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 FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 *et seq.*, (the "ADA") applies to the PGA Tour, Inc. ("PGA") when it operates golf courses, which the ADA expressly defines as places of public accommodation?

2. Whether the Court of Appeals properly affirmed as not clearly erroneous the district court's factual finding that the PGA did not demonstrate that providing a cart to Casey Martin — a disabled golfer who has all the skills to play professional golf but who cannot walk the golf course — fundamentally alters the nature of PGA competition?

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Bragdon v. Abbott, 524 U.S. 624 (1998) 20, 22, 26, 27, 33, 34, 42

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Colorado v. New Mexico, 467 U.S. 310 (1984) 45

Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993) 32, 40

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 19

Crowder v. Kitagawa, 81 F.3d 1480 (9th Cir. 1996) 33, 41, 42

Daniel v. Paul, 395 U.S. 298 (1969) 13, 22, 23

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 19

Cited Authorities

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Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052 (5th Cir. 1997) 31, 32, 33

Jones v. United States Golf Ass'n, Civ. No. A-00-CA-278 JN (W.D. Tex. Aug. 30, 2000) 13, 24

Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113 (3d Cir. 1998) 14

North Haven Board of Education v. Bell, 456 U.S. 512 (1982) 30

Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926 (N.D. Ind. 1999), *aff'd on other grounds*, 205 F.3d 1001 (7th Cir. 2000), *petition for cert. filed* (Sept. 20, 2000) (No. 00-434) 8, 9, 13, 24, 34, 39, 40

Olmstead v. Zimring, 527 U.S. 581 (1999) . . . 20, 22, 29

Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) 14, 18, 26, 46

Rothman v. Emory Univ., 828 F. Supp. 537 (N.D. Ill. 1993) 24

School Bd. of Nassau County v. Arline, 480 U.S 273 (1987) 33, 34

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 44

Cited Authorities

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Staron v. McDonald's Corp., 51 F.3d 353 (2d Cir. 1995) 33

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 22, 34

Thomas v. Davidson Acad., 846 F. Supp. 611 (M.D. Tenn. 1994) 41

United States v. Naftalin, 441 U.S. 768 (1979) 28

Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999) 34

Statutes:

42 U.S.C. § 12101(a) 32

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42 U.S.C. § 12181(2)(A) 19

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42 U.S.C. § 12182(b)(1)(A)(iv) 27

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28 C.F.R. ch. 1, pt. 36, App. A, § 4.1.3(5)(c) 21

28 C.F.R. ch. 1, pt. 36, App. B, § 36.104 20

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29 C.F.R. ch. 14, pt. 1630, § 1630.2(j) 48

29 C.F.R. ch. 14, pt. 1630, App., § 1630.2(j) 48

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Congressional Materials:

Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Sen. Subcomm. on the Handicapped of the Comm. on Labor and Human Resources and the House Subcomm. on Select Educ. of the Comm. on Educ. and Labor, 100th Cong. 15 (1988) 47

H.R. Rep. No. 101-485, pt. 2 (1990) 17, 20, 25, 28, 32, 47

H.R. 2273, 101st Cong. § 401(2)(A)(i)(I) (1989) . . . 29

S. 933, 101st Cong. § 401(2)(A)(i)(I) (1989) 29

S. Rep. No. 101-116, pt. 1 (1989) 20, 32

Other Authorities:

Jim Abbott, *It's Easy to Accommodate*, Golf World, Feb. 20, 1998 49

Associated Press, *Another Golfer Can Use Motor Cart*, Feb. 9, 2000, *available at* 2000 WL 12389828 48

Murray Chass, *Pro Football: 63 Yard Field Goal*, The New York Times, Nov. 9, 1970 49

Cited Authorities

Page

Larry Guest, *Rivals are Pouncing on UCF's Troubles*, Orlando Sentinel, Jan. 29, 1998, *available at* 1998 WL 5325429 48

Joe Hamelin, *Martin's Debut Solid Under Pressure*, The Press-Enterprise, Jan. 20, 2000, *available at* 2000 WL 7012432 47

Interview with David Fay, Web Street Golf Report, Oct. 26, 2000, available at http://www.golfbiz.net (last visited Dec. 10, 2000) 4, 9

Opinions Divided on Issue, USA Today, Jan. 18, 2000, *available at* 2000 WL 5766388 48

Ron Rapoport, *Smiling Was Easy With Payne Around*, Chicago Sun-Times, Oct. 26, 1999, *available at* 1999 WL 6562704 47

Settlement Agreement Concerning the Olympic Stadium, *available at* http://www.usdoj.gov/crt/ada/stadiumo.htm (last visited Dec. 10, 2000) 21

Ron Sirak, *Callaway's big bang*, GolfDigest.com, Oct. 27, 2000, available at http:/www.golfworld.com (last visited Dec. 10, 2000) 9

The International Will Be Twice as Nice, The Boston Globe, Jan. 23, 2000, *available at* 2000 WL 3311547 48

Cited Authorities

Page

U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, *Accessible Stadiums*, available at http://www.usdoj.gov/crt/ada/stadium.pdf (last visited Dec. 10, 2000) 21

Webster's Third New International Dictionary 30, 35

Yi-Wyn Yen, *One Rides A Cart, The Other Refuses - Olazabal Appreciates Martin's Plight*, The Star Ledger, June 21, 1998, *available at* 1998 WL 3424879 . . . . . 48, 49

Jonathan M. Young, National Council On Disability, *Equality of Opportunity — The Making of the Americans with Disabilities Act* 101-02 (1997) . . . 22

Hunki Yun, *Casey and the Cart – Martin Set for PGA Tour Debut*, Orlando Sentinel, Jan. 19, 2000, *available at* 2000 WL 3573262 47

STATEMENT OF THE CASE

A. Casey Martin Has A Disability

Mr. Martin suffers from a congenital, degenerative circulatory condition called Klippel-Trenaunay-Weber Syndrome. The PGA concedes that Mr. Martin has a disability.[1] J.A. 35.

Despite his disability, Mr. Martin has proven his ability to compete with the top golfers in the world. Mr. Martin earned a scholarship to Stanford University where he was an NCAA academic All-American, and led his college golf team to the NCAA championship in 1994. Supplemental Excerpts of Record filed with the Court of Appeals for the Ninth Circuit ("S.E.R.") 74, 116-17. While at Stanford, Mr. Martin's condition "significantly worsened" until he could no longer walk the course, and Mr. Martin applied for and received permission to use a cart in collegiate competitions. J.A. 207; S.E.R. 75-77. Since graduating from Stanford, Mr. Martin has sought to compete on the PGA Tour. By virtue of a preliminary and permanent injunction issued by the district court (and affirmed by the Court of Appeals), Mr. Martin first qualified to play on the PGA's Nike Tour (now known as the Buy.com Tour, and hereinafter referred to as the "Nike Tour" as it was known during the trial in this case) in 1998 and 1999, and thereafter qualified to play on the PGA Tour in 2000.

It is undisputed that Mr. Martin "is at substantial risk of

1. Mr. Martin has lodged with the Court copies of a short videotape that illustrates the nature and extent of his disability. The district court noted that the videotape "provides compelling evidence of the nature and extent of his disability." Joint Appendix ("J.A.") 50. The condition, first diagnosed when Mr. Martin was three years old, is manifested in a massive, permanent malformation of his right leg that dramatically limits his ability to walk. Although blood can circulate into his lower right leg, blockage at knee level prevents recirculation, resulting in severe pain and atrophy of the lower leg. He is placed at "significant risk" of fracturing his tibia, hemorrhaging and developing deep blood clots "by the simple act of walking," and other routine life activities. The condition has progressively deteriorated and Mr. Martin's right leg is at risk of amputation above the knee. J.A. 35, 49-51, 198-200, 227.

serious physical harm by the mere act of walking." J.A. 51. Reviewing the record, the Court of Appeals observed:

> [Mr. Martin's condition] render[s] him unable to walk for extended periods of time. The mere act of walking subjects him to a significant risk of fracture or hemorrhaging. There is no dispute that Martin is profoundly disabled.

J.A. 35. As the district court found, "it is medically necessary for Casey Martin to be permitted a cart if he is to play the game of golf." J.A. 51.

B. The PGA Owns And Operates Golf Courses

The PGA is a lucrative commercial enterprise employing hundreds of persons and has annual revenues of over $300 million. *See* S.E.R. 276-77. The PGA does not dispute that it owns or operates certain golf courses on which its golf tournaments are played. J.A. 35.

"The purpose of PGA Tour is to protect the interests of professional golfers who qualify for membership in PGA Tour, to promote professional golf tournaments for PGA TOUR members, and to further the professional golf careers of PGA TOUR members." Defendant PGA Tour, Inc.'s Concise Statement of Material Facts, Dec. 24, 1997 ("PGA's Statement"), at ¶ 3. The PGA sponsors three separate tours for professional golfers: the PGA Tour, the Nike Tour and the Senior Tour (for qualifying golfers 50 years or older). J.A. 35, 74, 245. The regular PGA Tour consists of the best golfers in the game, and features approximately 200 players. J.A. 35, 74, 246. The Nike Tour is the next tier, consisting of approximately 170 players. J.A. 35, 74, 246. Any member of the public can qualify to become a member of the PGA Tour or otherwise qualify to play in a PGA Tour event based on performance in certain qualifying events. J.A. 161-63, 262-66; S.E.R. 284-89; transcript of trial proceedings ("Tr.") 836-37.

The principal way a player becomes a member of the PGA or Nike Tour is by demonstrating his ability in a three-stage tournament known as the PGA Tour Qualifying School

("Q School"). Any member of the public can play in the Q School if he pays a $3,000 entry fee and submits two letters of recommendation from members of the PGA Tour or the PGA of America. J.A. 40, 162-63; S.E.R. 284-89; Excerpts of Record filed with the Court of Appeals for the Ninth Circuit ("E.R.") 8. In 1997, approximately 1,200 players competed at Q School. J.A. 265. Competition in the first two stages winnows the field to 168 players, each of whom is guaranteed a place for the ensuing tournament year on either the PGA or Nike Tour. J.A. 265; S.E.R. 253, 284-89. Once a player qualifies to become a member of the PGA Tour, he must pay his own expenses to participate in each tournament he wishes to enter. *See* Tr. 814-16. The players in each tournament compete for prize money offered by the PGA Tour and individual tournament sponsors. Tr. 819-20. Players do not receive guaranteed prize money for playing in a tournament. Tr. 816.

C. The PGA Requires Walking As A Matter Of Discretion

The rules governing PGA and Nike Tour competition come from three sources: (1) the "Rules of Golf," as promulgated by the United States Golf Association ("USGA") and the Royal and Ancient Golf Club of St. Andrews, Scotland; (2) "Conditions of Competition and Local Rules," which golfers call the "Hard Card;" and (3) "Notices to Competitors," which relate to the particular golf course involved in a tournament. J.A. 62-63, 104, 127, 246-48. The Rules of Golf are the recognized fundamental rules of the game; as Judy Bell (the immediate past president of the USGA) testified, "[i]f you want to play golf, you need to play by these rules."[2] J.A. 239.

