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Lessons from Martin: The ADA and Athletics Don't Mix

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LESSONS FROM *MARTIN*: THE ADA AND
ATHLETICS DON'T MIX

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I. INTRODUCTION

When Casey Martin’s story hit the news, it was apparent that whatever resolution was reached, it would be met with controversy. In the words of U.S. Supreme Court, Justice Antonin Scalia,

It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government’s power “to regulate Commerce with foreign Nations, and among the several States[.]” . . . to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a

golfer? The answer, we learn, is yes. [I]t will henceforth be the Law of the Land, that walking is not a “fundamental” aspect of golf.¹

As you can see, the controversy did not stop at the steps of the Supreme Court.

Martin is a professional golfer in his twenties who is stricken by Klippel-Trenaunay-Weber Syndrome.² This disability makes it medically impossible for him to play golf without the use of a golf cart.³ The pain and swelling that results from sustained periods of walking only slightly subsides when Martin elevates his leg.⁴ Using a golf cart provides only minimal relief from the pain Martin suffers while golfing; indeed, he suffers pain even while he is at rest.⁵

Martin sued the PGA Tour in 1997 after his request to use a golf cart in a tour event was denied.⁶ Martin made this request just prior to the third stage of PGA qualifying school in Grenelefe, Florida, in which competitors are precluded from using golf carts.⁷ The United States Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the District of Oregon allowing Martin to use a golf cart for PGA events.⁸ The U.S. Supreme Court affirmed the Ninth Circuit’s ruling.⁹

¹PGA Tour v. Martin, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting) (citation omitted).

²Martin v. PGA Tour, Inc., 204 F.3d 994, 996 (9th Cir. 2000), *aff’d* 532 U.S. 661 (2001). Although both the District Court and Ninth Circuit refer to Martin’s affliction as Klippel-Trenaunay-Weber Syndrome (“KTW”), that is a term no longer in use in the medical community. Website of Sturge-Weber Foundation, at <http://www.sturge-weber.com/aboutkt.html>. KTW was renamed to avoid confusion with Parkes-Weber Syndrome. *Id.* Martin’s disease is correctly identified as Klippel-Trenaunay Syndrome (“KT”), which is medically “characterized by a triad of signs: Port Wine Stain (capillary malformations) covering one or more limbs, vascular anomalies, usually venous varicosities or malformation and hypertrophy (enlargement of the limb) or atrophy (withering or smaller limb). *Id.* KT involves the lower limbs in about ninety percent of the patients; in rare instances, there is an absence of Port Wine Stain and not all three abnormalities need always be present for the syndrome to exist. *Id.* Each case of KT is different, with patients having varying abnormalities and severity. *Id.* Other associations with KT can include internal organ involvement, hematuria (blood in the urine), rectal bleeding and vaginal bleeding. Website of Sturge-Weber Foundation, *supra*. Bleeding from an abnormal lesion on the affected limb is also common. *Id.* Patients may have sometimes including anemia, coagulation problems (blood clots) and platelet trapping in the affected limb. *Id.*

³Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1244 (D. Or. 1998), *aff’d* 204 F.3d 994 (9th Cir. 2000).

⁴*Id.*

⁵*Id.* at 1243.

⁶*Martin*, 204 F. 3d at 996.

⁷*Id.* For a timeline that chronicles *Martin* and other similar cases, see Dahlia Lithwick, *The Wheels of Justice*, GOLF J., Jan./Feb. 2001, at 22.

⁸*See generally Martin*, 204 F.3d 994.

⁹*See generally PGA Tour*, 532 U.S. 661.

In a similar case that attracted much less media attention, professional golfer Ford Olinger was also denied use of a golf cart in a professional golf event.¹⁰ Olinger, who “suffers from bilateral avascular necrosis, a degenerative [hip] condition that significantly impairs his ability to walk,”¹¹ requested the use of a golf cart for play in qualifying rounds that proceed the 1998 United States Open.¹² The United States Golf Association (“USGA”), which conducts the US Open, denied Olinger’s request, and Olinger thereafter sued the USGA in the United States District Court for the Northern District of Indiana.¹³ After initially allowing Olinger to compete in the qualifying rounds, the District Court, and subsequently the Court of Appeals for the Seventh Circuit, denied Olinger the use of a golf cart in events governed by the USGA.¹⁴ Recently, the Supreme Court vacated the Seventh Circuit’s ruling.¹⁵

Considering that both golfers’ claims were under the Americans with Disabilities Act of 1990 (“ADA”), and the facts and circumstances are almost identical in each case,¹⁶ the opposite holdings reached by the courts of appeals is confounding. Equally perplexing is the Supreme Court’s decision in *Martin*. This note will indicate how the enlightened District Court for the Northern District of Indiana correctly decided, and the Seventh Circuit Court of Appeals subsequently affirmed, the *Olinger* matter. It will also highlight some of the many flaws in the Supreme Court’s opinion in *Martin*.

This Note begins that task by giving, in Part II, a brief background of the ADA. Part III closely examines the interpretation of the ADA that the District Court, the Ninth Circuit, and the Supreme Court engaged in while deciding *Martin*. Part IV provides a similar examination, except of the Seventh Circuit’s and the District Court’s interpretation in *Olinger*. Part V explains how *Martin* and *Olinger*, as professional golfers, do not meet the statutory definition of “disabled.” Part VI examines why athletics, by their nature, should not be governed by the ADA. Part

¹⁰See generally *Olinger v. United States Golf Ass’n*, 205 F.3d 1001 (7th Cir. 2000), *reh’g denied, reh’g en banc denied*, 2002 U.S. App. LEXIS 14464 (June 22, 2000), *vacated, remanded* 532 U.S. 1064 (2001), *on remand*, 2001 U.S. App. LEXIS 20379 (7th Cir. 2001).

¹¹*Id.* at 1001. Bilateral vascular necrosis, also referred to as osteonecrosis or aseptic necrosis is “a disease that results from poor blood supply to an area of bone causing bone death. This is a serious condition because the dead areas of bone do not function normally, are weakened, and can collapse. . . .” Website of Medfacts SportsDoc, at http://www.medfacts.com/d_avn.htm. The affliction can be caused “by trauma and damage to the blood vessels that supply bone its oxygen. Other causes of poor blood circulation to the bone include an embolism of air or fat that blocks the blood flow through the blood vessels, abnormally thick blood (hypercoaguable state), and inflammation of the blood vessel walls (vasculitis).” *Id.*

¹²*Olinger*, 205 F.3d at 1001.

¹³*Olinger v. United States Golf Ass’n*, 55 F. Supp. 2d 926 (N.D. Ind. 1999), *aff’d*, 205 F.3d 1001 (7th Cir. 2000).

¹⁴*Olinger*, 205 F.3d 1001.

¹⁵See *Olinger v. United States Golf Ass’n*, 532 U.S. 1064 (2001) (granting *certiorari* and vacating Seventh Circuit decision based on *PGA Tour v. Martin*).

¹⁶See generally *Martin*, 204 F.3d 994; *Olinger*, 205 F.3d 1001.

VII concludes this Note by arguing that the Supreme Court should have followed the reasoning of the *Olinger* courts and the logical analysis of dissenting Supreme Court Justice Scalia, thereby denying Martin's and Olinger's ADA claims and preventing the ADA from being applied to the substantive rules of competitive athletics.

II. BACKGROUND OF ADA

The stated purpose of the ADA, as set forth by Congress, is to provide a "mandate for the elimination of discrimination against individuals with disabilities[.]" to establish "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities[.]" and to ensure the federal government's central role in enforcing these standards while invoking the sweep of congressional authority.¹⁷

When instituted in 1990, the ADA "expand[ed] the basic protections of Titles II and VII of the Civil Rights Act of 1964 beyond prohibiting considerations of personal characteristics such as race, religion, sex, or national origin . . . to prohibiting discrimination on the basis of physical or mental disabilities."¹⁸ Thus, persons with disabilities victimized by discrimination were extended a cause of action similar to that already available to members of other minority groups.

Congress found that an increasing number of Americans have one or more physical or mental disabilities, estimating that number at forty-three million in 1990.¹⁹ Additionally, Congress found that our society isolates disabled individuals, and discriminates against them in the areas of "employment, housing, public accommodations, education, transportation, communication, recreation, . . . and access to public services."²⁰ Also, unlike persons discriminated against based on their race, color, sex, national origin, religion or age, persons discriminated against based on a disability often have had no avenues through which to pursue a legal claim.²¹ There was a need for such a claim based on Congress' findings that disabled persons regularly encounter various forms of discrimination, "including outright intentional exclusion, the . . . effects of architectural, transportation, and communication barriers, . . . exclusionary qualification standards and criteria . . . and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities[.]"²²

The various provisions of the ADA include the following: Title I deals with employment issues, and is designed to prevent employers with fifteen or more employees from discriminating on the basis of disability with respect to the terms, conditions, and privileges of employment, which includes, but is not limited to hiring, discharge, and promotion.²³

¹⁷42 U.S.C. § 12101(b) (1994).

¹⁸Wayne L. Anderson & Mary Elizabeth Roth, *Deciphering the Americans with Disabilities Act*, 51 J. Mo. B. 142, 142 (1995).

¹⁹42 U.S.C. § 12101(a) (1994).

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³*Id.* § 12112.

Title II is focuses on public services, such as transportation services provided by a state or local governments.²⁴ Its purpose is to prohibit discrimination by reason of disability in regards to the benefits of services, programs, or activities provided by a public entity.²⁵

Title III deals with public accommodations and services that are owned or operated by private entities.²⁶ Its purpose is to ban discrimination against disabled individuals 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.”²⁷

Title IV of the ADA is titled “Telecommunications,” and provides regulations applicable to the telephone and broadcast media.²⁸ The purpose of this section is to make media accessible to speech and hearing impaired persons through items such as the Telecommunications Device for the Deaf—commonly known as TDD—and close-captioned television programs.²⁹

Title V denotes several miscellaneous provisions, including that homosexuals, bisexuals, and transvestites are not disabled for purposes of this Act.³⁰ Title V also excludes individuals who engage in the illegal use of drugs from the definition of disabled.³¹ Additionally, Title V delineates a claimant’s alternative means of dispute resolution,³² and remedies, which include attorney’s fees.³³

Titles II, IV and V are beyond the scope of this Note; however, a close examination of Titles I and III follows in the discussion of *Martin* and *Olinger*, as they are the provisions at issue in each case.

