor had been permitted to use a golf cart, he might have improved his score by one or two strokes. See Matthew Kensky, *Casey Martin* v. *PGA Tour, Inc.: Introducing Handicaps to Professional Golf by*

(continued...)

The Seventh Circuit properly concluded that the USGA's decision, for more than a century, to require walking as an essential element of the national championship makes sense in light of the "basic nature, character, [and] purpose" of the U.S. Open. 205 F.3d at 1005. The standards of the competition are exacting, and are enforced uniformly with respect to all competitors. This is entirely proper under the ADA. As the Seventh Circuit concluded, any competitor who is permitted to use a golf cart may gain a significant advantage over other competitors, and any such advantage would compromise the integrity of the entire endeavor.[10]

C. The *Olinger* court also observed, correctly, that "courts consistently have concluded that an accommodation is not reasonable if it imposes an undue financial and administrative burden." 205 F.3d at 1005-06 (footnote omitted); see also *Arline*, 480 U.S. at 287 n.17 (Rehabilitation Act case); *Buckles* v. *First*

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[9] (...continued)
Widening the Scope of the ADA, 9 GEO. MASON U. CIV. RTS. L.J. 151, 163 & n.81, 187 (1998).

[10] Expert testimony supports that conclusion. In *Olinger*, Dr. Rippe, the founder of the leading walking research laboratory in the United States, testified extensively on the effects of allowing a waiver or modification of the rule requiring competitors to walk the course during a championship-level golf competition. See *Olinger*, 55 F. Supp. 2d at 935-36 (summarizing testimony). Dr. Rippe concluded that a competitor who is permitted to use a golf cart would have a substantial and unfair advantage over a competitor who walks the course. *Id*. at 935. Among other things, he found that the individual who is walking the course performs significantly more physiological work, and suffers greater cognitive and psychomotor fatigue, than the individual who uses a golf cart. *Ibid*. Dr. Rippe further testified that increased hills, humidity, or temperature would increase the differential in stresses affecting the walker and the rider. *Id*. at 936. In sum, as the *Olinger* district court found, "Dr. Rippe's report provides a strong basis to believe that as between two roughly similar golfers, the golfer who rides is likely to have some advantage when it comes to fatigue over the golfer who walks." *Id*. at 935-36.

Data Resources, Inc., 176 F.3d 1098, 1101 (8th Cir. 1999) (ADA case) ("an accommodation is unreasonable if it * * * 'imposes undue financial or administrative burdens'"); *Sandison* v. *Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026, 1035 (6th Cir. 1995) (ADA case) ("It is plainly an undue burden to require high school coaches and hired physicians to determine whether [various] factors render a student's age an unfair competitive advantage. * * * It is unreasonable to call upon coaches and physicians to make these near-impossible determinations").

Applying these decisions, the lower courts in *Olinger* held that the ADA does not require the USGA to "'develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete.'" *Olinger*, 205 F.3d at 1007 (quoting district court opinion). As the Seventh Circuit recognized, if the rule were modified to permit competitors to request waivers on an *ad hoc* basis, the USGA would be required to have a staff of medical specialists available to evaluate (for the U.S. Open alone) waiver requests from any of the more than 8,000 competitors at almost 100 qualifying sites across the country.

Moreover, even if the USGA had a large staff of medical specialists — which it does not — it would be impossible to draw the appropriate lines in evaluating the myriad disabilities that conceivably could be used to justify a particular competitor's request for permission to use a golf cart. Although "'temporary, non-chronic impairments of short duration, with little or no longterm or permanent impact, are usually not disabilities'" under the ADA (*Sanders* v. *Arneson Prods.*, 91 F.3d 1351, 1354 (9th Cir. 1996)), there are countless golfers and other professional athletes who very well might qualify as disabled under the ADA on the basis of their physical ailments. As the Sixth Circuit has held in similar circumstances (*Sandison*, 64 F.3d at 1035), no cadre of doctors and athletic officials can be expected to make the "near-impossible determinations" that would be required in deciding whether a waiver of the walking requirement would give a particular competitor an unfair advantage, or merely would bring him up to parity with his competitors.

The Ninth Circuit, however, concluded that the individualized waiver determinations mandated by its decision in this case do not pose any administrative difficulty. Pet. App. 14a-15a. That conclusion is simply untenable. There is no way to calibrate how much of a disadvantage a particular competitor's disability creates, and correspondingly there is no way to determine whether an accommodation for that competitor's disability merely negates the effect of the disability, or in fact overcompensates that competitor. Consequently, tournament officials who are forced by the *Martin* decision to evaluate individual requests for the use of a golf cart will have to engage in a speculative exercise, regardless of the other variables that are present. The approach taken by the courts below in *Olinger* is far more realistic, and this Court should endorse that approach.