2. The PGA's and amicus curiae USGA's argument that the rules for professional golf competitions are different than the rules of golf generally (PGA Br. at 3; USGA Br. at 7-8) is contradicted by the statement of David Fay, the Executive Director of the USGA. During a recent interview, Mr. Fay stated, "We write the Rules of Golf – including equipment rules – to cover the game of golf. Some believe that our rules are written just for competitions. That is not the case. We make no distinction between competitive golf and so-called casual golf." (Cont'd)

The Rules of Golf make it clear that the essence of the game is shot-making:

> Rule 1. The Game. 1-1. General. The Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with the Rules.

J.A. 104 (emphasis in original). The Rules do not require players to walk. Indeed, nothing in the Rules defines walking as a fundamental part of the game. J.A. 63.

Rule 33-1 of the Rules of Golf authorizes the committee overseeing a tournament to set forth certain "optional conditions" enumerated in Appendix I to the Rules, *i.e.*, a Hard Card. J.A. 107, 239-40. The PGA promulgates a Hard Card annually containing the optional conditions applying to a year's competitions. J.A. 247. The Rules of Golf make clear that enumerated "optional conditions" do not affect the fundamentals of the game:

> Conditions should include such matters as method of entry, eligibility requirements, format, the method of deciding ties, the method of determining the draw for match play and handicap allowances. . . .

J.A. 126. The walking requirement is among the "optional conditions" relating to "transportation." J.A. 125; S.E.R. 159. Appendix I of the Rules of Golf prescribes specific language if a committee wishes to adopt a walking requirement as an optional condition:

> If it is desired to require players to walk in a competition, the following condition is suggested: *Players shall walk at all times during a stipulated round.*

J.A. 125 (emphasis added). Even though the Rules of Golf spell out how to require walking, the PGA chose not to adopt the

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(Cont'd)
Interview with David Fay, Web Street Golf Report, Oct. 26, 2000, available at http://www.golfbiz.net (last visited Dec. 10, 2000) ("*Fay Interview*").

prescribed language. J.A. 127. Instead, it adopted a transportation rule that *specifically permits exceptions* for the use of carts. Thus, the PGA Tour Hard Card provides:

> Players shall walk at all times during a stipulated round *unless permitted to ride by the PGA TOUR Rules Committee.*

J.A. 127 (emphasis added) (The Nike Tour Hard Card has a substantially identical provision. J.A. 129). Ms. Bell acknowledged that the exception language added by the PGA "change[s] things, because you are talking about exceptions." J.A. 244. While the PGA seeks to portray walking as ingrained in the fundamentals of the game, it has not even adopted the optional walking requirement authorized by the Rules of Golf.

D. The PGA Does Not Enforce Its "Walking Rule" Uniformly

The PGA's so-called "walking rule" is riddled with exceptions.

1. The PGA Did Not Require Walking In Any Stage Of Q School Until 1997

The PGA has conducted Q School since 1965. As the Chairman of the Tour's Policy Board Richard Ferris testified, the purpose of Q School has always been to select "the best players" as members of the PGA Tour. S.E.R. 97; J.A. 266; *see also* J.A. 152 (the PGA's "philosophy has always been to conduct the Qualifying Tournament [Q School] in a manner that approximates a PGA TOUR event as closely as possible"). In implementing this philosophy of mirroring PGA Tour play at Q School, since 1965 the PGA has required Q School competitors to play under conditions comparable to PGA tournaments, *i.e.*, narrow fairways, high roughs, championship tees, fast greens and difficult pin placements. S.E.R. 91, 190-91. The Hard Card for PGA Tour events applies to all three stages of Q School. J.A. 267-68.

It was not until 1997 that the PGA required walking in the final stage of Q School. J.A. 216, 257-58. In 1997, PGA Commissioner Timothy Finchem proposed for the *first* time

that a walking requirement be imposed in the final stage of Q School. J.A. 152-54. The PGA Tour Policy Board (the equivalent of the PGA Board of Directors) approved the proposal as an optional condition of competition without any debate, without an expression by anyone that walking was fundamental to competitive golf, and without any suggestion that golfers using carts have an advantage over those who walk the course. *See* J.A. 152-54; S.E.R. 92-94. The PGA was never concerned about a perception during the three decades in which it allowed players to use carts in all three stages of Q School that players who rode gained a competitive advantage. S.E.R. 192. When the Commissioner was asked why riding was permitted in all three stages of Q School until 1997, he testified: "I wasn't commissioner." J.A. 258.

2. The PGA Continued To Permit Carts In The First Two Stages Of Q School

The PGA continued to allow golfers seeking to prove their ability to use carts in the first two stages of Q School until the appeal of this action. J.A. 162-63. Each of the 168 competitors that reaches the third stage is guaranteed a place on either the Nike or PGA Tour (J.A. 265; S.E.R. 253, 284-89), and thus until this very recent change could become a member of the "highest-level" tours without ever performing what the PGA terms a fundamental skill. The PGA did not require walking in the first two stages simply because of the economic and logistical difficulties in making caddies available for 1,200 competitors. J.A. 216-17. The PGA's Chairman testified that "[i]t was an economic decision" with no consideration about whether it fundamentally altered the competition. J.A. 220. By contrast, rules which affect shotmaking (such as the "one-ball rule") have been enforced at all stages of Q School. J.A. 267-68; Tr. 850.

3. The PGA Permits Carts In Other Qualifying Events

The PGA also does not require walking in the weekly "open" qualifying events conducted before each tournament which allow additional players the opportunity to compete in

the tournament. J.A. 262-64; Tr. 836-39. Every week golfers compete in these PGA qualifying events with carts, and the four lowest-scoring players receive an exempt entry into that week's tournament. J.A. 161, 262-64. These players do not have to prove walking ability to demonstrate their eligibility to compete in PGA Tour events. In 1986 at the Southern Open, Fred Wadsworth as an "open" qualifier, won a PGA tournament. S.E.R. 257.

4. The PGA Allows Carts During Its Events For Administrative Convenience

The PGA regularly permits competitors to ride when it suits the PGA's administrative convenience. For example, when a player cannot find his tee shot (or hits it out of bounds) during a PGA tournament, a PGA official will ride the player back to the tee in a cart after the player determines that his ball is lost or out of bounds. J.A. 201-02. Similarly, the PGA regularly rides tournament competitors when a long distance separates a green and the next tee, (J.A. 157-59; S.E.R. 58), and sometimes during play of an entire hole. J.A. 160.

5. The PGA Senior Tour Does Not Require Walking

The PGA permits players to use carts on the Senior Tour, which features 78 highly skilled golfers who are 50 years or older. J.A. 221-23. While the PGA has previously sought to minimize the competitiveness of the game on the Senior Tour by analogizing it to old-timers' day, for more than a decade the Senior Tour has offered highly competitive golf and lucrative earnings to its winners. J.A. 221-23; S.E.R. 111-13. Many Senior Tour golfers earn their living on the tour, and total available winnings exceed $40 million (contrasted with total winnings of $6.4 million on the Nike Tour). J.A. 224. In 1997, the leading money winner on the Senior Tour collected more money than Tiger Woods, the leading money winner on the same year's PGA Tour. *See* S.E.R. 56, 252.

The game played on the Senior Tour is the same game played on the PGA and Nike Tours (J.A. 224), and the same three sources of rules govern Senior Tour competition. J.A. 225.

The Chairman of the PGA Tour's Policy Board (which has ultimate authority over the Senior Tour) recognized that a linchpin to the PGA's position in this case — that one shot can separate first and second place in PGA Tour golf — is equally applicable to Senior Tour golf. J.A. 224. The Chairman also testified that carts are permitted at these competitive PGA golf events as "an economic matter, because if Arnold Palmer's got an arthritic hip and he can't walk 18 holes and we want Arnold Palmer out there playing because he's good for 5,000 more people to show up at the tournament," the walking requirement must yield. J.A. 218.

6. Other Examples Illustrate That Walking Is Not Fundamental

The NCAA And PAC-10 Have Accommodated Disabled Golfers. The Rules of Golf also govern the collegiate game. S.E.R. 42, 57. College golf is characterized by the same "very heavy competitive fire" as the PGA Tour, and many college courses are more difficult than Nike Tour courses. S.E.R. 42, 57. NCAA and PAC-10 rules not only require players to walk the course, but also carry their own bags and sometimes play 36 holes per day. S.E.R. 135. Nevertheless, the PAC-10's rules allow permanently disabled players to use carts upon approval by a majority of the coaches, and the NCAA's by-laws prohibit discriminatory practices. J.A. 155 (PAC-10 rules); S.E.R. 564 (NCAA by-laws); *see also* J.A. 207, 228. While at Stanford, Mr. Martin applied for and received permission to use a cart in collegiate competitions. J.A. 207, 228; S.E.R. 587. No one ever suggested that allowing Mr. Martin to use a cart altered the collegiate competition in any way. J.A. 208; S.E.R. 228-29.

Unlike Rules Addressing Shotmaking, Walking Does Not Affect A Golfer's Handicap. A handicap measures a golfer's skill level; the lower a golfer's handicap, the better the golfer. Tr. 428-29. A player's handicap is used to determine if he is eligible to compete in professional golf tournaments such as the U.S. Open. *See* J.A. 243; *Olinger v. United States Golf*

Ass'n, 205 F.3d 1001, 1002 (7th Cir. 2000), *petition for cert. filed* (Sept. 20, 2000) (No. 00-434). The PGA and the USGA do not consider whether a golfer used a cart in determining and recognizing his handicap. J.A. 229, 243.[3]

E. The PGA Refused Mr. Martin's Request To Use A Cart

Mr. Martin used a cart without objection in the first two stages of the 1997 Q School and qualified to enter the final stage. *See* J.A. 75. He requested permission from the PGA to use a cart in the final stage of Q School. In support of the request, he sent medical records to the PGA establishing his permanent disability, including a videotape showing the nature and extent of his condition. J.A. 232, 258-59; *see also supra* n.1.

The request and records were directed to the Commissioner, who never reviewed the medical records or contacted Mr. Martin's doctor. J.A. 232, 258-59. Nor did he consult with any experts concerning Mr. Martin's medical condition or determine whether use of a cart by Mr. Martin would fundamentally alter the nature of PGA competition. J.A. 232, 258-59. He did not even consider waiving the Hard Card's walking rule as is permitted under the PGA's own rules. And he decided not to consult the Rules Committee or the Tournament Director to see if they would exercise their authority to grant Mr. Martin an exception to the walking rule. J.A. 232, 258-59.

3. The PGA and USGA's indifference to whether an individual walked in determining his or her handicap contrasts with their vigilance in enforcing rules affecting shotmaking. Recently, Callaway (a golf club manufacturer) introduced a new driver. The USGA tested the club, and rejected its use. According to USGA spokesman Marty Parke, if a golfer uses the new driver in a round of golf, "[y]ou are not able to post that score [for handicap purposes] because it was not shot under the rules of golf." Ron Sirak, *Callaway's big bang*, GolfDigest.com, Oct. 27, 2000, available at http://www.golfworld.com (last visited Dec. 10, 2000). Executive Director of the USGA David Fay further stated, "if a player wishes to submit – from a golf course located in the United States – a score for golf-handicap purposes, that score can not be submitted if the player is using golf clubs and/or a ball which does not conform to the USGA Rules of Golf." *Fay Interview*.