III. *MARTIN V. PGA TOUR*

A. *District Court Decision*

Casey Martin brought his ADA claim in the District Court for the District of Oregon.³⁴ Magistrate Judge Thomas M. Coffin presided in the District Court; he

²⁴*Id.* § 12132.

²⁵*Id.*

²⁶*Id.* § 12182.

²⁷*Id.*

²⁸47 U.S.C. § 225 (1994).

²⁹*Id.*

³⁰*Id.* §§ 12211, 12208 (1994).

³¹*Id.* § 12210.

³²*Id.* § 12212.

³³*Id.* § 12205.

³⁴*Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320 (D. Or. 1998), *judgment entered*, 994 F. Supp. 1242.

wrote each of the court's two opinions.³⁵ The court examined Martin's plight, which was his attempt to gain membership to the PGA Tour, or the Nike Tour³⁶—a “minor leagues” also operated by the PGA—by competing in a three-stage qualifying school tournament.³⁷ The qualifying school is set up in stages:

The first stage consists of 72 holes. Those who score well enough in this stage advance to the second stage consisting of 72 holes. The top qualifiers, approximately 168 players, advance to the third and final stage consisting of 108 holes. . . . [¶] In the first two stages of the qualifying tournament, players are permitted to use golf carts. In the third stage, as well as on the regular PGA Tour and Nike Tour, players are required to walk. . . .³⁸

As noted above, Martin suffers from a debilitating disease that “curtails blood circulation in [his] leg. This condition has resulted in significant atrophy in the lower leg and bone deterioration of the tibia . . . substantially limit[ing] his ability to walk.”³⁹ Thus, Martin asserted, by not allowing him to use a golf cart in the third round of the qualifying school tournament, and subsequently on the PGA and Nike Tours, the PGA is violating the ADA by not allowing him access to its tournaments.⁴⁰

Subsequent to his suit, the court granted a preliminary injunction ordering the PGA to allow Martin to use a golf cart during the third stage of the qualifying school tournament.⁴¹ As a result, the PGA lifted its no-cart rule as it applied to all competitors, and after Martin qualified for play on the Nike Tour, the parties stipulated to extending the injunction to the first two Tour tournaments.⁴²

Martin's three claims against the PGA were: First, under Title III, Martin claimed that the PGA is a private entity that either is a place of public accommodation, or operates a place of public accommodation.⁴³ Thus, Martin claimed that the PGA is in violation of the ADA by discriminating on the basis of disability in the “full and equal enjoyment of the goods, services, facilities,

³⁵*Martin*, 994 F. Supp. at 1244. Judge Coffin ruled on two issues on the parties' motions for summary judgment: (1) the PGA is not exempt from the ADA because it does not qualify as a “private club” under the statutory definition; and (2) the golf courses that the PGA uses for its tournaments do meet the definition of “public accommodation” under the ADA. *Id.* The court conducted a bench trial to dispose of the remaining issues.

³⁶The Nike Tour is now known as the Buy.com Tour. Subsequent references to that tour will be “Nike Tour.”

³⁷*Martin*, 984 F. Supp. at 1321.

³⁸*Id.* at 1321-22.

³⁹*Id.* at 1322.

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Martin*, 984 F. Supp. at 1322.

⁴³*Id.*

privileges, advantages, or accommodations” of the PGA Tour.⁴⁴ Second, Martin claimed that PGA is a “private entity that offers examinations. . .related to licensing, certification, or credentialing for professional. . .purposes.”⁴⁵ Thus, they are subject to the ADA requirement that such activity be done in a place and manner accessible to persons with disabilities.⁴⁶ Martin’s third claim was, as an employer, the PGA is “prohibited from discrimination against a qualified individual with a disability because of the disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”⁴⁷

The PGA challenged Martin’s claims, and countered with three defenses, each of which was given thorough analysis in the court’s disposition of the motions for summary judgment. Its first is that it is statutorily exempt from the ADA because it is a private nonprofit establishment.⁴⁸ The PGA argued in the alternative that, even if it did not qualify for the private club exemption, its tournaments did not meet the definition of “places of public accommodation,” and that the PGA and Nike Tours are not examinations or courses.⁴⁹ The PGA also argued that contrary to the third count of Martin’s complaint, he is not an “employee” of the PGA or Nike Tours.⁵⁰

Two issues were disposed of summary judgment: (1) whether the PGA is a private club, exempt from the ADA, and (2) whether the PGA is a public accommodation, thus being governed by the ADA. The court’s analysis of each is discussed below. A bench trial followed, in which the remaining issues were disposed.

1. Motions for Summary Judgment

The *Martin* court’s disposition of the motions for summary judgment ruled on the issue of whether the PGA is exempt from the ADA as a private club,⁵¹ and whether the PGA is, or operates, places of public accommodation.⁵² Judge Magistrate Coffin declined to rule on whether Martin is an employee of the PGA, and whether the Tour is a course or examination, deciding that those issues should be disposed of at trial.⁵³

The issue of ADA exemption based on the PGA’s contention that it is a private club was disposed of in Martin’s favor by the court, noting that “[b]ecause of the importance of these laws, [the ADA and Civil Rights Act of 1964,] exemptions are narrowly construed and the burden of proof rests on the party claiming the

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*Martin*, 984 F. Supp. at 1323.

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.* at 1326.

⁵²*Martin*, 984 F. Supp. at 1327.

⁵³*Id.*

exemption.”⁵⁴ In its analysis, the court balanced PGA membership—relatively small—against its purpose—to generate revenue for its members—in determining that the PGA is not exempt as a private club.⁵⁵ It compared Martin’s case to *Welsh v. Boy Scouts of America*,⁵⁶ which “found that the Boy Scouts was indeed a private club notwithstanding its membership total of five million scouts.”⁵⁷ The *Welsh* court further asserted that:

Just as the large membership in the Scouts did not deprive the organization of its private club status when its membership requirements were fitted with the purpose of the group, so the relatively small membership of the PGA Tour does not confer private status on [it] when its selectivity is counterbalanced with the Tour’s purpose.⁵⁸

Citing *Quijano v. University Federal Credit Union*⁵⁹ and Webster’s Dictionary, the *Martin* court stated that “[g]enerating revenue for members scarcely seems to qualify as the type of protectable interest Congress had in mind when it excluded private clubs from coverage under the ADA and Civil Rights Act.”⁶⁰ The *Martin* court compared the PGA to a credit union or auto club, which “are not clubs in any sense of the word.”⁶¹

The *Martin* court then presented a detailed analysis of seven factors from *United States v. Landsdowne Swim Club*,⁶² which are regularly used to determine whether an organization is a *bona fide* private club.⁶³ After its weighing of these factors, the *Martin* court determined that the PGA is not a private club subject to ADA exemption; the factors are: (1) genuine selectivity; (2) membership control; (3) history of organization; (4) use of facilities by nonmembers; (5) club’s purpose; (6) whether the club advertises for members; and (7) whether the club is nonprofit.⁶⁴

The *Martin* court’s analysis of these factors, in turn, found that, although the PGA is selective in its membership, like a club, the selectivity is not based on “social, moral, spiritual, or philosophical beliefs, or any other . . . freedom of

⁵⁴*Id.* at 1323 (citing *Nesmith v. YMCA*, 397 F.2d 96, 101 (4th Cir. 1968); *Quijano v. Univ. Fed. Credit Union*, 617 F.2d 129, 131-32 (5th Cir. 1980)).

⁵⁵*Martin*, 984 F. Supp. at 1323.

⁵⁶993 F.2d 1267 (7th Cir. 1993). The court noted that *Welsh* stated a claim under the Civil Rights Act of 1964; however, the “ADA and the Civil Rights Act are interrelated in terms and application,” so the *Welsh* analysis is useful. *Martin*, 984 F. Supp. at 1324 n.3.

⁵⁷*Martin*, 984 F. Supp. at 1324.

⁵⁸*Id.*

⁵⁹617 F.2d 129 (5th Cir. 1980) (holding that a credit union was not exempt from Title VII coverage under the “private membership club” exception).

⁶⁰*Martin*, 984 F. Supp. at 1324.

⁶¹*Id.*

⁶²713 F. Supp. 785 (E.D. Pa. 1989) (holding that swim club was not a private club, but rather a place of public accommodation).

⁶³*Martin*, 984 F. Supp. at 1324.

⁶⁴*Id.* at 1324-25.

association values which are at the core of the private club exemption. . . .”⁶⁵ On the contrary, the court found that the PGA’s selectivity is based entirely on skill; such “selectivity is inherent to athletics, and does nothing to confer privacy to the organizations to which professionals matriculate.”⁶⁶

The *Martin* court noted that although the membership does have voting rights, it does not vote on new members; rather, the new members play their way in.⁶⁷ The court neglected to note, however, that to enter qualifying school, the PGA does require each potential member to submit two letters of recommendation from the current membership, rendering it exclusive in that regard.⁶⁸

Additionally, the *Martin* court found that since the PGA was formed prior to the ADA and Civil Rights Act, it is indeed *bona fide*, but that doesn’t necessarily mean it’s private.⁶⁹ The court relied on the significant need for public participation—through personal attendance and television audiences—in generating PGA Tour revenue, thus this factor cuts against private club status, as does the Tour’s purpose, which is discussed above.⁷⁰

The court dismissed as irrelevant the advertising factor under *Landsdowne*, noting that the PGA receives extensive media coverage, like most of professional sports, thus it need not advertise for golfers.⁷¹ The PGA is a nonprofit corporation; however, the court found that fact outweighed by the commercial interest of generating revenue for its members.⁷² Thus, remarkably, this final *Landsdowne* factor, as with the others, also cut against a “private club” finding, according to the court.⁷³ Accordingly, the court ruled that the PGA is not entitled to the private club exemption under the ADA.⁷⁴

The second issue before the *Martin* court was whether the PGA operates a place of public accommodation at the golf courses on which it conducts tournament play. The PGA’s contention was that the courses used are not open to the public during the course of tournament play; thus, the events do not meet the definition of “places of public accommodation” under the ADA.⁷⁵ Title III of the ADA requires that reasonable modifications be made to accommodate disabled persons using places of public accommodation.⁷⁶

⁶⁵*Id.* at 1325.