In addition to being wholly impracticable, the inquiry that tournament officials must follow under the Ninth Circuit's mandate undoubtedly will spawn frequent litigation.[11] PGA Tour competitor Ed Fiori has stated that he would like to use a cart because of his chronic back problems, and he "says there are 10 or 12 others who'd like to join him." Jeff Babineau, *Fiori Makes Cart Inquiry*, GOLFWEEK, Mar. 18, 2000, ¶ 1 (www.golfonline.com/news/golfweek/2000/march/fiori0318.html). When the field of possible plaintiffs is expanded from the 300 or so touring professionals with whom Fiori is familiar to the more than 8,400 entries for this year's U.S. Open, it is readily apparent that the number of competitors who may seek to use carts could be substantial.[12] It will not al

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[11] It is not surprising that the USGA had not received many requests for waivers of the walking rule before the *Martin* and *Olinger* cases. For many years, the application for entry into the U.S. Open has informed applicants that "[p]layers shall walk at all times during a stipulated round."

[12] Some 43 million Americans, roughly one in seven, have disabilities that are covered by the ADA. *Sutton* v. *United Air Lines, Inc.*,

(continued...)

ways be obvious whether a particular competitor suffers from a disability within the meaning of the ADA; doctors sometimes disagree on a diagnosis. And even the Justice Department has acknowledged that sometimes it will "be difficult to determine whether the requested accommodation, in view of the plaintiff's disability, would result in an unfair advantage." DOJ 9th Cir. Br. 35 n.22. Disagreements on these issues are inevitable, and if the Ninth Circuit's decision is affirmed each of those disagreements will have to be resolved by a court. In short, to the extent that the Ninth Circuit's decision compels the USGA (or any other entity conducting a championship-level athletic competition) to evaluate individual waiver requests on an *ad hoc* basis, the USGA and the federal courts will be forced to engage in an impracticable inquiry, seeking an unattainable answer.

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The U.S. Open has long played a prominent role in American sports history. Until the golf cart controversy arose, exactly the same rules of competition have applied to all of the competitors in each U.S. Open since the championship was first held in 1895. Permitting *some* select golfers to use carts would "change[ ] the nature of professional golf tournaments forever." Robert S. Shwarts, *A Good Walk Spoiled: The 9th Circuit Improves Its Lie*, Mar. 23, 2000, ¶ 3 (www.lawnewsnetwork.com/opencourt/stories/A19345-2000Mar22.html). Moreover, the inability to determine accurately which arguably disabled golfers should be permitted to use a golf cart — and the extraordinary burden of trying to make such determinations — may force golf's governing bodies to adopt a bright-line rule

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[12] (...continued)
527 U.S. 471, 484-486 (1999); 42 U.S.C. § 12101(a)(1). Even if the percentage of championship-level golfers who meet the statutory definition is much smaller, the number of disabled golfers wanting to use carts is likely to be considerable. This is especially true if one includes as potential litigants the golfers whose physical conditions are at (or outside) the margins of ADA coverage. When competitors in the U.S. Senior Open are considered, it is even more likely that many will seek to use carts, particularly in light of the *Jones* decision.

allowing all competitors to use golf carts. Of course, allowing *all* golfers to use carts because of the difficulty of comparing one claimed justification for a waiver of the walking rule against another claimed justification would be the most fundamental alteration of all. The ADA does not require either of those results. This Court should endorse the Seventh Circuit's conclusion, and reject the Ninth Circuit's.