Without making any objective determination that allowing Mr. Martin to use a cart would give him a competitive advantage, the Commissioner rejected Mr. Martin's request and returned the medical records to Mr. Martin without reviewing them. J.A. 51-52, 218, 232; S.E.R. 201-02.

F. The District Court Proceedings

Mr. Martin commenced this action in the United States District Court for the District of Oregon seeking preliminary and permanent injunctive relief under Title I and Title III of the ADA requiring the PGA to permit him to use a cart in the third stage of Q School and in subsequent PGA events for which he qualified. The district court granted the preliminary injunction, and Mr. Martin played well enough to earn a spot on the 1998 Nike Tour.

By Order dated January 30, 1998, the district court granted summary judgment against the PGA on two issues. The district court held on the basis of an undisputed factual record that (1) the PGA is not exempt from the ADA as a private club because it is a commercial enterprise, and (2) the PGA owns, operates and leases places of public accommodation, subjecting it to Title III of the ADA. *See* J.A. 84, 88.

The district court thereafter conducted a six-day bench trial in which it received medical and lay testimony principally relating to whether Mr. Martin's use of a cart to enable him to participate in PGA competition would fundamentally alter the nature of PGA competition. On February 19, 1998, the District Court issued its Findings of Fact and Conclusions of Law containing detailed factual findings supporting the conclusion that there is "compelling evidence that even the PGA Tour does not consider walking to be a significant contributor to the skill of shot-making," and that under the individual inquiry mandated under the ADA, the PGA had failed to meet its burden that permitting Mr. Martin to use a cart would fundamentally alter PGA competitions. J.A. 61, 67-69. The court stated:

> Every individual differs in their psychological fatigue components, but walking has little to do with such components. If anything, from the evidence

> introduced at trial, most PGA Tour golfers appear to prefer walking as a way of dealing with the psychological factors of fatigue. . . . Walking for Casey Martin is a different story. . . . As plaintiff easily endures greater fatigue even with a cart than his able-bodied competitors do by walking, it does not fundamentally alter the nature of the PGA Tour's game to accommodate him with a cart.

J.A. 61, 67-69.[4]

G. The Court Of Appeals Upheld The District Court's Findings

By Order dated March 6, 2000, the Ninth Circuit Court of Appeals affirmed the district court's rulings. The court held that the factual record developed in the district court supported the conclusion that "[t]he central competition in shot-making would be unaffected by Martin's accommodation. All that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability. That is precisely the purpose of the ADA." J.A. 43-44.

The Court of Appeals applied unambiguous statutory language in a straightforward manner. Addressing whether Title III applies to the PGA when it sponsors golf tournaments, the Court of Appeals observed that Congress expressly included golf courses among the list of places of public accommodation. J.A. 37. Rejecting the PGA's construct that places of public accommodation can be bifurcated into public and private zones, the Court of Appeals noted that "Title III does not restrict its coverage to members of the public; it provides that '[n]o individual shall be discriminated against' in the enjoyment of public accommodations by reason of disability." J.A. 40 n.7. The Court of Appeals identified the flaw in the PGA's bifurcation argument: "[T]hat users of a facility are highly selected does not mean that the facility cannot be a public accommodation." J.A. 40.

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4. The district court also ruled that Mr. Martin was not an employee of the PGA, and therefore could only receive protection under Title III. J.A. 58.

The Court of Appeals also affirmed as "not clearly erroneous" (J.A. 43) the district court's findings of fact made after a six-day bench trial under the individualized inquiry mandated under the ADA. "In light of these findings," the Court of Appeals concluded "as did the district court, that permitting Martin to use a cart in PGA and Nike Tour competitions would not fundamentally alter the nature of those competitions." J.A. 43.

SUMMARY OF ARGUMENT

This case involves a decision of the Court of Appeals interpreting Title III of the ADA in accordance with the plain language of the statute and its legislative history. Casey Martin is seriously disabled as a result of a debilitating circulatory condition. At the same time, Mr. Martin is a highly talented golfer, able to match skills with the best in the game. The PGA has tried to deny Mr. Martin access to the game of golf at its highest levels because he cannot walk the course. Mr. Martin requested a cart to enable him to play, and the PGA refused. In enacting the ADA, Congress recognized that unequal treatment of people with disabilities cannot be overcome unless both intentional and unintentional barriers to full participation in all aspects of life are eradicated. The Court of Appeals' decision simply enforced on an undisputed record unambiguous language in Title III of the ADA establishing that golf courses owned and operated by the PGA are places of public accommodation. Consistent with the individualized inquiry endorsed by this Court, the Court of Appeals also held that the ADA *requires* the PGA to accommodate Mr. Martin's disability unless it proves that use of a cart would fundamentally alter the nature of its competitions by giving *Mr. Martin* (as opposed to a hypothetical able-bodied golfer) a competitive advantage.

No case has ever held that a commercial enterprise which "is part of the entertainment industry" (J.A. 79) may insulate itself from federal anti-discrimination laws by creating artificial areas of exclusion. Title III of the ADA broadly prohibits discrimination on the basis of a disability against any

"individual" seeking the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Title III expressly defines a "public accommodation" as including a golf course. *See* 42 U.S.C. § 12181(7)(L). Mr. Martin is a disabled individual seeking the opportunity to play in PGA sponsored competitions taking place on golf courses. The clear and unambiguous language of Title III protects Mr. Martin from the PGA's discriminatory decision to deny him access to its competitions.

The PGA concedes that the ADA applies to spectators at its golf courses, but argues that Congress intended the ADA to extend only up to the ropes separating performers from spectators. The ADA provides no statutory basis to bifurcate a place of public accommodation into covered and uncovered zones. In *Daniel v. Paul*, 395 U.S. 298 (1969), this Court expressly rejected a similar argument under the analogous provision of Title II of the Civil Rights Act. *Id.* at 305-08. The lower courts have uniformly found that performance spaces are covered by Title III of the ADA.[5] The Department of Justice (the administrative agency charged with implementing the ADA) agrees. Both the implementing regulations and the legislative history support the same conclusion. Accordingly, the PGA proposes an unprecedented exception to the ADA that conflicts with the statutory language and interpretive authority.

The PGA fares no better with its newly-minted arguments that Title III applies only to "clients and customers" and that Mr. Martin is making a "workplace" claim foreclosed under Title III. First, the PGA waived these arguments by not raising

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5. *See, e.g.*, *Jones v. United States Golf Ass'n*, Civ. No. A-00-CA-278 JN, slip op. at 5-6 (W.D. Tex. Aug. 30, 2000); *Olinger v. United States Golf Ass'n*, 55 F. Supp. 2d 926, 933 (N.D. Ind. 1999) ("[T]he USGA's contention that it alone may set the rules is simply another version of its argument that the USGA is exempt from the provisions of the ADA, '[a]nd it is not.'") (quoting *Martin* district court opinion), *aff'd on other grounds*, 205 F.3d 1001 (7th Cir. 2000), *petition for cert. filed* (Sept. 20, 2000) (No. 00-434).

them in the lower courts. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998). On the merits, Section 12182 of the ADA prohibits discrimination against all "individuals." The PGA's attempt to engraft a "client or customer" limitation — borrowed from a subsequent and narrower provision of Title III — onto unambiguous coverage for "individuals" collides with basic statutory construction. The legislative history also confirms that the "client or customer" language is confined to sub-provisions not implicated here, and the only court to address this argument has flatly rejected it. *See Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113, 121 (3d Cir. 1998). Finally, even if this Court were to accept the PGA's "client or customer" limitation on Title III, Mr. Martin still qualifies for Title III protection as a consumer of the PGA's goods, services, facilities, privileges, advantages or accommodations.

The PGA's contention that Title III will engulf Title I if Mr. Martin prevails misapprehends the two titles. The Court of Appeals did not purport to address Title I, which governs "employee" claims; Title III applies to public accommodations. This case does not present the issue of whether an employee can obtain protection under Title III because the Court of Appeals did not disturb the district court's conclusion that Mr. Martin is not an employee. J.A. 48 n.10. Title III applies to claims by "individuals" seeking access to places of public accommodation. Mr. Martin clearly fits within this category and is therefore entitled to protection under Title III. That Mr. Martin might earn compensation at PGA tournaments by winning prize money does not change the analysis. Simply put, Title III does not withhold protection from "individuals" who may earn money at places of public accommodation but are not employees.

At bottom the PGA seeks a license to discriminate. Accepting the PGA's argument that Title III does not apply to it would grant it free rein to discriminate "inside the ropes" not only on the basis of any disability, but on the basis of race or

religion. The PGA's counsel acknowledged this before the district court. J.A. 197. The Court of Appeals foreclosed this result by applying Title III according to its terms.

The PGA next argues that there can be no modification of its walking requirement for Mr. Martin, contending that it has adopted a facially neutral rule which requires all players to walk. The PGA asserts that each and every rule of PGA Tour competition it deems "substantive" is "fundamental," and a change in any rule could hypothetically confer a competitive advantage. Through this argument the PGA would effectively elevate professional sports beyond the reach of Congress, no matter how great a barrier to participation a given rule poses, no matter how insignificant the rule to the competition, and no matter how reasonable the modification requested. The Court of Appeals identified the flaw in this argument: "The mere fact that PGA has defined walking to be part of the competition cannot preclude inquiry, or PGA will have been able to define itself out of the reach of the ADA." J.A. 45.

Under Title III of the ADA, the PGA was required to honor Mr. Martin's request unless it could prove that allowing him to use a cart would "fundamentally alter" the nature of its "goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii). The fundamental alteration analysis turns on an inquiry into the facts of Mr. Martin's disability and the effect of his requested modification on the PGA competitions. The Court of Appeals' "intensively fact-based" holding (J.A. 45) was expressly based on detailed factual findings made in the district court following a six-day bench trial supporting the conclusion that permitting Mr. Martin to use a golf cart would not fundamentally alter the nature of PGA and Nike Tour golf. As the Court of Appeals stated, the issue of "whether the accommodation of permitting Martin to use a golf cart fundamentally alters the PGA and Nike Tour competitions . . . was fully tried in the district court," and the district court's findings were affirmed under the appropriate

clearly erroneous standard. J.A. 43. Those findings demonstrated that "[a]ll that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability." J.A. 44. In addition, the Court of Appeals correctly concluded that the PGA could not meet its burden because the evidence showed that the PGA's own walking requirement is riddled with exceptions which permit the use of carts, and there is no Rule of Golf which prohibits accommodations for people with permanent disabilities who cannot walk the course. J.A. 42. The PGA does not contest the factual underpinnings of the district court's findings.

Mr. Martin is not asking for a wider golf hole, or a few strokes in "handicap." He is not asking to change the rules of the game; he is asking only to be allowed to *get to the game*, which is exactly what the ADA requires. The ADA requires that all organizations subject to the ADA modify their rules to permit full participation by people with disabilities. To argue that in sport the rules themselves are what is fundamental to the enterprise is to try to define sport as exempt from the ADA — and to do so in an insidious way. If no rule of competition, regardless of its purpose, can be modified to permit participation by people with disabilities, then — ironically — sport becomes the only industry in America permitted to construct barriers to access that are unrelated to performance.