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*PGA Tour*, 532 U.S. at 661.

⁶⁹*Martin*, 984 F. Supp. at 1325.

⁷⁰*Id.*; see also *supra* notes 55-61 and accompanying text.

⁷¹*Martin*, 984 F. Supp. at 1325.

⁷²*Id.*

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.* at 1326.

⁷⁶42 U.S.C. § 12182 (1994).

The ADA denotes a list of specific “public accommodations.” The list includes: gymnasiums, health spas, bowling alleys, golf courses, or “other place[s] of exercise or recreation.”⁷⁷

The PGA argued “that its courses are only places of public accommodation in those areas actually accessed by the public at large. It contend[ed] that since the public gallery is not allowed inside the playing area, the fairways and greens of its golf courses are not places of public accommodation.”⁷⁸

The *Martin* court dismissed the PGA’s contention with two separate assertions; first, stating that the PGA’s argument would render the “private club exemption” irrelevant.⁷⁹ It made the claim that if a club was not found to be a “bona fide private membership club,” as the PGA was, “it could nonetheless refuse to accommodate any handicapped members by pointing out it only admits the country club’s members (and not the public at large) on its grounds.”⁸⁰

A second assertion made by the court is that the statute does not support the concept of “zones of ADA application.”⁸¹ The PGA referred to:

cases wherein private facilities do not lose their exempt status on the private portions of its facilities simply by operating a discrete public accommodation area (*e.g.*, a private country club renting space to a private day care center open to non-members has ADA obligations only with respect to the day care center, according to [Department of Justice] regulations).⁸²

The court did not see the logic in this proposition by the PGA, and dismissed what it called “hop-scotch” areas of ADA enforcement.⁸³ The court analogized the *Martin* scenario to many other sports-related scenarios, including the dugout of a baseball stadium, executive suites at an arena, caddies used by professional golfers, and scenarios totally unrelated to sports, including reception halls, convention centers, and private schools,⁸⁴ failing throughout to recognize that there is no competitive aspect in the latter examples as there is in professional golf.

In accordance with the above exploration of the *Martin* court’s analysis, the court rejected the PGA’s assertion that the ADA does not apply to the competitive areas of a golf course during PGA tournaments.⁸⁵ And, this rejection, coupled with the court’s disposition of the PGA’s prior defense, resulted in the court denying the PGA’s motion for summary judgment.⁸⁶ Accordingly, the court granted Martin’s

⁷⁷*Id.* § 12181(7)(L).

⁷⁸*Martin*, 984 F. Supp. at 1326.

⁷⁹*Id.* at 1326.

⁸⁰*Id.*

⁸¹*Id.* at 1327.

⁸²*Id.* at 1326.

⁸³*Martin*, 984 F. Supp. at 1327.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

motion for partial summary judgment on the issues of whether the PGA qualifies for a private club exemption from the ADA and whether it operates a place of public accommodation.⁸⁷

2. Bench Trial

Judge Magistrate Coffin's bench trial opinion rendered judgment on the remaining issues.⁸⁸ The first is whether Martin is an employee of the PGA, thereby triggering a Title I claim under the ADA.⁸⁹ That issue, as well as the second issue, whether the Nike Tour is a "course or examination" under the Act, were rejected by the court without an explanation of its own.⁹⁰ The court referred to, incorporated into its opinion, and thereby endorsed, the PGA's brief in support of summary judgment on those two issues.⁹¹

However, the remaining issues are discussed in detail in the court's opinion. These issues are whether the accommodation that Martin requires—a golf cart—would either fundamentally alter the nature of the tournament, or result in an undue administrative hardship being placed upon the PGA, neither of which is required by the ADA.⁹² The court stated that since it determined Martin to be an independent contractor—and not a PGA employee⁹³—the court's focus would be on whether Martin is entitled to the accommodation based on the "fundamental alteration" issue, rather than the undue hardship issue, which it said was appropriate for employer/employee relationships.⁹⁴

The court began its analysis of said issues with illustrations of what it considered "fundamental alterations" of an entity's business or programs in response to the needs of disabled persons.⁹⁵ For instance, the court stated that if a blind customer requests Braille books from a bookstore that normally does not carry such books, "such an accommodation would fundamentally alter the nature of its business."⁹⁶ The court also recited an example of "fundamental alteration" given by the PGA: If a day care center does not normally provide individualized care—one adult for each

⁸⁷*Id.*

⁸⁸*Id.* at 1242.

⁸⁹*Martin*, 994 F. Supp. at 1247.

⁹⁰*Id.*

⁹¹*Id.* at 1247 n.7.

⁹²*Id.* at 1244.

⁹³The court did not reveal how it determined Martin was an independent contractor, other than to state he is not an employee of the PGA, preferring to keep that a secret. *See id.* at 1247 n.7; *id.* at 1245 n.2. However, exclusion from one category does not automatically mean inclusion in another. Some statutes only apply to employers that employ a certain number of employees. By the same logic, would those "employers" automatically acquire another statutory definition, just because they failed to meet the statutory definition of employer? Of course not.

⁹⁴*Martin*, 994 F. Supp. at 1245 n.2.

⁹⁵*Id.* at 1245.

⁹⁶*Id.* (citing 28 CFR Ch. 1 Pt. 36, App. B at 632 (July 1, 1997)).

child—and a disabled child requests such an accommodation, the day care center is not required to give such care because it would fundamentally alter the nature of the service that the center provides.⁹⁷

The court next reviewed appellate case law regarding the application of the ADA to sports programs. It first examined two Sixth Circuit Court of Appeals cases that upheld Michigan High School Athletic Association's (MHSAA) eligibility requirements, *McPherson v. MHSAA*,⁹⁸ and its predecessor, *Sandison v. MHSAA*.⁹⁹ In *McPherson*, the court considered the MHSAA's rule that limits athletic eligibility for student-athletes to eight semesters of interscholastic competition.¹⁰⁰ *McPherson* ruled that even though the plaintiff had a learning disability that prevented him from completing high school in eight semesters, the rule was necessary, in part, to "limit the level of athletic experience and range of skills of the players in order to create a more even playing field for the competitors..."¹⁰¹ The *Sandison* court held like *McPherson*, that "individually determining whether each older student possessed an unfair advantage was not a reasonable accommodation,"¹⁰² while holding that waiving an age regulation would fundamentally alter the athletic program.¹⁰³

In *Pottgen v. MSHAA*,¹⁰⁴ the Eighth Circuit Court of Appeals also determined that the "age requirement was essential to the high school athletic program and that an individualized inquiry into the necessity of the requirement [in each] case was inappropriate."¹⁰⁵

The *Martin* court then briefly reviewed three district court cases cited by the PGA, all of which made determinations on the eligibility of competitors based on individualized inquiries.¹⁰⁶ Based on this limited application of ADA law to athletics,

the PGA asserts that the court should focus on whether an athletic rule is "substantive"—*i.e.*, a rule which defines who is eligible to compete or a rule which governs how the game is played. If it is [substantive] ... the rule cannot be modified without working a fundamental alteration of the

⁹⁷*Id.*

⁹⁸119 F.3d 453 (6th Cir. 1997).

⁹⁹*Martin*, 994 F. Supp. at 1245 (citing 64 F.3d 1026 (6th Cir. 1995)).

¹⁰⁰*Id.* (citing *McPherson*, 119 F.3d at 456).

¹⁰¹*Martin*, 994 F. Supp. at 1245, n.4.

¹⁰²*Id.* (citing *Sandison*, 64 F.3d at 1037).

¹⁰³*Sandison*, 64 F.3d 1026.

¹⁰⁴40 F.3d 926 (8th Cir. 1994).

¹⁰⁵*Martin*, 994 F. Supp. at 1245 (citing *Pottgen*, 40 F.3d at 930).

¹⁰⁶*Id.* at 1245 (citing *Johnson v. Florida High School Athletic Activities Ass'n* 899 F. Supp. 579 (M.D. Fl. 1995), *vacated as moot* 102 F.3d 1172 (11th Cir. 1997); *Dennin v. Conn. Interscholastic Athletic Conference*, 913 F. Supp. 663 (D. Conn 1996), *vacated as moot* 94 F. 3d 96 (2d Cir. 1996); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 974 F. Supp. 459 (D.N.J. 1997)).

competition, and the ADA consequently does not require any modification to accommodate the disabled.¹⁰⁷

The court, however, noted that all of the cases cited by the PGA to support its position examined the purpose of the rule in question to determine if the modification was reasonable.¹⁰⁸

The *Sandison* and *McPherson* courts noted that the purpose of the eligibility rule is closely tied to the purpose of interscholastic athletics.¹⁰⁹ *Martin* summed up that purpose as “allow[ing] students of the same age group to compete against each other.”¹¹⁰ Allowing the learning disabled plaintiffs to compete, according to *Martin*, would “fundamentally alter[] the nature of the services at issue.”¹¹¹ The court claimed that the skill level of the plaintiffs is irrelevant; high school athletics are only for students in the fourteen to eighteen years age group.¹¹² Additionally, the court in *Bowers v. National Collegiate Athletic Association* ruled that a waiver of the curriculum requirement for college athletes at issue there would alter the fundamental nature of the program, by allowing unqualified students to compete.¹¹³

The *Martin* court, however, stated that athletic associations do not have unfettered discretion in this area of rulemaking, illustrating that a rule prohibiting the use of corrective lenses during competition would not be immune from the ADA just because it would alter a rule of competition.¹¹⁴ The court conceded that the PGA Tour, and professional sports in general, enjoy a high profile, and possess a high level of skilled competition, but claimed that the analyses of ADA questions do not change from the high school to professional sports level.¹¹⁵ “[I]f it is unreasonable to accommodate Casey Martin’s disability with a golf cart at the PGA Tour level because of its rules of competition, it is equally unreasonable to so accommodate a similarly disabled golfer at the high school level if the same rules were applicable.”¹¹⁶

Additionally, the court found no difference in ADA enforcement between athletics than any other area, stating: “[T]he disabled have just as much interest in being free from discrimination in the athletic world as they do in other aspects of everyday life.”¹¹⁷

¹⁰⁷*Martin*, 994 F. Supp. at 1246.

