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Title III of the ADA Allows a Qualified Disabled Entrant to Use a Motorized Cart on the Professional Golf Tour: *PGA Tour, Inc. v. Martin*

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Title III of the ADA Allows a Qualified Disabled Entrant to Use a Motorized Cart on the Professional Golf Tour: *PGA Tour, Inc. v. Martin*

CONSTITUTIONAL LAW — CIVIL RIGHTS — AMERICANS WITH DISABILITIES ACT — The Supreme Court of the United States held that Title III of the ADA protects access to professional golf tournaments by a qualified entrant with a disability, and that a disabled participant's use of a motorized golf cart during play would not fundamentally alter the nature of tournament play.

PGA Tour, Inc. v. Martin, 121 S.Ct. 1879 (2001)

PGA Tour, Inc. sponsors and cosponsors three annual golf tours, which include the PGA Tour, the Nike Tour, and the Senior PGA Tour.[1] A player may gain access to the tours through a number of different processes.[2] Casey Martin was an acclaimed amateur golfer despite his battle with a life long disability defined under the Americans with Disability Act of 1990 ("ADA").[3] Specifically, Martin was born with Klippel-Trenaunay-Weber Syndrome, which is a degenerative circulatory disorder that disturbs the blood flow to his right leg.[4] The disease is progressive and has now atrophied his right leg.[5] The pain became so extreme in his later college years

1. PGA Tour, Inc. v. Martin, 121 S. Ct. 1879 (2001). PGA Tour, Inc. was formed in 1968 as a not-for-profit entity. *PGA Tour, Inc.*, 121 S. Ct. at 1884. The PGA Tour is the highest level of competition, while the Nike Tour is the secondary tier. *Id.* The Senior PGA Tour is for those attaining a minimum age. *Id* at 1885.

2. *Id* at 1884. A competitor may gain entry to an official tour by succeeding in an open qualifying round conducted before each tour. *Id.* The majority of competitors gain entry to either the PGA or Nike Tour through the qualifying school ("Q-School") process. *Id.* Any golfer may gain entry to the school by paying a $3,000 entry fee and submitting two letters of reference from tour members. *Id.* The Q-School entails three rounds in which the pool of contestants is continually thinned. *Id.* Of those advancing to the third round, about one-fourth gain entry to the PGA Tour. *Id.* The remainder are admitted to the Nike Tour, but may advance to the PGA Tour based on performance standards. *Id.*

3. *Id.* at 1885. The Americans with Disabilities Act provides in part: "The term 'disability' means, with respect to an individual — (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual . . ." 42 U.S.C. § 12102 (1990).

4. *PGA Tour Inc.*, 121 S. Ct. at 1885. Walking for Martin not only causes great pain and fatigue, but also creates the risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that amputation may be necessary. *Id.* at 1885-86.

5. *Id.* at 1885. Atrophy is defined as a decrease in size or wasting away of a bodily part

that Martin requested, and was granted, a waiver of the walking rule for NCAA golf competitions.[6] Following college, Martin entered the Q-School operated by the PGA and successfully surpassed the first two elimination rounds, which permitted the use of electric carts.[7] Martin filed a request, supported by medical records, for the waiver of the walking rule enforced by the PGA in the third round, but the PGA Tour refused the waiver.[8]

Martin filed a complaint in United States District Court of Oregon to enjoin the defendant from enforcing its mandatory walking rule based on the anti-discrimination clause to public accommodations embodied in Title III of the ADA.[9] The district court granted Martin a preliminary injunction and, with the use of a cart, Martin successfully completed the final stage of the Q-School to earn a place on the 1998 Nike Tour.[10] The district court then granted Martin partial summary judgment, rejecting defendant's argument that the PGA was considered a "private club" under the ADA, and held that the PGA Tour was considered a place of public accommodation within the scope of the ADA.[11]

Upon bench trial of the remaining issue, the district court found that the modification of the walking rule for Martin was a reasonable accommodation under Title III of the ADA and that this

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or tissue. THE NEW MERRIAM-WEBSTER DICTIONARY 62 (1989).