ARGUMENT

I. THE PGA OPERATES A "PLACE OF PUBLIC ACCOMMODATION" AND THEREFORE IS SUBJECT TO TITLE III OF THE ADA

A. Golf Courses Are Places Of Public Accommodation

The ADA is the most extensive civil rights legislation enacted by Congress since the Civil Rights Act of 1964, and it embodies "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress enacted the ADA in 1990 after 20 years of experience with six other disability discrimination statutes demonstrated that a

comprehensive federal remedy was necessary. *See* H.R. Rep. No. 101-485, pt. 2, at 47-48 (1990). As Congress recognized, "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous. . . ." 42 U.S.C. § 12101(a)(9). Accordingly, Congress enacted the ADA as a direct and sweeping federal response, forbidding disability discrimination in all aspects of society.

The threshold inquiry here is whether the PGA is subject to the ADA when operating golf courses for its tournaments. Section 12181 of Title III sets forth the operative definitions for the title. 42 U.S.C. § 12181. Section 12182 enacts the "Prohibition of discrimination by public accommodations." 42 U.S.C. § 12182. Section 12182(a) sets forth the general rule against discrimination:

> (a) General rule — No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Casey Martin is an individual who claims that the PGA has sought to discriminate against him on the basis of his undisputed disability in the full and equal enjoyment of the "goods, services, facilities, privileges, advantages or accommodations" offered at the golf courses on which the PGA sponsors tournaments.

In Section 12181, Congress expressly defined "public accommodation" to include a "golf course." 42 U.S.C. § 12181. The statute provides:

> § 12181. Definitions — As used in this subchapter:
>
> * * *

> (7) Public accommodation. — The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce —
>
> * * *
>
> (L) a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation.

42 U.S.C. § 12181(7)(L) (emphasis added). This language makes it crystal clear that when the PGA owns, leases or operates a golf course, it is subject to the strictures of the ADA. There is no exception in the statute for use of places of public accommodation at specific events, such as competitions or tournaments.

Section 12181(7)(C) also identifies as a "public accommodation" a "motion picture house, theater, concert hall, stadium, *or other place of public exhibition or entertainment*," and Section 12181(7)(D) extends the definition to "an auditorium, convention center, lecture hall, or other place of public gathering." 42 U.S.C. § 12181(7)(C), (D) (emphasis added). Thus, in addition to specifically defining golf courses as public accommodations, Congress broadly designated as a public accommodation any place where the public gathers, which certainly would include the tournaments the PGA offers for public exhibition.

As this Court recently and unanimously stated, "unambiguous statutory text" in the ADA must be enforced as written. *See Yeskey*, 524 U.S. at 212. This Court held that the unambiguous language of Title II of the ADA plainly includes prisons within the Act's coverage because "[s]tate prisons fall squarely within the statutory definition of 'public entity.'" *Id.* at 210. This Court concluded that there was no textual basis for distinguishing between the "many recreational 'activities,' medical 'services,' and educational and vocational 'programs'" provided by prisons that "theoretically 'benefit' . . . prisoners," and the programs, services, and activities provided by other public entities. *Id.*

The analysis here is the same. Title III of the ADA applies to "golf courses" without qualification. Moreover, the numerous definitions of "public accommodations" capture the golf courses used during PGA competitions under a variety of labels, whether they are considered places of exercise, recreation, exhibition or public gathering. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) ("Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'") (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Confronted with this unambiguous language, the PGA concedes that the golf courses it operates during tournaments are "public accommodations" for spectators, but would draw a line to permit discrimination "inside the ropes" where the golfers play. The flaws in this artificial divide are manifold. First, no statutory basis exists to compartmentalize a place of public accommodation into covered and uncovered territory. The statute covers facilities in their entirety — "golf courses," "stadiums," "auditoriums." It would contravene the plain language of Title III to allow operators of these public spaces to arbitrarily draw lines between where they will and won't abide by the ADA.[6]

Amicus curiae USGA turns the statute on its head to argue that Congress' inclusion of the scope-*extending* phrase "or other place of exercise or recreation" after the enumeration of golf courses as places of public accommodation should limit the common meaning of "golf course." USGA Br. at 11. The legislative history indicates that by incorporating a catch-all

6. The examples of "mixed use" facilities cited by the USGA (USGA Br. at 12-14) are inapposite. With respect to the example of the residential apartment wing of a hotel, the wing is not covered because Congress specifically exempted it from coverage under the Act. *See* 42 U.S.C. § 12181(2)(A). Congress made no such exemptions for different parts of golf courses.

component into the definition, Congress intended the enumerated examples to be construed broadly.[7]

The Justice Department's regulations implementing the ADA — which "are entitled to deference" — reinforce the conclusion that Congress intended to address a wide variety of places, and not to limit the applicability of Title III to particular uses within those places.[8] The regulations provide that "[a] facility . . . is a place of public accommodation for purposes of the ADA to the extent that its operations include those types of activities engaged in . . . by the facilities [listed] in section [12181](7)." 28 C.F.R. ch. 1, pt. 36, App. B., § 36.104. Clearly,

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7. Consistent with the broad scope of public accommodations, Senate Report 116 stated that "the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities." S. Rep. No. 101-116, pt. 1, at 59 (1989); *see also* H.R. Rep. No. 101-485, pt. 2, at 100 (1990). It was intended "that the 'other similar' terminology should be construed liberally." *Id.*; *see Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (recognizing that the list of "major life activities" under the ADA "is illustrative, not exhaustive"). The legislative history states:

> [T]he legislation lists "golf course" as an example under the category of "place of exercise or recreation." This does not mean that only driving ranges constitute "other similar establishments." Tennis courts, basketball courts, dance halls, playgrounds, and aerobics facilities, to name a few other entities are also included in this category. Other entities covered under this category include video arcades, swimming pools, beaches, camping areas, fishing and boating facilities, and amusement parks.

S. Rep. No. 101-116, pt. 1, at 59 (1989); H.R. Rep. No. 101-485, pt. 2, at 100 (1990).

8. *See Olmstead v. Zimring*, 527 U.S. 581, 597-98 (1999) ("Because [the Justice Department] is the agency directed by Congress to issue regulations implementing Title II, . . . its views warrant respect."); *Bragdon*, 524 U.S. at 642, 646 ("[T]he Department's views are entitled to deference" and provide guidance regarding construction of the ADA.). The Justice Department has submitted an amicus curiae brief supporting Mr. Martin's position and providing its unequivocal view that the competition area of golf courses operated by the PGA during tournaments are places of public accommodation.

golf competition is the exact activity contemplated in Section 12181(7). The regulations add that the term "place of public accommodation" under Title III "is *quite extensive* and . . . [applies] even if the operation is only for a short time." 28 C.F.R. ch. 1, pt. 36, App. B, § 36.201 (emphasis added). These indications of the breadth of Title III directly contradict the PGA's effort to circumscribe and limit the amount of space that qualifies as a "public accommodation."

Historical support for the Justice Department's views is found in its Standards for Accessible Design applying Title III to many areas designated for performers. The Standards pertain to areas of "Public Use" — the "rooms or spaces" made accessible to the "general public" — *and* areas of "Common Use," which refer to:

> [T]hose . . . spaces, or elements that are made available for the use of a *restricted group of people* (for example, occupants of a homeless shelter, the occupants of an office building, or the guests of such occupants).

28 C.F.R. ch. 1, pt. 36, App. A, § 3.5 (emphasis added); *see also id.* § 4.1.3(5)(a), (c) (ADA applies to "performing areas," where general public is not allowed during performances). In a policy statement promulgating ADA requirements for the construction of new sports stadiums, the Justice Department requires construction of accessible routes that "connect the wheelchair seating locations with the stage(s), performing areas, arena or stadium floor, dressing or locker rooms, *and other spaces used by performers*." U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, *Accessible Stadiums*, available at http://www.usdoj.gov/crt/ada/stadium.pdf (last visited Dec. 10, 2000) (emphasis added).[9]

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9. In 1996, the United States resolved an ADA dispute with the Atlanta Committee for the Olympic Games by requiring accessibility for the public seating, dugouts, locker rooms, and dressing rooms. *See Settlement Agreement Concerning the Olympic Stadium*, *available at* http://www.usdoj.gov/crt/ada/stadiumo.htm (last visited Dec. 10, 2000).

Thus, the PGA's argument that players step outside the protections of the ADA when they take the field is meritless.

This Court's interpretation of analogous civil rights statutes is also instructive.[10] While none of the eight ADA cases decided by this Court addressed the specific question of defining "public accommodations" for purposes of Title III, the Court has decided a closely analogous issue under Title II of the Civil Rights Act of 1964. *See Daniel*, 395 U.S. at 302. In *Daniel*, this Court held that because the snack bar of a recreational entertainment facility was covered, the entire facility was a public accommodation under Title II. *Id.* at 305. Because Congress intended the ADA to expand significantly the public accommodations covered under the Civil Rights Act (limited to lodging, eating, and entertainment), *a fortiori* Congress intended to include golf courses without limitation. *See* Jonathan M. Young, National Council On Disability, *Equality of Opportunity — The Making of the Americans with Disabilities Act* 101-02 (1997).

More significantly, this Court in *Daniel* flatly rejected the argument that the term "place of entertainment" refers "only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity." *Daniel*, 395 U.S. at 306-08. Although much of the Civil Rights Act's legislative history "focused on places of spectator entertainment," this Court held "it does not follow that the scope of [the public accommodation provision under Title II] should

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10. *See, e.g.*, *Olmstead*, 527 U.S. at 599 (looking to the statutes that preceded the ADA in concluding that it "stepped up earlier measures to secure opportunities" for disabled persons); *id.* at 616-19 (Thomas, J., dissenting) (looking to Title VII and the Rehabilitation Act in construing the definition of discrimination under the ADA); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 505-06 (1999) (Stevens, J., dissenting) (looking at Title VII in construing the scope of the ADA's coverage); *Bragdon*, 524 U.S. at 631 (looking to the Rehabilitation Act and the Fair Housing Amendments Act in construing the definition of disability under the ADA).

be restricted to the primary objects of Congress' concern *when a natural reading of its language would call for broader coverage*," particularly in light of the broad remedial purpose of the Act. *Id.* at 307-08 (emphasis added).

The Court of Appeals correctly observed that "the greatest difficulty with PGA's argument" that it can discriminate at allegedly "private spaces" on golf courses (PGA Br. at 22) is the assumption — contradicted by the record — that "there is nothing public about the competition itself." J.A. 40. Competitors in PGA events are very much members of the public. The Q School through which most members of the Nike and PGA Tours qualify is hardly selective. "Any member of the public who pays a $3000 entry fee and supplies two letters of recommendation may try out in" Q School. J.A. 40, 162-63; S.E.R. 284-89; E.R. 8. The PGA's Executive Vice President testified he is unaware of any Q School applicant ever turned away. J.A. 184. As the PGA's Chairman testified, "there are a lot of people that have the Walter Middy [sic] dream, and they are willing to pay the [fee] just for the fun of going and trying." J.A. 220. As the Court of Appeals noted, there is "no justification in reason or in the statute to draw a line beyond which the performance of athletes becomes so excellent that a competition restricted to their level deprives its situs of the character of a public accommodation." J.A. 41.[11] Many places of public accommodation have selective admission criteria. But it does not follow that people satisfying the criteria thereby forfeit the protections of anti-discrimination laws. As the Court of Appeals noted, even though only a small percentage of students are admitted to the nation's top law schools, it is undisputed that

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11. The foundation of the bifurcation argument — that only competitors are permitted on the field of play during competition — is also factually flawed. It is undisputed that scores of individuals who are not PGA members, including caddies, tour personnel and reporters, are permitted "inside the ropes" during PGA competition. J.A. 38.