¹⁰⁸*Id.*

¹⁰⁹*See supra* notes 98-103, and accompanying text.

¹¹⁰*Martin*, 994 F. Supp. at 1246.

¹¹¹*Id.*

¹¹²*Id.*

¹¹³*Bowers*, 974 F. Supp. at 459, *cited in Martin*, 994 F. Supp. at 1245.

¹¹⁴*Id.* at 1246. How severe would a sight-impairment have to be to qualify as a disability under the ADA? In other words, is the example given by the court even relevant to the discussion of this issue?

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*Id.*

The court next provided an overview of the ADA, and how it applies to this case, concentrating specifically, and appropriately, on Title III.¹¹⁸ It noted that Martin has the burden of demonstrating that he is disabled,¹¹⁹ and that a modification was requested and that the modification was reasonable.¹²⁰ The PGA received his request for a golf cart, and the court stated “the use of a golf cart is certainly not unreasonable in the game of golf.”¹²¹

The evidence, the court argued, demonstrating that the use of a golf cart is reasonable is that the Rules of Golf do not require walking; and the PGA Tour does not require walking on its Senior Tour, or for the first two rounds of its qualifying school competition.¹²² In those two types of tournaments, the PGA does not handicap or penalize competitors that choose to use a golf cart.¹²³

Johnson v. Gambrinus Co. is followed by the court in determining whether the modification—golf cart—is reasonable.¹²⁴ *Gambrinus* ruled that an ADA plaintiff must first show that the modification requested is generally reasonable.¹²⁵ So, Martin first had to show that golf carts are reasonable in golf, generally, without regard to the PGA Tour itself. Thus the court found that the permitted use of golf carts at levels of inferior competition, *i.e.*, Senior PGA Tour and PGA qualifying school, are “compelling evidence that even the PGA Tour does not consider walking to be a significant contributor to the skill of shot-making.”¹²⁶ Additionally, the court cited the fact that the National Collegiate Athletic Association and the Pacific Ten Conference allow golf carts to be used by disabled golfers as evidence to meet the plaintiff’s burden that the accommodation is “reasonable.”¹²⁷

After it was satisfied that Martin had met his burden, the court’s next step was to analyze whether the PGA Tour met its burden of proof that Martin’s use of a golf cart would “fundamentally alter” the nature of its public accommodation.¹²⁸ If that

¹¹⁸*Id.* at 1247.

¹¹⁹*Martin*, 994 F. Supp. at 1244. The PGA Tour stipulated to Martin’s disability, and to the fact that his disability prevents him from walking the course during a round of golf. *Id.* One could argue against such stipulation. See Part V, *infra*.

¹²⁰*Id.* at 1248.

¹²¹*Id.*

¹²²*Id.* The Senior PGA Tour is open only to competitors of fifty years of age or greater. *Id.* at 1249 n.9.

¹²³*Martin*, 994 F. Supp. at 1248.

¹²⁴*Johnson v. Gambrinus Co.* 116 F.3d 1052 (5th Cir. 1997) (allowing guide dog to accompany blind patron on brewery tour), *cited in Martin*, 994 F. Supp. at 1249.

¹²⁵*Martin*, 994 F. Supp. at 1248 (citing *Gambrinus*, 116 F.3d at 1059).

¹²⁶*Id.*

¹²⁷*Id.* The NCAA and the Pac-10 Conference were the two governing bodies that permitted Martin to use a golf cart while playing college golf for Stanford University in Palo Alto, California. *Id.*

¹²⁸*Id.* at 1249.

burden is not satisfied in an ADA case, the defendant must provide the modification.¹²⁹

The PGA, citing *Pottgen*, stated that an individualized inquiry into the necessity of the walking rule here is inappropriate.¹³⁰ The court cited *Gambrinus*,¹³¹ *Crowder v. Kitagawa*,¹³² and *Stillwell v. Kansas City*,¹³³ in reaching its determination that “the ultimate question in this case is whether allowing plaintiff, given his individual circumstances, the requested modification would fundamentally alter PGA and Nike Tour competitions.”¹³⁴

The *Martin* court next tracked the terms of walking and golf cart use throughout *The Rules of Golf*, finding that nowhere is walking required or defined as essential to the game.¹³⁵ It also noted that the USGA permits golf cart use unless otherwise prohibited.¹³⁶ According to the “Transportation” portion of the *Conditions of Competition and Local Rules* promulgated by the PGA Tour, which governs the PGA and Nike Tour events, “Players shall walk at all times during a stipulated round unless permitted to ride by the PGA Tour Rules Committee.”¹³⁷ The court noted that there is no written policy regarding the determination of when a waiver of the walking requirement is appropriate.¹³⁸ When the walking requirement has been waived, it has been waived for all players, and it has never been waived under individualized circumstances, such as Martin’s disability.¹³⁹

The court also went into excruciating detail through additional discussion of Martin’s disability, and the lengths Martin went, in order to play golf without a golf cart.¹⁴⁰ The court, on two occasions, interjected an illustration of the similarity

¹²⁹*Martin*, 994 F. Supp. at 1249.

¹³⁰*Pottgen*, 40 F.3d at 930-31, cited in *Martin*, 994 F. Supp. at 1249.

¹³¹*Gambrinus*, 116 F. 3d 1059.

¹³²81 F.3d 1480 (9th Cir. 1996) (holding that statewide carnivorous animal quarantine effectively prevented blind travelers from entering Hawaii, and without reasonable modification, quarantine violates ADA).

¹³³872 F. Supp. 682 (W.D. Mo. 1995) (holding that *per se* exclusion of one-handed applicants for armed security guard license is in violation of ADA and Constitutional due process rights).

¹³⁴*Martin*, 994 F. Supp. at 1249.

¹³⁵*Id.* THE RULES OF GOLF are promulgated by the USGA and the Royal and Ancient Golf Club of St. Andrews, Scotland. *Id.*

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸*Id.*

¹³⁹*Martin*, 994 F. Supp. at 1249.

¹⁴⁰*Id.* As stated above, the PGA does not contend the severity of Martin’s disability, or the extent to which it limits his ability to play golf without a golf cart. *See supra* notes 48-50 and accompanying text.

between a disabled airline passenger and Martin, again overlooking the competitive nature of golf, and the lack of competition (by passengers) in air travel.¹⁴¹

The court noted that the PGA's stated purpose for the walking rule is "to inject the element of fatigue into the skill of shot-making."¹⁴² It found that under the ADA, that purpose is "cognizable," whereas if the PGA cited "tradition," that would not have been a cognizable purpose.¹⁴³ The court then went through an extensive analysis of walking while playing golf, only to determine that the fatigue factor is insignificant under normal circumstances.¹⁴⁴ Testimony was offered at trial from which the court concluded that because walking is often chosen over riding in a golf cart on the Senior Tour and PGA qualifying rounds, walking must not inject additional fatigue into the competition as the PGA claimed.¹⁴⁵

Martin's disability is so severe that the court found any fatigue which is injected into the competition has a more profound effect upon Martin, so he couldn't be put at a competitive advantage by gaining the use of the golf cart.¹⁴⁶ "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."¹⁴⁷

Before holding that the "requested accommodation of a cart is eminently reasonable in light of Casey Martin's disability,"¹⁴⁸ the court went through a hypothetical application of another one of *The Rules of Golf* to the ADA, again reaching the conclusion that the analysis of reasonableness must be on a individualized basis.¹⁴⁹

B. Ninth Circuit Court of Appeals Decision

The PGA appealed the District Court decision to the Ninth Circuit.¹⁵⁰ The Court of Appeals examined the same issues did the District Court, taking a detailed look at the terms "public accommodation," and "reasonable modification."¹⁵¹

¹⁴¹*Martin*, 994 F. Supp. at 1249. For fully developed version of this analogy, *see id.* at 1247.

¹⁴²*Id.* at 1249.

¹⁴³*Id.* at 1250.

¹⁴⁴*Id.*

¹⁴⁵*Martin*, 994 F. Supp. at 1251.

¹⁴⁶*Id.*

¹⁴⁷*Id.* at 1251-52. The illogic of the court's statement is astounding. Obviously, all golfers do not compete with the same skill-set or physical attributes; that doesn't mean the rules should be changed for some to compensate for the lack or presence of certain skills or attributes.

¹⁴⁸*Id.* at 1253.

¹⁴⁹*Id.* at 1252-53 (stating that a rule—intended purely for recreation golf—allowing a blind golfer to have a coach with him on the course requires the same individualized assessment as the cart rule of issue in *Martin*).

¹⁵⁰*See generally Martin*, 204 F.3d 994. A three judge panel ruled on the PGA's appeal of the *Martin* decision; the panel was composed of Senior Circuit Judge William C. Canby, who wrote for the court, Circuit Judge Thomas G. Nelson, and Judge Jeremy Fogel from the District Court for the Northern District of California, sitting by designation. *Id.*

The Ninth Circuit's analysis of the definition of the term "public accommodation" differed from the District Court's in one respect: The Ninth Circuit ruled that even if the golf course does not qualify under "golf course . . . or other place of exercise or recreation," it must qualify as "theater, stadium or other place of exhibition or entertainment."¹⁵²

The court then cited a number of cases dealing with student-athletes to demonstrate how the ADA does indeed apply to athletics, but none deal with a substantive rule of competition.¹⁵³ The only case cited by the court that even approaches waiving a substantive rule is *Anderson v. Little League Baseball*.¹⁵⁴ In that case, the court held that Title III applies to the coaches' box on a baseball field, but in no way implicates a player, let alone how that player would play the game.¹⁵⁵

The Ninth Circuit, much like the District Court below, also found that the ADA cannot be compartmentalized within a golf course.¹⁵⁶ This court also stated that much like the PGA, private universities have very competitive entry standards, but that does not bar those universities from ADA enforcement.¹⁵⁷

The court held, and thereby unanimously affirmed the District Court's ruling on the issue that golf courses remain places of public accommodation while a PGA Tournament is being held on them.¹⁵⁸ The court did not "see any justification for drawing a line between use of a place of public accommodation for pleasure and use in the pursuit of a living."¹⁵⁹

The court next explored whether the use of a golf cart by Martin is a "reasonable accommodation" under that ADA, or whether the accommodation would "fundamentally alter" the nature of goods or services of the PGA Tour.¹⁶⁰ The court for the most part adopted the findings of the court below and found that they are not

¹⁵¹*Id.*

¹⁵²*Martin*, 204 F.3d at 997 (citing 42 U.S.C. § 12187(7)(C) (1994)). The PGA argued that tour golfers are not exercising or recreating—they are trying to win money, so the golf course doesn't qualify under that provision of the ADA. *Id.* The court then mysteriously concluded, "[i]f a golf course during a tournament is not a place of exercise or recreation, then it is a place of exhibition or entertainment." *Id.* Note, however, that just because an entity isn't covered under one section of a statute, doesn't automatically mean it is covered under another. See note 93, *supra*.