III. THIS CASE HAS BROAD RAMIFICATIONS FOR OTHER CHAMPIONSHIP-LEVEL ATHLETIC COMPETITIONS.

The questions presented here concerning the scope of Title III have broad ramifications not only for golf, but for all championship-level athletic competitions. As several commentators have pointed out, the golf cart controversy litigated here and in *Olinger* has, for the first time, extended the reach of the ADA to the realm of championship-level sports. *E.g.*, Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. and Discriminatory Boundaries in the Americans With Disabilities Act*, 18 LAW & INEQ. J. 131, 148 (Winter 2000) ("Although several spectators have requested that covered entities comply with the ADA's accessibility requirements with respect to watching professional sports, Casey Martin and Ford Olinger are the only two athletes to claim that the ADA should apply to the playing of professional sports"); 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, 3 (Fall 1998) (noting that Martin's case is "the first to apply [the ADA] * * * to professional sports"). Prior ADA cases frequently have involved eligibility rules in scholastic and intercollegiate athletics, but none has involved an attempt by a professional athlete to obtain a waiver of a substantive rule of his or her sport. Unless this Court cabins the Ninth Circuit's impulse to extend the reach of the ADA to places that Congress never contemplated — to decide, without congressional warrant, that the disabled must be given a way to be competitive in events whose very purpose is to determine the most *physically able* competitors according to predetermined, uniformly applied rules of competition — then this case may

prove to be a "watershed event" that "interject[s] the ADA into professional sports." *Id*. at 4; see also Dave Addis, *Can Allowances For Disabilities Work In Sports?*, VIRGINIAN-PILOT & LEDGER-STAR, JAN. 18, 1998, at J1 ("a precedent in Martin's case would become an immediate problem when applied to other professional sports, which is certain to happen in a society where pro-sports venues are drowning in dollars and lawyers").

A ruling that the ADA compels the modification of the basic, long-established rules of a championship-level sports competition would have repercussions far beyond golf. Olympic gold medalist Jackie Joyner-Kersee and tennis champion Jimmy Connors have asthma. Must they be permitted extra time between long jumps and tennis sets because asthma adversely affects their ability to recuperate? Must a biathlete with hypertension be permitted to take extra time between the long-distance skiing and the shooting competition?[13] A request by a competitor to modify the time rules in any of these championship-level athletic competitions on the basis of an asserted impairment of his or her ability to cope effectively with the physical stress of the competition — like respondent's request to use a golf cart in PGA Tour competitions — would eliminate an essential element of the competitions.

These examples highlight the fundamental tension between the ADA-based accommodation imposed by the Ninth Circuit in this case and the realities of championship-level athletic competitions. Athletic competition tests the ability of people with different physical abilities to compete against each other under uniform rules. Sometimes brute strength prevails. In other instances, stamina, guile, or luck accounts for the result. The point is that competitors try to play to their strengths and overcome their weaknesses, within the rules of the game. Whatever "fairness" may mean in other aspects of life — where, for example, it may be grossly unfair to treat one scientist or lawyer

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[13] To cite just one more example, must that biathlete be permitted to take drugs to combat hypertension, even if those drugs are otherwise banned as performance enhancing?

differently from another based on physical abilities, because physical abilities are not the relevant skills — "fairness" in championship-level athletic competitions ordinarily means that everyone competes under the same rules. Equality of opportunity is not the criterion of fairness in an athletic competition, because the very purpose of an athletic competition is to ascertain who is most physically excellent in the skills being tested. Modification of the rules to compensate for physical limitations is not a common feature of championship-level athletic competitions, in which the winners generally are those competitors who overcome whatever physical limitations they may have.[14]

The Seventh Circuit recognized this tension, and further understood that Congress enacted the ADA to ensure that disabled persons have access to places that are accessible "indiscriminately to other members of the general public" (*Olinger*, 205 F.3d at 1004), not to inject the federal judiciary into the micromanagement of championship-level athletic competitions. As the Seventh Circuit sensibly concluded, whether the rules of championship-level golf "should be adjusted to accommodate [the plaintiff] is best left to those who hold the future of golf in trust." *Id*. at 1007.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

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[14] The annals of sports history contain many examples in which disabled competitors have struggled to compete — sometimes with amazing success — under the uniform rules that governed their particular sports. Major league baseball pitcher Jim Abbott was forced both to field his position and to take a turn at bat, even though he was born without a right arm. No rules of baseball were modified to accommodate Abbott's disability. Golfer Ben Hogan was not permitted to use a golf cart in championship-level competitions, even though the debilitating injuries that Hogan sustained in a near-fatal automobile accident resulted in a "permanent loss of stamina" that forced Hogan to reduce his annual tournament appearances from thirty to approximately five. See SAMPSON, HOGAN 139.

Respectfully submitted.

LEE N. ABRAMS
JAMES C. SCHROEDER
ROBERT M. DOW, JR.
Mayer Brown & Platt
190 South LaSalle St.
Chicago, Illinois 60603
(312) 782-0600

ROY T. ENGLERT, JR.
Counsel of Record
Mayer Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

JOHN W. VARDAMAN
Williams & Connolly
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

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