Title III of the ADA applies to those institutions.[12] *See* J.A. 40; 42 U.S.C. § 12181(7)(J); *Rothman v. Emory Univ.*, 828 F. Supp. 537, 541 (N.D. Ill. 1993).

Recently, the United States District Court for the Western District of Texas addressed the same question presented here and roundly rejected the USGA's bifurcation argument. *See Jones*, Civ. No. A-00-CA-278 JN, slip op. at 5-6.[13] The court noted that the plain language of the statute identified golf courses as places of public accommodation, and "there is no basis for finding . . . that a place defined as a public accommodation can have certain exempt zones carved from it." *Id.* at 4-6.

The PGA's view would forfeit the protections of anti-discrimination laws for a host of individuals who currently enjoy full and equal access to public accommodations. For example, an "auditorium," a "museum" and a "private school" are places of public accommodation, *see* 42 U.S.C. § 12181(7)(D), (H), (J), and do not cease to be for individuals with disabilities who need an accommodation to access the facilities to audition or perform. The PGA posits that members of the public attending an opera or symphony are protected, but individuals such as

12. The PGA unfairly asserts that the Court of Appeals should have compared Mr. Martin to a teacher at a private school rather than to a student. PGA Br. at 23. Because the PGA did not even raise below the issue that Title III somehow encroaches on Title I, the Court of Appeals had no occasion to consider any possible difference between a teacher and a student at a private school. The Court of Appeals' analogy to a talented student at a private institution was an apt response to the PGA's argument below that Title III did not apply to Mr. Martin because the PGA is highly selective.

13. The Court of Appeals' interpretation of Title III is also consistent with the only other case involving application of Title III to a professional golf association — *Olinger*. In holding that the USGA is subject to Title III of the ADA, the *Olinger* district court (the Seventh Circuit did not resolve the issue) expressly stated that it was joining the *Martin* district court decision. *Olinger*, 55 F. Supp. 2d at 932-33. Thus, *every case to decide whether Title III applies to a professional golf association has held that it applies*.

blind tenor Andrea Bocelli and violinist Itzhak Perlman (who has a crippling disability) — both of whom excel in their professions — can be discriminated against on the basis of disability at auditions or performances because they need accommodations to access the performance area. Similarly, the PGA would withhold anti-discrimination protection from an individual with a disability who wants to try out or perform at a theater or recital, or seeks to earn compensation at a talent show, even though Title III unambiguously applies to all places of "exhibition or entertainment." *See* 42 U.S.C. § 12181(7)(C).

Congress extended the protections of Title III to all "individuals" at "places" of "public accommodation," without limiting their purpose for being there or the uses being made of the facility. During the legislative process, Congress took note of then-Attorney General Thornburgh's testimony "that we must bring Americans with disabilities into the mainstream of society 'in other words, *full participation* in and access to all aspects of society.'" H.R. Rep. No. 101-485, pt. 2, at 35 (1990) (emphasis added) (quoting Congressional testimony of the then-Attorney General). In the ADA Congress also responded to testimony that identified discrimination in "the failure to make reasonable modifications in policies to allow *participation*" by people with disabilities, *id*. at 36 (emphasis added), and observed that "it can constitute a violation [of Title III] to impose criteria that limit the *participation* of people with disabilities," *id*. at 105 (emphasis added).

B. The PGA's Proposed "Clients Or Customers" Limitation On All Of Title III Is Meritless

1. PGA Waived Its "Clients Or Customers" Argument By Not Raising It Below

The PGA next formulates an argument that was not presented to and therefore not addressed by the courts below. Engrafting a sharply limited standing requirement onto Section 12182(a)'s general prohibition against discrimination, the PGA asserts that the only individuals who are protected by Title III are "clients or customers" of the public accommodation. The

phrase "clients or customers" never even appears in the PGA's Court of Appeals briefs. The PGA's failure to raise this argument in the district court or the Court of Appeals precludes its assertion here. *See Yeskey*, 524 U.S. at 212-13 (refusing to rule on constitutional argument in ADA case, noting that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"); *see also Bragdon*, 524 U.S. at 658 n.1 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("[W]e have rarely addressed arguments not asserted below.").

2. Section 12182(a) Of Title III Plainly Applies To "Individuals"

Putting aside that the PGA's "client or customer" argument is not properly before the Court, the argument makes up in creativity what it lacks in textual support. Section 12182(a) of Title III prohibits discrimination against an "individual." 42 U.S.C. § 12182(a). By misinterpreting a subpart of Section *12182(b)* — which on its face does not apply to all of Section 12182(a) — the PGA seeks to recast Congress' unambiguous intention to protect "individuals" as protecting a narrower segment of the population, individuals who are "clients or customers" of a public accommodation.

Section 12182(b), termed "Construction," contains part (1) "General prohibition" and part (2) "Specific prohibitions." 42 U.S.C. § 12182(b)(1), (2). Casey Martin's request is governed by part (2)'s subsection dealing with reasonable modifications. The relevant text provides:

> (2) Specific prohibitions
>
> (A) Discrimination – For purposes of subsection (a) of this section, discrimination includes —
>
> * * *
>
> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or

> accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii). Congress did not limit the type of "individual" protected or the status of a purported plaintiff. This Court's observation in *Bragdon* that "[t]he breadth of the term confounds the attempt to limit its construction in this manner" is equally applicable here. 524 U.S. at 638. The statute's plain language defeats the PGA's proposed revision of the statute — adopted by no authority — that an "individual" suing under Section 12182(a)'s "General rule" and Section 12182(b)(2)(A)(ii)'s "reasonable modification" requirement be a "client or customer."

The PGA borrows this purported limitation from a completely different part of Section 12182(b). In subparagraph 12182(b)(1)(A), the statute addresses a "General prohibition" related to "Activities." 42 U.S.C. § 12182(b)(1)(A). In three clauses, the statute provides that entities shall not subject "an individual or class of individuals" to (i) denial of participation, (ii) participation in an unequal benefit, or (iii) separate benefits. 42 U.S.C. § 12182(b)(1)(A)(i)-(iii). A fourth clause clarifies that *for these three clauses only*, the term "individual or class of individuals" refers to "clients or customers:"

> (iv) Individuals or class of individuals – *For purposes of clauses (i) through (iii)* of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

42 U.S.C. § 12182(b)(1)(A)(iv) (emphasis added).

The legislative history explains that the limitation was prompted by Congress' recognition that subparagraph 12182(b)(1)(A) (not relied on by Mr. Martin or the Court of Appeals) is virtually limitless in terms of covered entities,

reaching any person or organization who "directly, or through contractual, licensing, or other arrangements" causes a disabled person or class of individuals to be subjected to specified discriminatory treatment. 42 U.S.C. § 12182(b)(1)(A). Congress was concerned about the potentially far-reaching scope of contractual liability and therefore included a limitation on complainants entitled to sue. Clause (iv) clarifies that a contracting entity will not be liable "for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers." H.R. Rep. No. 101-485, pt. 2, at 101 (1990). This provision simply specifies the extent of liability for contractual relations; it does not sweepingly limit Title III.

This conclusion is reinforced by Congress' decision *not* to include a "client or customer" limitation on what it denominated the "General rule." *See* 42 U.S.C. § 12182(a). Nor did it place such a limitation in the general definitions in Section 12181. 42 U.S.C. § 12181. The only "client or customer" limitation is in Section 12182(b), and that limitation is expressly confined to a subparagraph 12182(b)(1)(A) not at issue here. 42 U.S.C. § 12182(b)(1)(A). The PGA's attempt to overlay an expressly limited sub-definition onto the general anti-discrimination provision (Section 12182(a)) and the specific prohibitions contained in Section 12182(b)(2) collides with bedrock principles of statutory interpretation. Where Congress has expressly limited the applicability of a statutory provision, this Court will not expand the applicability of that provision to other sections. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation omitted)); *United States v. Naftalin*, 441 U.S. 768, 773 (1979) ("Respondent nonetheless urges that the phrase 'upon the purchaser,' found only in subsection (3) of § 17(a), should be read into all three subsections. The short answer is

that Congress did not write the statute that way."); *see also Olmstead*, 527 U.S. at 622 (Thomas, J., dissenting) (citing *Bates* in comparing the definitions of discrimination under Titles I and II of the ADA).

Although the plain language of the statute is sufficient to defeat the PGA's argument, the legislative history buttresses the conclusion. The drafting reports indicate that Congress initially considered defining "public accommodation" generally as "privately operated establishments . . . that are used by the general public as customers, clients, or visitors." S. 933, 101st Cong. § 401(2)(A)(i)(I) (1989); H.R. 2273, 101st Cong. § 401(2)(A)(i)(I) (1989). The decision by Congress to enact in Section 12181 a broader definition that does not refer to "customers or clients" indicates a conscious decision not to limit the status of potential plaintiffs in the manner proposed by the PGA.

3. Applying Title III To "Individuals" Does Not Encroach On Title I

The PGA's contention that the Court of Appeals' straightforward application of Title III has worked mischief on the interplay between Title III and Title I's employment provisions is an extended detour around unambiguous statutory language. Title III grants equal access and enjoyment of different and often broader areas than Title I's employment-related provisions: Title III grants to "individuals" full and equal access to the "goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a).