¹⁵³*Id.* at 998 (citing *Bowers v. NCAA*, 9 F. Supp. 2d 460 (D. N.J. 1998) (academic ineligibility of football player); *Tatum v. NCAA*, 992 F. Supp. 1114 (E.D. Mo. 1998) (academic ineligibility of basketball player); *Ganden v. NCAA*, No. 96 C 6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (academic ineligibility of swimmer); *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342 (D. Ariz. 1992)).

¹⁵⁴794 F. Supp. 342.

¹⁵⁵*Martin*, 204 F.3d at 998 (citing *Anderson*, 794 F. Supp. at 344).

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸*Id.* at 999.

¹⁵⁹*Id.*

¹⁶⁰*Martin*, 204 F.3d at 999.

clearly erroneous.¹⁶¹ It noted, however, that the District Court's finding that the use of a golf cart does not provide a golfer with a competitive advantage over a golfer who walks, distinguishes this case from *Olinger*.¹⁶²

The court concluded through a *de novo* review, therefore, that under Title III of the ADA, a golf course is a place of public accommodation while the PGA is conducting a tournament.¹⁶³ Additionally, the court found no errors in the determination of the court below that providing Martin with a golf cart was a reasonable accommodation that did not fundamentally alter the nature of the PGA and Nike Tour events, and thereby affirmed the lower court's ruling.¹⁶⁴

C. United States Supreme Court Decision

1. Majority Opinion

On January 17, 2001, the Supreme Court heard oral arguments in *Martin*.¹⁶⁵ Although *Olinger* was not consolidated with *Martin* for purposes of this appeal, the Supreme Court's ruling in *Martin*, in effect, controlled the outcome of *Olinger*.¹⁶⁶ On May 29, 2001, the Court released its opinion in *Martin*, affirming the Ninth Circuit decision.¹⁶⁷ The Court's decision, with Justice John Paul Stevens writing for the seven-to-two majority, focused on two questions: "Whether the Act protects access to professional golf tournaments by a qualified entrant with a disability," and "whether a disabled contestant may be denied the use of a golf cart because it would 'fundamentally alter the nature' of the tournaments ... to allow him to ride when all other contestants must walk."¹⁶⁸

With respect to the first question, the Court focused on whether the courses the PGA leases in order to hold their tournaments meet the ADA's definition of "places of public accommodation," and found that they "fit comfortably."¹⁶⁹ The Court also ruled that Martin fell within the Act's protection as a statutory "individual."¹⁷⁰ The Court ruled that the PGA offers as one its "privileges" the chance to compete in qualifying school, and play in the tour events, and dismissed the PGA argument that the competitors in their tournaments are not the class protected by Title III.¹⁷¹ The Court, in fact, found the PGA offers "privileges" to two separate groups, those who

¹⁶¹*Id.* at 999-1001.

¹⁶²*Id.* at 1002 n.9 (citing *Olinger*, 55 F. Supp. 2d at 935).

¹⁶³*Id.* at 1002.

¹⁶⁴*Id.*

¹⁶⁵*PGA Tour*, 532 U.S. 661 (2001); *see also* 2001 U.S. Trans. LEXIS 2.

¹⁶⁶*See Olinger*, 532 U.S. 1064 (granting *certiorari*, vacating the judgment of the Seventh Circuit, and remanding the case for consideration in light of *Martin*).

¹⁶⁷*PGA Tour*, 532 U.S. 661.

¹⁶⁸*Id.* at 664-65.

¹⁶⁹*Id.* at 677.

¹⁷⁰*Id.*

¹⁷¹*Id.* at 677-78.

watch, and those who compete.¹⁷² The Court relied on *Daniel v. Paul*,¹⁷³ *Evans v. Laurel Links, Inc.*¹⁷⁴ and *Wesley v. Savannah*,¹⁷⁵ to support the contention.¹⁷⁶ In those cases, however, the “participants” were not professional athletes, but rather amateurs playing games for enjoyment, not profit.¹⁷⁷ Furthermore, *Daniel* and *Evans* interpreted Title II of the Civil Rights Act of 1964, and were merely allowing access to the event, not changing the rules of it.¹⁷⁸

As to the second question, the Court ruled that providing Martin with a cart would not “fundamentally alter” PGA-sponsored events.¹⁷⁹ The Court, without regard to the rule-making autonomy of professional (or amateur) sports organizations, began its discussion by noting that “the use of golf carts is not itself inconsistent with the fundamental character of the game of golf.”¹⁸⁰ The Court next meandered through a history of golf, and its rules, to demonstrate its view that the walking rule is of limited import to the game, historically and presently.¹⁸¹ The PGA’s argument, however, is that at golf’s highest level, the PGA Tour, the purpose is “to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules ... [and that t]he waiver of any possibly ‘outcome-affecting’ rule for a contestant would violate this principle ... [and thus] fundamentally alter the nature of the ... event.”¹⁸² The Court dismissed that claim, stating that the weather and luck play a role in determining the outcome, thereby mitigating the force of the PGA argument.¹⁸³ Ultimately, the Court determined that granting Martin a waiver of the walking rule would not fundamentally alter the PGA brand of tournament golf, and affirmed the judgment of the Ninth Circuit.¹⁸⁴

¹⁷²*PGA Tour*, 532 U.S. at 679-80.

¹⁷³*Id.* at 680 (citing *Daniel v. Paul*, 395 U.S. 298 (1969)).

¹⁷⁴*PGA Tour*, 532 U.S. at 680 (citing *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474, 477 (E.D. Va 1996)).

¹⁷⁵*PGA Tour*, 532 U.S. at 680 (citing *Wesley v. Savannah*, 294 F. Supp. 698 (S.D. Ga. 1969)).

¹⁷⁶*PGA Tour*, 532 U.S. at 680 (citing *Daniel*, 395 U.S. at 306; *Evans*, 261 F. Supp. at 477; *Wesley*, 294 F. Supp. 698).

¹⁷⁷*PGA Tour*, 532 U.S. at 680.

¹⁷⁸*Id.* (citing cases in notes 173-74, *supra*).

¹⁷⁹*Id.* at 689 (“[T]he walking rule is at best peripheral to the nature of [PGA] athletic events...”).

¹⁸⁰*Id.* at 683.

¹⁸¹*Id.* at 683-88.

¹⁸²*PGA Tour*, 532 U.S. at 686.

¹⁸³*Id.* The dissent opines, “I guess that is why those who follow professional golfing consider Jack Nicklaus the *luckiest* golfer of all time, only to be challenged of late by the phenomenal *luck* of Tiger Woods.... ‘Pure chance’ is randomly distributed among the players, but allowing [Martin] to use a cart gives him a ‘lucky’ break every time he plays.” *Id.* at 701-02 (Scalia, J., dissenting).

¹⁸⁴*Id.* at 690-91.

2. Dissenting Opinion

Justice Antonin Scalia, however, with whom Justice Clarence Thomas joined, dissented from the Court's opinion.¹⁸⁵ Throughout a well-reasoned and superbly-written opinion, Justice Scalia set forth logical arguments demonstrating how the Court's "opinion exercises a benevolent compassion that the law does not place it within [its] power to impose," and, "distorts the text of Title III, the structure of the ADA, and common sense."¹⁸⁶

Besides dissenting from the majority's view on the effect of luck and chance on professional golf,¹⁸⁷ the dissent also disagreed with the Court's application of the terms "customer" and "client," stating that under the majority's application, the persons gathering at an auditorium would be covered by Title III, as would those who contracted to clean it.¹⁸⁸ Similarly, the persons recreating at a zoo would be covered by Title III, as would the animal handlers bringing in the pandas.¹⁸⁹ In addition, the dissent finds unreasonable the majority's position that employees exempted from Title I coverage (*i.e.*, independent contractors and employees of businesses employing fewer than fifteen persons) are covered under Title III because such employees "enjoy the employment and contracting that such places provide."¹⁹⁰ The dissent also points out that Martin "did not seek to 'exercise' or 'recreate' at the PGA ... events; he sought to make money (which is why he is called a *professional* golfer)."¹⁹¹ It is no surprise that the dissent concluded that it is impossible for athletes to be "customers" of the PGA, because that organization pays them.¹⁹²

The dissent also addressed what it found to be another grave error on the majority's part, *viz.*, its interpretation of, "access to."¹⁹³ The dissent stated the "PGA ... cannot deny [Martin] *access* to [its] game because of his disability, but it need not provide him a game different (whether in its essentials or in its details) from that offered to everyone else."¹⁹⁴ The dissent also noted the statute was not designed to

¹⁸⁵*Id.* at 691-705 (Scalia, J., dissenting).

¹⁸⁶*PGA Tour*, 532 U.S. at 691.

¹⁸⁷*See supra* note 167 and accompanying text.

¹⁸⁸*PGA Tour*, at 693.

¹⁸⁹*Id.*

¹⁹⁰*Id.* at 694. *See also supra* note 93.

¹⁹¹*PGA Tour*, 532 U.S. at 696.

¹⁹²*Id.* at 697. The dissent thoroughly analyzed this point. *See, e.g., id.* at 695. ("[N]o one in his right mind would think that [baseball players] are *customers* of the American League or of Yankee Stadium. They are themselves the entertainment that the customers pay to watch."); *see also id.* at 697 ("By the Court's reasoning, a business exists not only to sell goods and services to the public, but to provide the 'privilege' of employment to the public, wherefore it follows, like night the day, that everyone who seeks a job is a customer.").

¹⁹³*Id.* at 703.

¹⁹⁴*PGA Tour*, 532 U.S. at 699. On this point, the dissent states, in discussing whether shoe stores must sell single shoes for one-legged persons, that there is "no basis for considering whether the rules of ... competition must be altered. It is as irrelevant to the PGA's ... compliance with the statute whether walking is essential to the game of golf as it is to [a] shoe

ensure that Martin's "disability will not deny him an *equal chance to win* competitive sporting events."¹⁹⁵ In concluding its opinion, the dissent offers this statement, which aptly summarizes its position:

Agility, strength, speed, balance, quickness of mind, steadiness of nerves, intensity of concentration—these talents are not evenly distributed. No wild-eyed dreamer has ever suggested that the managing bodies of the competitive sports that test precisely these qualities should try to take account of the uneven distribution of God-given gifts when writing and enforcing the rules of competition. And I have no doubt Congress did not authorize misty-eyed judicial supervision of such a revolution.¹⁹⁶

IV. *OLINGER V. USGA*

A. *District Court Decision*

The case of Ford Olinger was, for some reason, much less publicized than that of Casey Martin. Olinger, like Martin, is a professional golfer with a physical impairment.¹⁹⁷ Olinger, a club pro from Warsaw, Indiana,¹⁹⁸ was eligible for, and desired to, compete in, the 1999 U.S. Open qualifying rounds held at South Bend Country Club in Indiana.¹⁹⁹ The U.S. Open is one of thirteen national championships conducted by the USGA each year.²⁰⁰ The USGA prohibits the use of golf carts in the Open, and in the qualifying rounds that precede it.²⁰¹

Olinger suffers from bilateral avascular necrosis, which significantly impairs his ability to walk, and makes a golf cart necessary for the completion of an eighteen hole round of golf.²⁰² Thus, Olinger filed suit against the USGA under Title III of the ADA, seeking an order allowing him to use a golf cart while competing in the U.S. Open qualifying rounds.²⁰³

store's compliance whether 'pairness' is essential to the nature of shoes." *Id.* at 698 (quoting *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 560 (7th Cir. 1999)). Further, Scalia offered, "[w]hy cannot the PGA . . . , if it wishes, promote a new game, with distinctive rules (much as the American League promotes a game of baseball in which the pitcher's turn at the plate can be taken by a designated hitter?" *Id.* at 699.

¹⁹⁵*Id.* at 703.

¹⁹⁶*Id.* at 703-04.

¹⁹⁷*Olinger*, 55 F. Supp. 2d at 929.

¹⁹⁸Lithwick, *supra* note 7, at 22.

¹⁹⁹*Olinger*, 55 F. Supp. 2d at 929.

²⁰⁰*Id.* at 928.

²⁰¹*Id.* at 929.

²⁰²*Id.*

²⁰³*Id.*

The District Court opinion is divided into two parts: One that is based on the motion for summary judgment filed by the USGA, and the other based on a bench trial.²⁰⁴

1. Motion for Summary Judgment

The USGA argued that the U.S. Open is not “public,” nor is it a “place,” so it certainly could not be a “place of public accommodation” under the ADA.²⁰⁵ Since the USGA does allow certain amateurs to participate in the U.S. Open and its qualifying rounds, the court does find that it is “public.”²⁰⁶

Olinger claimed that although the USGA is literally not a “place,” it does, for the purposes of conducting its championships, “operate[s] a place of public accommodation,” as provided for in the statute.²⁰⁷ Thus, the court concluded, due to the control the USGA has over the courses before, during, and after its tournaments, that it does indeed operate a place of public accommodation, therefore falling under the control of Title III of the ADA.²⁰⁸

The USGA also argued that the competition areas of the U.S. Open and its qualifying rounds is off limits to the general public, so only the spectator areas should be governed by the ADA.²⁰⁹ The court cited a number of cases where the NCAA ruled on the eligibility of college student-athletes, and the courts did not find that the competitive areas—*i.e.* pool, court, or field—were outside the reach of the ADA.²¹⁰ In each of these cases, however, eligibility pending upon the plaintiff’s ability to perform academically, not athletically, was the issue.

The USGA also argued that it should be enabled, as an organizer of a championship event, to make its own rules of competition. It cited *New York Roadrunners Club v. State Division of Human Resources*,²¹¹ “which held that because the New York City Marathon is a footrace, its organizers had no obligation to allow other means of locomotion. . . .”²¹² The plaintiff countered, saying that if that were to be so, sports would become the only industry “allowed to construct barriers to access that are unrelated to performance.”²¹³ The court called this argument “simply another version of [the USGA] argument that [it] is exempt from

²⁰⁴*Olinger*, 55 F. Supp. 2d at 930. *Olinger* was presided over, and the opinion was written by Judge Robert L. Miller, Jr. of the District Court for the Northern District of Indiana. *Id.*

²⁰⁵*Id.*

²⁰⁶*Id.*

²⁰⁷*Id.*

²⁰⁸*Id.* at 931.

²⁰⁹*Olinger*, 55 F. Supp.2d at 931

²¹⁰*Id.* at 932 (citing *Bowers*, 9 F. Supp. 2d 460 (learning disability); *Tatum*, 992 F. Supp. 1114 (anxiety disorder and testing phobia); *Ganden*, 1996 U.S. Dist. LEXIS 17368 (learning disability); *Butler v. NCAA*, 1996 WL 1058233 (W.D. Wash. 1996) (learning disability)).

²¹¹ 432 N.E.2d 780 (N.Y. 1982).

²¹²*Olinger*, 55 F. Supp. 2d at 932.

²¹³*Id.* at 933.

the provisions of the ADA,” and denied the USGA’s motion for summary judgment.²¹⁴

2. Trial

The issue pursued at trial was the USGA’s argument that the accommodation that Olinger requested, a golf cart, would fundamentally alter the nature of the U.S. Open and its qualifying rounds.²¹⁵ The court, following trial, agreed with the USGA.²¹⁶

As the court pointed out, “fundamentally alter” comes from *Southeastern Community College v. Davis*,²¹⁷ a case under the Rehabilitation Act²¹⁸ that interpreted “reasonable accommodation.”²¹⁹ The Rehabilitation Act language is so similar to the ADA, that the “reasonable accommodations” analysis is “easily transferable to the Title III . . . context.”²²⁰

The court examined the initial burden, on the plaintiff, to provide that the accommodation is reasonable in the general sense, noting that the “golf cart has become so ubiquitous in the sport that any such challenge would seem doomed.”²²¹ That being established, the USGA must prove that the accommodation would fundamentally alter the nature of the tournament: “Proof must focus on the specific circumstances rather than on reasonableness in general.”²²² Thus, the USGA must show that the use of a golf cart in U.S. Open and its qualifying rounds would fundamentally alter the competition.

The USGA claimed that since the U.S. Open is the national golf championship, the standards for competition must be higher than those of its other tournaments.²²³ For instance, its U.S. Senior Open, in which competitors are at least fifty-five years old or more, is not a test of stamina like the U.S. Open.²²⁴ Also, other tournaments that do not bestow the winner with “national champion” status do allow golf carts, but often that is due to the fact that the tournaments are held during school months, thus there is a shortage of students to act as caddies.²²⁵ As a result, “the court sees no inconsistency in . . . allowing carts in some events while barring them in what they view as the national championship.”²²⁶ Through the court’s findings, many derived

²¹⁴*Id.*

²¹⁵*Id.*

²¹⁶*Id.*

²¹⁷442 U.S. 397 (1979) (holding that a college nursing program is not required to change oral communication requirements for deaf student).

²¹⁸29 U.S.C. § 701 *et seq.* (1994).

²¹⁹42 U.S.C. § 12112(b)(5)(A) (1994).

²²⁰*Olinger*, 55 F. Supp. 2d at 933 (citing *Gambrinus*, 116 F.3d 1052).

²²¹*Id.* at 934.

²²²*Id.* (citing *Gambrinus*, 116 F.3d at 1059-60).

²²³*Id.*

²²⁴*Id.*

²²⁵*Olinger*, 55 F. Supp. 2d at 934.

²²⁶*Id.* at 936.

from a study of walking fatigue while playing golf reported by an expert physiologist, Dr. James Rippe, show “not that a golfer who rides invariably has a competitive advantage over a very similar golfer who walks; . . . only that a strong possibility exists that on any particular day, such a competitive advantage might exist, and that it might be substantial.”²²⁷

The court also noted that even a slight competitive advantage could affect the outcome of the U.S. Open. “Slightly over 100 U.S. Opens have been played, and on 30 occasions, a playoff was needed to decide the winner, so a single stroke can be determinative.”²²⁸ Additionally, although the court conceded this was not part of the trial record, “a single stroke would have an impact on money won or lost below the levels of first and second places.”²²⁹

The court was also cautious about the precedent it would set if it allowed Olinger the use of a golf cart, stating that if the “inquiry moves beyond . . . Olinger, the issue broadens and becomes more difficult . . . Olinger must ride a golf cart to play, and even with a cart he is likely to be more fatigued at the end [of a round] than a healthy Tiger Woods or healthy David Duval.”²³⁰ The court anticipated that later someone else may apply for a golf cart, and the same thing will be said:

But how will that applicant be compared to Ford Olinger? Will next year’s applicant . . . have a competitive advantage over Olinger if allowed to ride? Will Mr. Olinger have a competitive advantage over next year’s applicant if both are allowed to ride? If either would have an advantage over the other, would one be allowed to ride? or both? or neither?²³¹

The court also noted that it was able to decide whether Olinger was to use a golf cart with the help of many attorneys who provided far more information to the court than it ultimately needed, in the form of briefs, testimony, and other evidence.²³² It also noted that the USGA does not ask for all of the information that these skilled attorneys were able to provide.²³³ Of course it could, “but the USGA then also would need to develop a system and a fund of expertise to determine whether a given applicant truly needs, or merely wants, or could use but does not need, to ride a cart to compete.”²³⁴

“It is important . . . not to allow ‘stamina’ or ‘nature of the program’ to become a proxy for discrimination against persons protected by the ADA.”²³⁵ However, the court stated that, unlike the workplace,

²²⁷*Id.*

²²⁸*Id.*

²²⁹*Id.* at 936 n.6.