The PGA's assertion that the Court of Appeals has radically expanded the scope of the employment provisions of Title I is puzzling; the Court of Appeals did not purport to address Title I. This case does not present the issue of whether an employee can obtain protection under Title III because the Court of Appeals did not disturb the district court's conclusion that Mr. Martin is not an employee. J.A. 48 n.10. Even if Mr. Martin were considered an employee, it is noteworthy that in *North*

Haven Board of Education v. Bell, 456 U.S. 512 (1982), this Court held that Section 901 of Title IX, which provides that "no person" may be discriminated against on the basis of gender, covers employees as well as students. The Court's observation that "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of § 901(a)" applies equally here. *Id*. at 521.[14]

4. Even Under The PGA's Theory, Casey Martin Is A "Client Or Customer" Of The PGA

Even if the PGA were correct that Title III protects only "clients or customers" at places of public accommodation, Mr. Martin remains covered. The ADA does not define the term "client or customer." A client is commonly understood as "a person who engages the professional advice or services of another" and a customer as "one that purchases some commodity or service." *Webster's Third New International Dictionary* 422, 559 (1993). The PGA declares that "[t]he purpose of PGA Tour is to protect the interests of professional golfers who qualify for membership in PGA Tour, to promote professional golf tournaments for PGA TOUR members, and to further the professional golf careers of PGA TOUR members." PGA's Statement ¶ 3. The PGA staff organizes and administers Q School, plans and operates each tournament, arranges for spectator viewing and television broadcasts, and coordinates with third party tournament sponsors. *See* J.A. 139-44; S.E.R. 235-39. Mr. Martin pays a fee of $3,000 to participate in Q School and pays his own expenses to play in each tournament. J.A. 40; Tr. 814-16. The PGA competitions allow Mr. Martin to focus exclusively on his game and leave the logistics of his

14. The PGA also fails to acknowledge material differences between Titles I and III that will prevent the flight from Title I to Title III envisaged by the PGA. Title I affords money damages to employees, and covered entities must go to greater lengths to accommodate a disabled individual as an ongoing member of their workforce, including finding alternative positions in the organization. Title III only permits suits for injunctive relief to allow *access* to public accommodations, which covered entities may provide in a variety of ways.

performance to others, while at the same time providing a forum to demonstrate his skills and attract third party endorsement. Mr. Martin is clearly a consumer of the PGA's goods, services, facilities, privileges, advantages and accommodations — by virtue of the PGA's providing these benefits, Mr. Martin does not have to personally arrange a display of his golfing skills. That the PGA has additional customers called spectators does not affect this conclusion.

II. GOLF IS A GAME OF SHOT MAKING — NOT WALKING: THE FACTUAL FINDINGS AFFIRMED BELOW SUPPORT THE CONCLUSION THAT THE PGA HAD NOT MET ITS BURDEN THAT PERMITTING MR. MARTIN TO USE A CART FUNDAMENTALLY ALTERS PGA GOLF

A. The Inquiry Turns On Casey Martin's Specific Facts

Title III broadly provides that any private entity that owns, leases or operates a "public accommodation" must make a "reasonable modification" of its "policies, practices, or procedures" when necessary to make its "goods, services, facilities, privileges, advantages, or accommodations" available to individuals with disabilities, unless the PGA demonstrates that such modification would "fundamentally alter the nature" of its "goods, services, facilities, privileges, advantages or accommodations." 42 U.S.C. §12182(b)(2)(A)(ii). Because the PGA conceded that Mr. Martin has a disability, Mr. Martin's only burden was to show that "a modification was requested and that the requested modification is reasonable." *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997). The PGA has never contended a cart is an unreasonable modification — its Commissioner acknowledged that carts have been a part of the game of golf for 30-40 years. J.A. 270. As the district court properly concluded, "[t]he requested accommodation of a cart is eminently reasonable in light of Casey Martin's disability" because "Casey Martin cannot walk the course, and only a cart will permit him to compete." J.A. 65, 73.

Once Mr. Martin met his burden, the PGA had to permit the modification unless it proved that the modification "would fundamentally alter the nature of the public accommodation." *Johnson*, 116 F.3d at 1059. In seeking to meet its burden, the PGA must "focus[ ] on the specifics of the plaintiff's or defendant's circumstances and not on the general nature of the accommodation." *Id*. at 1060.

The PGA contends that the modification requested by Mr. Martin is unreasonable without ever considering the nature and extent of his disability — facts it deems irrelevant. *See, e.g.*, PGA Br. at 36. The House Report squarely rejected the PGA's position, observing 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." H.R. Rep. No. 101-485, pt. 2, at 102 (1990) (emphasis added). Congress' focus on individualized treatment is repeatedly emphasized in the findings of fact set forth as the preamble to the ADA. *See* 42 U.S.C. § 12101(a).[15]

As the Court of Appeals recognized, the fundamental alteration inquiry is "intensively fact-based." J.A. 45. District court findings of fact are entitled to significant deference on appeal. *See, e.g.*, *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 573-74 (1985).

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15. For example, Congress found that "forms of discrimination against *individuals* with disabilities continue to be a serious and pervasive social problem," 42 U.S.C. § 12101(a)(2) (emphasis added); "discrimination against *individuals* with disabilities persists in such critical areas as . . . public accommodations," *id.* § 12101(a)(3) (same); and that "*individuals* with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices," *id.* § 12101(a)(5) (same).

When interpreting the ADA, this Court has acknowledged the value of consensus among the lower courts. *See Bragdon*, 524 U.S. at 644-45 (drawing support from the consensus of lower courts that ruled an HIV infection was a handicap under the Rehabilitation Act). The lower court opinions in this case are consistent with uniform circuit and district court authority.[16]

This Court has already endorsed an individualized inquiry under the "reasonable accommodation" provision of the Rehabilitation Act. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987). The ADA was modeled after and extended the protections of the Rehabilitation Act, and this Court has held that the two should be interpreted consistently. *See Bragdon*, 524 U.S. at 632 (This Court is required "to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."). [17] In *Arline*, this Court observed that individualized inquiries are necessary to implement Section 504 of the Rehabilitation Act, which requires employers to make reasonable accommodations for otherwise qualified employees:

> [I]n most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice,

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16. *See, e.g., Johnson*, 116 F.3d at 1059-60; *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1996) ("[T]he determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry."); *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2d Cir. 1995) ("[T]he determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry.").

17. Congress specified in the ADA that "[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a).

> stereotypes, or unfounded fear, while giving appropriate weight to [any countervailing considerations].

Arline, 480 U.S. at 287.[18]

Significantly, the Seventh Circuit (the same court that decided *Olinger*) recently applied this guidance from *Arline* in reaffirming the appropriateness of evaluating a plaintiff's individual circumstances under Title II of the ADA. *See Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840, 851 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999). As the *Washington* court noted:

> The entire point of *Arline*'s statement that a person is otherwise qualified if he is able to participate with the aid of reasonable accommodations is that some exceptions ought to be made to general requirements to allow opportunities to individuals with disabilities. To require a focus on the general purposes behind a rule without considering the effect an exception for a disabled individual would have on those purposes would negate the reason for requiring reasonable exceptions.

Id.

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18. This Court also requires an individualized inquiry when determining (a) whether an individual is disabled under the ADA and (b) whether hiring or accommodating an individual poses a "direct threat" to the health and safety of others. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) ("[T]he existence of disabilities [is determined] on a case-by-case basis."); *id.* at 569 ("[The direct threat] criterion ordinarily requires an individualized assessment of the individual's present ability to safely perform the essential functions of the job." (internal quotation omitted)); *Sutton*, 527 U.S. at 483 ("Whether a person has a disability under the ADA is an individualized inquiry."); *Bragdon*, 524 U.S. at 649 ("The existence . . . of a [direct threat] must be determined from the standpoint of the person who refuses the treatment or accommodation."); *id.* at 662 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (agreeing with the *Bragdon* majority that an individualized inquiry is required under the direct threat analysis).

B. The District Court Factual Findings Affirmed By The Court Of Appeals Were Not Clearly Erroneous And Support The Conclusion That Mr. Martin's Use Of A Cart Does Not Fundamentally Alter PGA Competition

1. Walking Is Not Fundamental To PGA Tour Competitions

To determine whether the PGA's so-called walking rule is fundamental to PGA Tour competitions, it is helpful to consider the meaning of the term "fundamental." The dictionary defines fundamental as "serving as a basis supporting existence or determining essential structure or function." *Webster's Third New International Dictionary* 921 (1993). The term "essential" means "constituting an indispensable structure, core, or condition of a thing." *Id.* at 777.

The Rules of Golf make it clear that the essence of the game is shot-making, not walking. J.A. 104. The PGA Commissioner acknowledged that "the essentials" of the game of golf are contained in Rule 1-1 of the Rules of Golf and that "the key element of skill in the game of golf is shot-making." J.A. 261, 269-70. As the district court noted, "*[n]othing* in the Rules of Golf requires or defines walking as part of the game." J.A. 63 (emphasis added). The USGA's *Decisions on the Rules of Golf* state that the Rules *permit* use of a cart during any competition unless prohibited in the conditions for competition of a particular event. J.A. 131, 229, 243. The PGA was unable to produce any document stating directly or indirectly that walking is fundamental to competitive golf. J.A. 261.

Significantly, the Rules of Golf do not prohibit the use of carts or require players to walk. Rather, the Rules of Golf provide a model *optional* condition for a competition to include if the competition wishes to require players to walk. Not only did the PGA not adopt the Rules' optional condition, it adopted a "walking rule" that specifically provides for exceptions. As found by the courts below, the PGA regularly rebuts its contention that walking is fundamental to PGA golf by permitting the use of carts throughout its competitions:

- For 30 years the PGA rules permitted players to use carts in all three stages of the Q School. There is no evidence that over the course of 30 years any player or PGA official *ever* complained that a player who chose to use a cart had an advantage over those players who chose to walk. Only in 1997, the year Mr. Martin played in the qualifying rounds of the Q School, did the PGA for the first time require players to walk in the final stage. J.A. 154, 216, 257-58; S.E.R. 92-94, 192.
- Every golfer who advances to the third stage of Q School is assured of a place on either the PGA or Nike Tour. Yet until the pendency of the appeal of this action, the PGA still did not require any golfer to walk in the first two qualifying stages when testing the skills of players who would become Tour members. J.A. 162-63, 264-65.
- A player can earn the right to play in a single PGA event as an "exempt" entry by playing in the open qualifying event for that tournament and being one of the four lowest-scorers in that event. Carts are permitted for such events. J.A. 161, 262-64.
- The PGA routinely permits all players to ride in carts during PGA and Nike Tour competition for administrative convenience, including when players retrieve a ball hit out of bounds, when a lengthy distance separates a green and the next tee, and sometimes during play of an entire hole. J.A. 157-60, 201-02; S.E.R. 58.
- The PGA permits carts and does not require walking on its highly competitive Senior Tour. J.A. 218, 221-25.[19]

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19. The PGA has never questioned the integrity of the Q School, weekly qualifying tournaments, PGA Tour, or Senior Tour competitions in which players have used carts. *See, e.g.*, S.E.R. 192. Similarly, no one ever complained about the integrity of collegiate competitions in which Mr. Martin was granted an exception to requirements that players walk and, unlike PGA competition, carry their own clubs. J.A. 207-08; S.E.R. 79, 228-29.

- The PGA rules provide no handicap or penalty for players who use carts, in contrast to its rules that penalize players for using non-conforming balls or clubs. J.A. 229, 243; *Fay Interview*.

The perception of what is "fundamental" to golf by those involved in the game's highest levels further confirms the centrality of shot-making. Eric Johnson, who won the second tournament on the 1998 Nike Tour and who played on the 1997 PGA Tour, testified that skills relating to stance, setup and swing are the fundamental aspects of the game. This is shot-making. J.A. 204. A former Championship Director of the U.S. Open, who has organized and played in significant tournaments for decades, testified that while "walking adds to the joy and pleasure of the game," it is not an "integral part of the game." J.A. 206; *see also* J.A. 203-04 (Mr. Johnson testified that walking is part of the game only as a way to reach the next shot).

The Court of Appeals also noted the district court's factual finding "that, at the low levels of intensity of exercise involved in untimed walking of a golf course during a competition, 'fatigue . . . is primarily a psychological phenomenon. . . . Stress and motivation are the key ingredients here.'" J.A. 43 (quoting the district court's opinion). The Court of Appeals correctly concluded that "[t]here was ample evidence to support all of these findings, and they are not clearly erroneous." J.A. 43.