²³⁰*Olinger*, 55 F. Supp. 2d at 937.

²³¹*Id.*

²³²*Id.*

²³³*Id.*

²³⁴*Id.*

²³⁵*Olinger*, 55 F. Supp. 2d at 937; *see also* 42 U.S.C. § 12101 *et seq.* (1994).

The point of athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than . . . any other competitor. The set of tasks assigned to the competitor in the U.S. Open includes not merely striking a golf ball with precision, but doing so under greater than usual mental and physical stress.²³⁶

As a result, the district court held that, although the accommodation Olinger sought was reasonable in a general sense, granting it would fundamentally alter the nature of the competition in the U.S. Open.²³⁷

B. Seventh Circuit Court of Appeals Decision

After the District Court's ruling, Olinger appealed the decision to the Seventh Circuit Court of Appeals.²³⁸ The nature of Olinger's appeal centers on the evidence that the USGA offered at trial. He contended that it lacked a nexus between his "personal circumstances as they interacted with the USGA's event—that in fact allowing a cart would fundamentally alter the event."²³⁹ Olinger also asserted that the USGA did not show that "impossible administrative burdens" would be imposed upon it if it were to allow Olinger to use a golf cart.²⁴⁰ The court began its analysis of the Olinger case with an extensive background of the history and tradition of the U.S. Open, reaching the conclusion that "the U.S. Open is the greatest test in golf."²⁴¹ The court asserted that, as the District Court did, this case can be resolved upon the narrow issue of whether Olinger's "use of a cart during the tournament would fundamentally alter the nature of the competition."²⁴²

The court then thoroughly analyzed Title III provisions and its key terminology much like the court below had done, finding that the use of a golf cart by Olinger "would alter the fundamental nature of that competition . . ." by removing a "particular type of stamina."²⁴³ The testimony of three witnesses, Ken Venturi, Dr. Theodore Holland, and Dennis Hepler, are relied on in the court's opinion as evidence of the above finding.²⁴⁴ Venturi, the 1964 U.S. Open champion, testified at

²³⁶*Id.* at 937-38.

²³⁷*Id.* at 938.

²³⁸*Olinger*, 205 F.3d 1001. Circuit Judge Terence T. Evans wrote for a unanimous Seventh Circuit panel, which also included Circuit Judges Michael S. Kanne and Ilana Diamond Rovner. *Id.* Olinger's request for rehearing and rehearing en banc was denied June 22, 2000. See 2000 U.S. App. LEXIS 14464.

²³⁹*Olinger*, 205 F.3d at 1001.

²⁴⁰*Id.*

²⁴¹*Id.* at 1002-03.

²⁴²*Id.* at 1005.

²⁴³*Id.* at 1005-06.

²⁴⁴*Olinger*, 205 F.3d at 1005-06.

trial to the conditions he overcame to win the tournament that year, as well as the story of Ben Hogan's dramatic victory in 1950.²⁴⁵

Dr. Holland testified that physical endurance and stamina are vital factors in determining the U.S. Open champion, saying that "[t]here is a lot more to getting . . . around those seventy-two holes than just hitting the shots."²⁴⁶ Much like Holland, Olinger's own witness, Hepler, "testified that physical endurance and stamina and uniform rules are critical factors in determining the national golf champion."²⁴⁷

The court, in closing, and without discussion, adopted the District Court's holding that to require the USGA to examine each request for a golf cart would impose undue administrative burdens upon it.²⁴⁸

Accordingly, the court affirmed the decision of the court below, and noted that it is not deciding whether the "USGA should give seriously disabled . . . golfers a chance to compete," but rather are required to do so.²⁴⁹ Ultimately, the court held they will not grant Olinger's request for a golf cart, "[b]ecause the law does not force the USGA to make the accommodation Olinger seeks."²⁵⁰

V. MARTIN AND OLINGER DO NOT MEET THE STATUTORY DEFINITION OF DISABLED

With the publicity that is attached to an attraction such as professional golf, it was not long before scholars weighed in on the decisions reached in both *Martin* and *Olinger*. Some found the golfers' claims reasonable, and others said that "big brother again undermined a private organization's ability to set its own rules."²⁵¹

As noted above, the PGA stipulated to Martin's disability, which is the plaintiff's initial burden when filing an ADA claim.²⁵² After hearing of his condition, one has little doubt that Martin is disabled. Or is he? Similarly, the USGA stipulated to Olinger's disability,²⁵³ and the Social Security Administration has determined that Olinger is disabled, but those regulations have nothing to do with the ADA.²⁵⁴ One

²⁴⁵*Id.* at 1006-07. Venturi overcame temperatures of 100 degrees and humidity of ninety-seven percent, while battling dehydration, and against the advice of his doctor, to win the tournament in 1964. *Id.* The use of a golf cart for that tournament "would have been a tremendous advantage." *Id.* at 1006 (quotation marks omitted). In 1949, Hogan was severely injured when his car was hit by a Greyhound bus, and was told he would never walk again, but in spite of that, won the 1950 U.S. Open. *Id.*

²⁴⁶*Olinger*, 205 F.3d at 1006.

²⁴⁷*Id.*

²⁴⁸*Id.*

²⁴⁹*Id.*

²⁵⁰*Id.*

²⁵¹Tanya R. Sharpe, *Casey's Case: Taking a Slice out of the PGA Tour's No-Cart Policy*, 26 FLA. ST. U.L. REV. 783, 785 (1999) ("The talent in golf is hitting a golf ball with precision and distance and keeping your cool as millions watch your performance. Martin can complete these tasks very well. He just needs a ride to the starting line." (footnotes omitted)).

²⁵²See note 119, *supra*, and accompanying text.

²⁵³*Id.*

²⁵⁴*Olinger*, 55F. Supp. 2d at 929.

scholar asserts that both Martin and Olinger, as professional athletes, may not even qualify as “disabled” under the ADA, making any claim under that law doomed from the outset.²⁵⁵

Under the ADA, a person must meet three necessary elements to qualify as disabled: (1) “physical or mental impairment” that (2) “substantially limits” a (3) “major life activity.”²⁵⁶ Clearly, both golfers have “physical impairments,” but does either substantially limit a major life activity?

There are no specific criteria for “major life activity” provided by either the Equal Employment Opportunity Commission or Congress.²⁵⁷ However, the “major life activities” that they have recognized share three characteristics, which have been described as a “Frequency-Universality Test.”²⁵⁸ An activity meets this test, and thereby qualifies as a “major life activity,” if it is performed with microfrequency (throughout the day), macrofrequency (daily or almost daily), and universally (by almost everyone, except those prevented from doing so by an impairment).²⁵⁹

Under that test, query what possible “major life activity” are these two men being prevented from doing? Walking, golfing, or golfing professionally are three possibilities. If the claim is that the “major life activity” is walking, are both plaintiffs “substantially limited” as the statute requires? Consider that both men do indeed walk while playing a round of golf; that is, they do not hit their shots from the golf cart. They must still walk from the golf cart to the ball and back, which, it is estimated, is still twenty-five percent of the course, or roughly one and one-quarter miles for a round of eighteen holes.²⁶⁰ It is reasonable to assume, for the sake of argument, that these two professionals play golf six days per week. If so, that is roughly seven and one-half miles of walking per week during golf alone. It is doubtful that this would qualify under the universal prong of the test, for few persons walk that far on a weekly basis.

With the next two possibilities, golf, and more narrowly, professional golf, the prospect of either of these men satisfying the test becomes increasingly remote. The typical golfer may, and usually does, spend large amounts of time at his or her game, but the number of able-bodied persons participating in golf could hardly be termed “universal.” By even greater logic, the argument that professional golf is a “major life activity” becomes impossible to make. “In fact, even though professional athletes . . . may participate in sports for a large portion of the day, every day,

²⁵⁵Sean Baker, *The Casey Martin Case: Its Possible Effects on Professional Sports*, 34 TULSA L.J. 745, 762 (1999) (arguing that it is impossible to compare golf to “more vigorous sports” like football, basketball, baseball, and hockey).

²⁵⁶42 U.S.C. § 12102(2)(A) (1994).

²⁵⁷*But see* 24 C.F.R. § 100.201(b) (1998).

²⁵⁸Baker, *supra* note 255, at 762 (citing Todd Lebowitz, Note, *Evaluating Purely Reproductive Disorders Under the Americans With Disabilities Act*, 96 MICH. L. REV. 724 (1997) (arguing that purely reproductive disorders should not be covered under the ADA, but rather the Pregnancy Discrimination Act)). “Major life activities” means functions such as caring for one’s self, performing manual tasks, *walking*, hearing, speaking, breathing, learning and working.” *Id.* (*emphasis added*)

²⁵⁹*Id.*

²⁶⁰*Martin*, 994 F. Supp. at 1251.

participation in sports must fail the universality test because unimpaired people commonly choose not to participate in sports.”²⁶¹ Thus, there is a distinct “possibility that in cases where the disability is not stipulated and where courts require that a plaintiff prove the disability [while] further requiring a showing that a major life activity is substantially limited, the professional athlete may run into difficulty.”²⁶²

Another possible “major life activity,” as it applies to these cases is “working.” Even though neither court found grounds for a Title I claim,²⁶³ which covers employee/employer relationships under the ADA, that does not preclude the determination of “working” as a major life activity. It stands to reason that even if both plaintiffs are judged to be independent contractors, rather than employees of the respective defendants, both could still be considered to be working as they compete for the tournament purse.