Even a small sampling of the evidence below illustrates that the district court's findings were well-grounded in the record:

- Dr. Gary Klug, a professor of physiology at the University of Oregon, testified that walking in competitive golf is not physiologically taxing and does not create an appreciable measure of fatigue. J.A. 210-11; S.E.R. 83-85. Moreover, unlike aerobic sports such as basketball, no cumulative fatigue arises from

successive golf games over a period of tournament play. *Id.* [20]

- Mr. Johnson confirmed Dr. Klug's conclusions from the player's experience. Playing a round of golf in PGA competition does not cause players to break a sweat. J.A. 202. Mr. Johnson testified he does not go to a gym or jog to improve his endurance. He simply does not "consider[ ] physical fatigue in [the game]." J.A. 204.
- A professional round of golf takes longer than a non-professional round because players take longer periods to set up their shots and also must wait for other players to take their shots, which allows them to regenerate energy. *See* J.A. 202.
- Contrary to the PGA's position, the former president of the USGA testified that "[o]bviously [golf is] not a major endurance contest, because otherwise we'd require players to run between shots." J.A. 242.
- Even PGA witness Ken Venturi admitted that the principal cause of fatigue in PGA golf is mental stress caused by the pressure of competition. J.A. 235-37. Indeed, Mr. Venturi admitted playing 36 holes does not induce greater physical fatigue than playing 18. J.A. 238. Mr. Venturi further acknowledged that any fatigue inherent in PGA golf is stress related: "You know, if you are shooting 80 [a poor score in PGA golf], you don't get fatigued." J.A. 236.
- Mr. Venturi and the other PGA witnesses who testified that riding reduces a perceived fatigue factor admitted they were speaking generally about able-bodied hypothetical golfers and not about Mr. Martin. J.A. 238; *see also* J.A. 177-78, 191. None of the PGA witnesses

20. The PGA's argument that PGA Tour golfers suffer cumulative fatigue from walking the golf course on successive days is further refuted by the testimony of the PGA's Commissioner, who testified that the scores for the majority of finishers of a golf tournament are generally lower on the last day than the first day. Tr. 857-59.

who testified about the purported fatigue factor had any knowledge about the nature and extent of Mr. Martin's disability. *See* J.A. 177-78, 185, 191, 258-59.

The most compelling evidence that walking during competitive golf does not induce fatigue comes from the actions of players who understand that one shot may determine the outcome. As the district court noted, when given the choice to ride or walk a competitive round of golf, most golfers choose to walk. J.A. 68, 167, 179, 201, 209, 214, 225. At the final stage of the 1997 Q School, after the district court had issued the preliminary injunction, the Commissioner decided to make cart use optional for all participants. S.E.R. 95. Mr. Martin testified that he saw only 5 or 6 of the 168 other participants using carts. J.A. 231. As Stanford's golf coach testified, it is a "huge disadvantage to have to ride around in a cart," and he would be "exhilarat[ed]" if an opposing team all used carts. J.A. 208-09. Professional golfers generally prefer to walk for several reasons unrelated to the demands made upon the player when hitting shots — walking helps the golfer (a) relieve stress; (b) assess wind conditions; (c) assess course features and conditions; and (d) stay warm in chilly weather. *See, e.g.*, J.A. 179-80, 214; S.E.R. 43-44, 139-40. Even the PGA's Commissioner acknowledged that walking in certain circumstances provides a competitive advantage over riding. S.E.R. 194.

In short, the PGA has produced no document, and pointed to no statement, made by anyone prior to the trial of this action suggesting that fatigue is an important element in the game of golf.[21] The district court found that the element of fatigue is not

21. Amicus USGA believes that it developed a better record supporting its position in *Olinger* than the PGA developed here. *See, e.g.*, USGA Br. at 4. Their assertion underscores that far from announcing any broad split with the Court of Appeals, the Seventh Circuit simply affirmed a district court holding based on findings of fact made "after a full trial" in which the evidence received was quite different than the evidence heard by the court in *Martin*. (Cont'd)

fundamental to PGA golf competitions. The PGA has failed to show that the district court's findings were clearly erroneous. *See Concrete Pipe*, 508 U.S. at 623; *Anderson*, 470 U.S. at 574.

2. The PGA Cannot Refuse To Consider Mr. Martin's Request

The PGA seeks to litigate this case as if the ADA does not exist. It misstates the Court of Appeals' holding and analysis, asserting that the Court of Appeals reshaped Title III into a vehicle to "create a more level playing field for competitors *of different physical ability*." PGA Br. at 36 (emphasis added). In fact, the Court of Appeals carefully confined its ruling to the PGA's discriminatory conduct toward Mr. Martin in failing to comply with the ADA's mandate that it reasonably accommodate his permanent disability. The Court of Appeals clarified that its holding, which was expressly based on the unique factual record developed at Mr. Martin's trial, carried no far-reaching effect:

> The nature of the district court's findings reflect the fact that whether an accommodation fundamentally alters a competition is an intensively fact-based inquiry. For that reason, we reject PGA's argument that permitting Martin to use a golf cart would open the door to future decisions requiring that disabled swimmers or runners be given a head start in a race. . . . We have little doubt that fact-based inquiries into the effects of such accommodations

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(Cont'd)

See Olinger, 205 F.3d at 1004. The district court in *Olinger* stated that "this case is different from the *Martin* case," and emphasized important differences in both the factual records of the cases and the nature of the competitions to which the respective individuals sought access. *Olinger*, 55 F. Supp. 2d at 933 n.4. The Seventh Circuit acknowledged the district court decision in *Martin*, but never suggested that its holding was inconsistent with *Martin*. The *Olinger* district court stated it was making an "individualized decision concerning the plaintiff." *Id.* at 937. Thus, any differences in the decisions arise from differing factual records, not from conflicts on the law.

> would result in rulings that those accommodations fundamentally altered the competitions.

J.A. 45.

The PGA argues that it should not have to entertain Mr. Martin's request because it deems its walking requirement "substantive," which in litigation it defines as "a rule that is intended to, and potentially does, affect the outcome of a particular competitive event." *See* PGA Br. at 10 n.12.[22] But Congress specifically foreclosed retreat to "facially neutral" rules, and rejected attempts to justify exclusion based on disability because "the rules are the rules." *See, e.g.*, *Crowder*, 81 F.3d at 1484; *Thomas v. Davidson Acad.*, 846 F. Supp. 611, 619 (M.D. Tenn. 1994) (The ADA forecloses "blind adherence to policies and standards resulting in a failure to accommodate a person with a disability."). The Court of Appeals properly rejected the PGA's argument, recognizing that "[t]he mere fact that PGA has defined walking to be part of the competition cannot preclude inquiry, or PGA will have been able to define itself out of the reach of the ADA." J.A. 45. The Court of Appeals exposed the fatal flaw in the PGA's argument:

> The difficulty with [the PGA's] position is that it reads the word "fundamentally" out of the statutory language, which requires reasonable accommodation unless PGA can demonstrate that

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22. The PGA's attempt to equate its rule against using carts with other requirements of the Hard Card such as the one-ball rule, which requires players to use the same brand of ball throughout play, and limiting players to 14-clubs during a round, is misguided. Those requirements directly affect the shot-making aspect of golf, and an alteration of those requirements for one player could provide a shot-making advantage. J.A. 232-33; S.E.R. 63. After a six-day trial, the district court made detailed factual findings — affirmed by the Court of Appeals — based on evidence showing that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances" and that "providing Martin with a golf cart would not give him an unfair advantage over his competitors." J.A. 43, 48.

> the accommodation would "fundamentally alter the nature" of its competition.

J.A. 44 (quoting 42 U.S.C. § 12182(b)(2)(A)(ii)).[23]

In *Bragdon*, this Court held that even defendants with special expertise are not exempt from judicial review under the ADA. *Bragdon*, 524 U.S. at 649 ("[Health care professional's] belief that a significant [health] risk existed, even if maintained in good faith, would not relieve him from liability. . . . [P]etitioner receives no special deference simply because he is a health care professional."). The *Crowder* court underscored the need for judicial review:

> The court's obligation under the ADA . . . is to ensure that the decision reached by the [defendant] is appropriate under the law and in light of proposed alternatives. Otherwise, any [defendant] could adopt requirements imposing unreasonable obstacles to the disabled, and when haled into court could evade the antidiscrimination mandate of the ADA merely by explaining that the [defendant] considered possible modifications and rejected them.

Crowder, 81 F.3d at 1485.

The PGA returned Mr. Martin's documentation of his permanent disability, including a videotape demonstrating the severity of his condition, without even opening the envelope. *See* J.A. 51-52, 218, 232; S.E.R. 201-02. Having refused even to look at Mr. Martin's medical records, the PGA asserts that it would be unduly burdensome for it to comply with the ADA's required case-by-case evaluation of disability. PGA Br. at 39.

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23. Seeking to create the impression that the decision below has broad ramifications, the PGA argues that this case concerns "whether Title III compels the Tour to grant selective waivers of its substantive rules in order to accommodate disabled competitors." PGA Br. at 2. But no rule of the PGA Tour has to be changed for Mr. Martin. He only asks that the PGA Tour Rules Committee apply its existing rule, which already provides for exceptions to its prohibition against carts.

As the Court of Appeals noted, however, "[n]othing in the record establishes that an individualized determination would impose an intolerable burden on PGA." J.A. 47.[24]

The Rules of Golf expressly provide for individual determinations of whether particular modifications for players with disabilities confer a competitive advantage. Ruling 14-3/15 in the USGA's *Decisions on the Rules of Golf* (Plaintiff's Trial Exhibit 105, Tr. 626), interpreting Rule 14-3 concerning use of "artificial devices and unusual equipment," states that an artificial limb is generally not considered a forbidden artificial device under the Rules of Golf. *Id.* "However, if the Committee believes that an artificial limb . . . would give the player an undue advantage over other players, the Committee has authority to deem it to be an artificial device contrary to Rule 14-3." *Id*.

In addition, the PGA regularly makes these individualized determinations pursuant to an extension rule for PGA members who miss certain events because of a medical condition. The Commissioner testified that the PGA reviews a PGA or Nike Tour player's medical condition and generally accepts a treating physician's conclusion that the player missed a tournament for medical reasons. The PGA then permits this *temporarily* disabled player to return to the Tour (to the extent determined by a formula) *without having to return to Q School*, which the PGA concedes gives the exempt player an advantage on the basis of disability over those who must qualify. *See* J.A. 269; Tr. 871-72. Thus, the PGA is already evaluating the medical condition of golfers and is willing to make judgments about the effect of even a temporary disability on the ability to play for one of its own. The ADA prohibits the PGA from refusing

24. In the three years since Mr. Martin petitioned for a cart, no one has sued the PGA, and only two golfers (Ford Olinger and JaRo Jones) have sued the USGA, seeking to use carts in professional competitions. Given the nature of the sport, it is highly unlikely that many individuals with disabilities will possess both the shot-making skills required for PGA play and the tenacity to overcome the type of disability suffered by Mr. Martin on a daily basis.

to exercise its demonstrated ability to evaluate golfers with disabilities when the request is from a golfer seeking to play on the tour.

3. Mr. Martin Does Not Have An Advantage Over Other PGA Tour Players

If the PGA had evaluated Mr. Martin's condition as required by the ADA, it could not believe for an instant that he has a competitive advantage using a cart. Even with a cart, Mr. Martin (who is unable to do aerobic exercise) must walk an appreciable part of the course, "100 yards for a 400-yard hole, at least." J.A. 230. The district court correctly found that Mr. Martin must walk about twenty-five percent of the course because the cart cannot be brought near the ball in many cases. J.A. 69. The district court summarized the effect on Mr. Martin as follows:

> [Mr. Martin] is in significant pain when he walks, and even when he is getting in and out of the cart. With each step, he is at risk of fracturing his tibia and hemorrhaging. The other golfers have to endure the psychological stress of competition as part of their fatigue; *Martin has the same stress plus the added stress of pain and risk of serious injury. . . . To perceive that the cart puts him — with his condition — at a competitive advantage is a gross distortion of reality*.

J.A. 69 (emphasis added); *see also* J.A. 198-200, 227.[25]

The Court of Appeals observed that the fact-intensive issue of whether permitting Mr. Martin to use a cart would provide an unfair advantage was "fully tried in the district court."

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25. These findings distinguish the present case from *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), a case brought under the Rehabilitation Act of 1973, in which this Court held based on the factual record before it that a nursing program need not make fundamental alterations to its program in order to enroll a student who had a hearing limitation that could interfere with her safely caring for patients. *Id.* at 413.

J.A. 43. The Court of Appeals summarized the evidence concerning the nature of Mr. Martin's disability and his inability to walk a golf course and agreed with the district court's conclusion that "permitting Martin to use a golf cart . . . would not fundamentally alter the nature of those competitions." J.A. 43. The Court of Appeals concluded:

> All that the cart does is permit Martin access to a type of competition in which he would otherwise could not engage because of his disability. That is precisely the purpose of the ADA.

J.A. 44.[26]

The PGA has never attempted to show that the district court's findings were clearly erroneous. Instead, the PGA is largely reduced to platitudes to defend its choice — which is a matter of taste, not the essentials of golf — to require walking. This is exactly the kind of otherwise benign "custom" that the ADA was enacted to modify.

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26. The PGA's argument that Mr. Martin could have an advantage over golfers with "debilitating (though not necessarily 'disabling') conditions" (PGA Br. at 14) ignores that "disability" is a statutory term. If (as here) an individual proves a disability, he or she is protected by the ADA and must be reasonably accommodated at places of public accommodation unless the proposed modification would result in fundamental alteration.

The conjecture offered by the PGA and USGA cannot satisfy the PGA's burden of proving a fundamental alteration. S*ee* PGA Br. at 40 n.28 ("It is certainly arguable that respondent . . . has a distinct advantage."); USGA Br. at 23 n.9 ("If that competitor had been permitted to use a golf cart, he *might have* improved his score." (emphasis added)); Tr. 862 (Mr. Finchem speculated "I *assume* that riding in a golf cart in certain instances, on certain topography, in certain conditions, is an advantage." (emphasis added)). Such speculation does not satisfy the PGA's burden of proof, and certainly cannot justify overturning the district court's factual findings as clearly erroneous. *See Colorado v. New Mexico*, 467 U.S. 310, 324 (1984) ("[E]videntiary burden cannot be met with generalizations . . . and unstudied speculation.").

III. GRANTING CASEY MARTIN EQUAL ACCESS FURTHERS THE ADA AND WILL NOT UNDULY BURDEN SPORTS ORGANIZATIONS

Ultimately, the PGA and its amici seek to justify the PGA's refusal to comply with the ADA by conjuring slippery slope scenarios. They suggest this Court should interpret the absence of express discussion by Congress of "championship-level athletic competitions" in the ADA (USGA Br. at 5; *see* PGA Br. at 22) as evidence of an intent to exclude such events from statutory coverage. This Court has recently unanimously rejected that argument under the ADA:

> [A]ssuming . . . that Congress did not "envision that the ADA would be applied [in suggested manner]," *. . . in the context of an unambiguous statutory text that is irrelevant*. . . . [T]hat a statute can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. *It demonstrates breadth*."

Yeskey, 524 U.S. at 212 (emphasis added) (internal quotation omitted); *see Brogan v. United States*, 522 U.S. 398, 403 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy — even assuming that it is possible to identify that evil from something other than the text of the statute itself.").

Nothing in the legislative history suggests that Congress intended to exempt the sports world from the ADA. To the contrary, one of the original bill sponsors testified:

> Society has neglected to challenge itself and its misconceptions about people with disabilities. When people don't see the disabled among our co-workers, or on the bus, or at the *sports field*, or in a movie theater, most Americans think it's because they can't. It's time to break this myth. The real reason people don't see the disabled among their co-workers, or on the bus, or at the *sports field*, or in a movie theater

> is because of barriers and discrimination. Nothing more.

Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Sen. Subcomm. on the Handicapped of the Comm. on Labor and Human Resources and the House Subcomm. on Select Educ. of the Comm. on Educ. and Labor, 100th Cong. 15 (1988) (emphasis added) (statement of former House Majority Whip Tony Coelho).

Moreover, professional sports organizations including the NBA, the NFL, the NHL and Major League Baseball appeared before Congress during its consideration of the ADA. None of these organizations suggested that the ADA would not apply to them. Instead, they sought guidance from Congress concerning whether drug-testing programs for *players* would comply with the ADA. *See* H.R. Rep. No. 101-485, pt. 2, at 80-81 (1990).

The PGA's suggestion that permitting Mr. Martin to use a cart will provoke complaint from other golfers that Mr. Martin has an advantage is belied by experience. As more PGA Tour golfers have watched Mr. Martin and seen his condition, they have increasingly supported his use of a cart. Jack Nicklaus, who testified against Mr. Martin in the district court, has now changed his position and stated that the PGA Tour should provide him a cart. *See* Hunki Yun, *Casey and the Cart – Martin Set for PGA Tour Debut*, Orlando Sentinel, Jan. 19, 2000, *available at* 2000 WL 3573262; Joe Hamelin, *Martin's Debut Solid Under Pressure*, The Press-Enterprise, Jan. 20, 2000, *available at* 2000 WL 7012432. Tiger Woods, when asked whether the PGA Tour should allow Mr. Martin to ride in a cart, stated "[t]hat would be a very sympathetic thing for the PGA to do. It would make them look very good." Ron Rapoport, *Smiling Was Easy With Payne Around*, Chicago Sun-Times, Oct. 26, 1999, *available at* 1999 WL 6562704.[27]

27. Other golfers who support Mr. Martin include eight time major-winner Tom Watson, two-time British Open champion Greg Norman, former PGA Championship winner Paul Azinger (who himself battled cancer to return to the PGA Tour), former British Open champion (Cont'd)

The PGA's concern that accommodating Mr. Martin will ripple into other sports is overstated. Requiring reasonable accommodations for people with permanent disabilities does not force sports organizations to change the nature of the game to allow people who lack the core skills needed to compete. Someone who cannot run is not qualified to participate in a foot-race. But if a player qualifies by demonstrating exceptional ability in the sport's essential skills, his permanent disability unrelated to the sport should not exclude him from using that ability.[28]

The PGA's argument that providing Mr. Martin with a cart will lead others to challenge the integrity of its competitions is also belied by experience. The Australasian PGA Tour, the highest-level tour in Australia and parts of Asia, recently granted a cart to Australian pro golfer Nigel Lane, who has arthritis in both feet.[29] *See* Associated Press, *Another Golfer Can Use Motor Cart*, Feb. 9, 2000, *available at* 2000 WL 12389828. The European PGA Tour, the highest level tour in Europe, offered two-time Masters Champion Jose Maria Olazabal a cart in two of its events after he suffered a serious foot injury. *See* Yi-Wyn Yen, *One Rides A Cart, The Other Refuses - Olazabal*

(Cont'd)
Tom Lehman, two-time winner on the 2000 PGA Tour Notah Begay, two-time U.S. Open champion the late Payne Stewart, and even PGA Tour Policy Board member John Cook. *See Opinions Divided on Issue*, USA Today, Jan. 18, 2000, *available at* 2000 WL 5766388; *The International Will Be Twice as Nice*, The Boston Globe, Jan. 23, 2000, *available at* 2000 WL 3311547; Larry Guest, *Rivals are Pouncing on UCF's Troubles*, Orlando Sentinel, Jan. 29, 1998, *available at* 1998 WL 5325429.

28. Contrary to the PGA amici's "slippery slope" hypotheticals, the ADA does not protect individuals with temporary ailments. The ADA does not cover the average person ill from the flu or incapacitated by short term surgery. *See* 29 C.F.R. ch. 14, pt. 1630, § 1630.2(j) (defining "substantially limits"); 29 C.F.R. ch. 14, pt. 1630, App., § 1630.2(j) (interpreting § 1630.2(j)).

29. This fact squarely contradicts the PGA's assertion that "[t]he importance of the rule [against carts] is reinforced by the fact that it is observed, not just in the highest-level Tour events, but in every other comparable golf tournament throughout the world." PGA Br. at 14.

Appreciates Martin's Plight, The Star Ledger, June 21, 1998, *available at* 1998 WL 3424879. In addition, the PGA of America, which sponsors events for club and non-touring professionals, permits golfers to use carts. J.A. 214.

Other sports have also made accommodations for disabled athletes who have shown that they can meet the essential skills of the sport. For example, former major league baseball player Jim Abbott, who was born without a right hand, recounts how baseball adjusted one of its rules for him:

> So what if the PGA Tour has to adjust its rules in order to help Casey compete? Baseball did a similar thing for me. It allowed me to spin the ball even though the strictest interpretation of the rules state that a pitcher must remain completely still before his delivery. But since I couldn't keep the ball in my glove — I had to switch the glove to my left hand immediately after I finished my release to the plate — baseball made an exception. It meant that batters wouldn't be able to see my grip and thus be tipped off to what pitch I would be throwing. I wasn't given an advantage; I was merely being allowed to do something that everyone else was able to do naturally.

Jim Abbott, *It's Easy to Accommodate*, Golf World, Feb. 20, 1998, at 92. Former professional football player Tom Dempsey, who still shares the record for the longest field goal in NFL history, wore a special kicking shoe approved by the league. *See* Murray Chass, *Pro Football: 63 Yard Field Goal*, The New York Times, Nov. 9, 1970, at 58; *cf.* PGA Br. at 13 ("[N]o sport grants waivers of its substantive rules to selected players.").

Mr. Martin has not invoked the ADA to "raise" him to the level of the "able-bodied." PGA Br. at 15. That cannot happen without divine intervention. Mr. Martin does not ask that he be absolved from having to strike the ball into the hole, nor does he argue that any Rule of Golf must be changed for him.

He merely seeks removal of a barrier interposed by the PGA that prevents him from pursuing a career where his talents lie. *See* J.A. 44 ("All that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability."). The ADA requires the removal of such barriers.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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