The U.S. Supreme Court, in *Sutton v. United Air Lines*, analyzed the statutory definition of disabled.²⁶⁴ The Court determined “[w]hen the major life activity under consideration is that of working, the statutory phrase ‘substantially limits’ requires, at minimum, that Plaintiffs allege they are unable to work in a *broad class of jobs*.”²⁶⁵ The Court also looked to the EEOC’s definition of “substantially limits” as applied to the major life activity of working, which states “[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.”²⁶⁶ The Court concluded, therefore, “[i]f jobs utilizing an individual’s skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.”²⁶⁷ Since Olinger works as a club pro, and Martin is a graduate of Stanford University with a degree in economics, neither appears to be limited from a broad class of jobs.²⁶⁸

Sutton therefore held that the Plaintiffs—who claimed the Defendants failure to hire them as commercial airline pilots because of poor vision was a Title I violation—were not “disabled” under the ADA’s meaning.²⁶⁹ Applying the Court’s

²⁶¹Baker, *supra* note 255, at 762 (citing Lebowitz, *supra* note 258 (quotation marks omitted)).

²⁶²*Id.*

²⁶³Martin’s Title I claim was rejected. *See* notes 89-91, *supra*, and accompanying text. Olinger did not, in fact, make a Title I claim in his case against the USGA. *See generally Olinger*, 55 F. Supp. 2d 926.

²⁶⁴527 U.S. 471 (1999) (holding, in part, that severely myopic applicants for pilot positions must be denied a broad category of jobs, not just the narrow “global pilot” position, before eye condition is to have said to “substantially limited” the “major life activity” of working).

²⁶⁵*Id.* at 491 (*emphasis added*).

²⁶⁶*Id.* (citing 29 CFR § 1630.2(j)(3)(i)).

²⁶⁷*Sutton*, 527 U.S. at 492.

²⁶⁸U.S. Department of Justice, ADA Home Page, *available at* <http://www.usdoj.gov/crt/ada/fmovtin.htm>.

²⁶⁹*Sutton*, 527 U.S. at 494.

analysis to *Martin* and *Olinger*, absent stipulations to the respective Plaintiff's disabilities, and extending the definition of "major life activity" that the high Court used in its Title I claim to our Title III claims, it is likely, again, that Martin and Olinger would fail to meet the ADA definition of "disabled."

VI. SUBSTANTIVE RULES OF ATHLETICS WERE NOT MEANT TO BE GOVERNED BY THE ADA

Another argument not presented at length in the analysis of either court, but mentioned briefly in *Olinger*, is that the ADA should not apply to the competitive component of athletics. "The point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor."²⁷⁰ Athletics present a far different question than do workplace claims under Title I, in which "the pertinent inquiry is whether a particular otherwise qualified individual can perform a job if a reasonable accommodation is made to allow for the person's disability."²⁷¹ Title III prohibits eligibility criteria that "screen out or tend to screen out an individual with a disability . . . from fully and equally enjoying any goods [and] services . . ."²⁷² Professional athletics isn't about "enjoyment" and access; it is about competition and huge winnings. The Title III claims presented by these two golfers not only ask for access, but also for the chance to compete and win.²⁷³

[I]t is . . . without question that . . . Martin's use of a cart places him in a much better position than if he were forced to compete without the use of a cart. Given the format of professional golf . . . allowing . . . Martin to use a cart during competitive play will undoubtedly permit him to finish higher, thereby receiving a greater winning.²⁷⁴

An important difference between all of the ADA cases that are cited in support of the plaintiff in *Martin*, many of which are NCAA eligibility cases, is that they regulate the *access* athletics, while Martin and Olinger want the rules changed after they have already gained access. "What is most threatening to professional sports about the *Martin* decision is not that [he] was given the opportunity to compete on the professional level, but rather that a court altered competition in order to do so."²⁷⁵

Adam Jay Golden, writing in the *Sports Law Journal*, sets forth an excellent example of how judicial interference with the substantive, competitive rules of golf could present itself in other sports; he used baseball as an example.²⁷⁶ Golden asks

²⁷⁰*Olinger*, 205 F.3d at 1006.

²⁷¹*Id.*

²⁷²42 U.S.C. § 12182(b)(2)(A)(i) (1994).

²⁷³*Martin*, 204 F.3d 994; *Olinger*, 205 F.3d 1001.

²⁷⁴Adam Jay Golden, *A Good Walk Spoiled: The Americans with Disabilities Act and the Casey Martin Case*, 7 *SPORTS LAW. J.* 161, 175 (2000) ("When the courts or legislature determine that certain deficiencies warrant accommodation at the professional level . . . [that] undermines the competitive nature inherent in sports at the highest level.").

²⁷⁵*Id.* at 182.

²⁷⁶*Id.* at 178.

you to assume that a Major League Baseball (“MLB”) pitcher has the same disorder as Martin, and that he has all the skills necessary to be a MLB pitcher, but he cannot remain standing for long periods of time.²⁷⁷ “In order to continue competing in professional baseball, the pitcher requests that MLB permit him to place a chair next to the pitcher’s mound so that he may sit when he is in the act of pitching.”²⁷⁸ This is an obviously absurd mental picture.

Most people who know anything about baseball would agree that placing a chair in the middle of a baseball diamond is a ridiculous accommodation. The same people will also tell you that standing for long periods of time is not a *skill* that is fundamental to becoming a big league pitcher. Nonetheless, Golden correctly states that if you were to go through the same ADA analysis as in *Martin*, you may find yourself watching a game that features a folding chair as part of the baseball landscape.²⁷⁹ For even though the accommodation of a “chair on a baseball diamond is more foreign than that of a golf cart on a golf course, the oddity of such an accommodation would not alter the legal analysis”²⁸⁰ The *Martin* court, for instance, ruled that the purpose of any rule cannot be mere tradition.²⁸¹ So, MLB could not offer such argument, nor an argument of unsightliness, to defeat this hypothetical accommodation.²⁸²

The Supreme Court made a similar argument during oral arguments in *Martin*.²⁸³ The Court cited the designated hitter rule in MLB as an illustration of how a sport can be played under two different sets of rules, just like in professional golf.²⁸⁴ In the American League, one of the two MLB leagues, the pitcher is replaced in the batting order by a designated hitter; yet in the National League the pitcher bats. The Court asked Martin’s attorney, Roy L. Reardon of New York, if a pitcher with a blood deficiency that causes him to tire easily should be entitled to relief from hitting if he played in the National League, because the designated hitter rule couldn’t be “fundamental” since it is in only one of the Major Leagues.²⁸⁵ Reardon responded that the National League rule requiring the pitcher to bat is fundamental, and changing that rule would be impermissible.²⁸⁶

The Court, unable to tell the difference between the PGA golf cart rule and the American League designated hitter rule, responded that it couldn’t understand “the whole meaning of fundamentalness with regard to sport.”²⁸⁷ It then asked the

²⁷⁷*Id.* at 178-79.

²⁷⁸*Id.*

²⁷⁹Golden, *supra* note 274, at 178-79.

²⁸⁰*Id.* at 179.

²⁸¹*See supra* note 143 and accompanying text.

²⁸²*Id.*

²⁸³Supreme Court Official Transcript, PGA Tour, Inc. v. Martin, No. 00-24, 2001 WL 41011, at *20 (2001).

²⁸⁴*Id.*

²⁸⁵*Id.*

²⁸⁶*Id.*

²⁸⁷*Id.*, at *20-21.

Respondent if a player had a disability that caused an unusually long torso, could baseball change the strike zone, which is normally from the knees to the chest, and make it smaller for him.²⁸⁸ Reardon again responded that the strike zone is a fundamental rule.²⁸⁹ The Court responded by calling the strike zone a “silly rule,” and saying “[a]ll sports rules are silly rules. . . .”²⁹⁰ Clearly, the point the Court was trying to make is that all sports are governed by rules that are arbitrarily created to put all competitors on a level playing field and test them—not to discriminate against disabled people. Granted, a person born with unusually short arms would be discriminated against if he were to try out for quarterback of a football team. A dwarf would be discriminated against if he were to try out for a basketball team; that is the very nature of athletics.

Sometimes hyperbole is the only way to make an argument effective; sometimes extending an apparently logical argument to an extreme shows how it is actually illogical. The above examples demonstrate the primary point of *Olinger*, that the purpose of athletics is to compete under the same conditions, and then see who is victorious. An extension of *Martin* changes that goal; hence, the ADA should not apply to competitive athletics.

VII. CONCLUSION

After reading the above, it is understandable how many people would cry that the PGA is being cold-hearted, and how they should allow Martin to compete. It is a terrible condition that he suffers from; likewise, Olinger suffers from a condition that severely curtails his ability to walk. Moreover, there are many other persons quietly suffering from terrible medical conditions, which have no cure, who cannot even find work, let alone compete in professional athletics.

The ADA is not a panacea for those who wish to participate in professional sports. Nor was its design to ensure that this nation went without suffering. The ADA was implemented to ensure that disabled Americans could get into the factories, movie houses, and ballparks of their communities. Most of the cases cited in support by both golfers are those which an athlete gained *access* to an event that he would have been barred from were it not for the ADA. This Note’s primary contention is that access is where the ADA needs to stop—before it changes the substantive rules, and consequently, the overall nature, of athletics. Nowhere did Martin, Olinger, nor any of the courts cite a case that even proposed that rules of competition should be changed so an athlete can compete. Nevertheless, in light of the Supreme Court’s decision in *Martin*, the “world of professional sports may

²⁸⁸Supreme Court Official Transcript, *PGA Tour, Inc. v. Martin*, No. 00-24, 2001 WL 41011, at *21.

²⁸⁹*Id.*

²⁹⁰*Id.* See also *PGA Tour*, 532 U.S. at 700 (Scalia, J., dissenting)

(“[T]he rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone—not even the Supreme Court of the United States—can pronounce one or another of them to be ‘nonessential’ of the rulemaker (here the PGA Tour) deems it to be essential.”).

forever be altered.”²⁹¹ But rest assured, “[t]he year was 2001, and ‘everybody was finally equal.’”²⁹²

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²⁹¹Golden, *supra* note 274, at 177.

²⁹²*PGA Tour*, 532 U.S. at 705 (Scalia, J., dissenting).

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