6. *PGA Tour Inc.*, 121 S. Ct. at 1886. Until that time, Martin refused the use of a cart and was able to attain 17 junior tournament victories, a state high school championship, and an NCAA championship, despite the significant pain he endured. *Id.* at 1885.

7. *Id.* at 1886. Three sets of rules govern all PGA sponsored tournaments, including the Q-School. *Id.* at 1884-85. The Rules of Golf are the general rules promulgated by the USGA (the basic governing body of golf), which apply to all manners of golf. *Id.* at 1884. The USGA Rules contain no prohibition on the use of carts. *Id.* at 1884-85. The "hard card" rules are PGA addendums to the rules governing tournament play. *Id.* at 1885. The "hard card" has always prohibited carts in PGA Tournaments, but has allowed carts in the first two rounds of the Q-School. *Id.* The "weekly notices" are specific rules concerning course conditions or course specific regulations. *Id.*

8. *Id.* at 1886. The PGA refused the waiver on the basis that it would alter the nature of the tournament by providing Martin with an advantage due to the elimination of stamina as an element of the tournament. *Id.*

9. *Id.* Title III of the ADA provides: "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation." 42 U.S.C. § 12182(a) (1990).

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

11. *Martin*, 984 F. Supp. at 1323-27. Title III of the ADA provides exemption from coverage to public accommodations or services operated by private entities. 42 U.S.C. § 12187 (1990). The court found that this exemption operates as a benefit to the public, and that an operator of a private accommodation may not establish private enclaves within the facility to escape the reach of the ADA. *Martin*, 984 F. Supp. at 1327.

modification did not fundamentally alter the nature of PGA tournaments.[12] The court found fatigue in the game of golf insignificant, and that Martin's use of a cart would not provide him with a competitive advantage over the other competitors.[13] The court therefore granted Martin a permanent injunction, which afforded Martin the use of a motorized cart in the PGA Tour, Nike Tour, and any qualifying rounds in which Martin was eligible to play.[14]

The PGA appealed to the Ninth Circuit, in which it challenged the district court's ruling as to its classification as a public accommodation under Title III of the ADA, and renewed its contention that a modification of the walking rule would fundamentally alter the nature of PGA tournaments.[15]

The Ninth Circuit found that the highly selective procedures for competition were irrelevant and that the PGA Tour golf courses fit squarely within the ADA definition of public accommodation.[16] The court found no dispute about the fact that Martin's use of a cart was a reasonable accommodation and moved to address, in an individual fact-based inquiry, whether Martin's use of a cart would fundamentally alter tournament golf by eliminating stamina as a testing factor.[17] The majority found that fatigue was not an essential aspect of the game of tournament golf and that Martin's accommodation would only permit him access to a competition in which he otherwise could not engage because of his disability.[18]

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12. Martin v. PGA Tour, Inc., 994 F. Supp. 1242, 1246-52 (D. Or. 1998). Title III provides that discrimination includes:

> 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) (1990).

13. *Martin*, 994 F. Supp. at 1250-51.

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

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

16. *Id.* at 999. Title III of the ADA provides: "The following private entities are considered public accommodations for the purposes of this subchapter . . . L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." 42 U.S.C. § 12181(7) (1990).

17. *Martin*, 204 F.3d at 999-1001.

18. *Id.* at 1000. The court found that Martin's disability provides fatigue in excess of other competitors due to the distance he still has to walk with a cart. *Id.* The court also noted that fatigue is mostly a psychological phenomenon, in which stress and motivation are the key factors. *Id.*

The PGA Tour petitioned for a writ of *certiorari*.[19] The United States Supreme Court granted certiorari to settle a conflict among the circuits regarding the application of the ADA to professional golf tournaments.[20]

The issues on appeal to the Supreme Court were "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 tournaments, § 12182(b)(2)(A)(ii), to allow him to ride when other contestants must walk."[21] The majority found that PGA Tour, Inc. competitions were expressly included as places of public accommodation and subject to regulation under the ADA.[22] The majority also affirmed the lower court's decision that fatigue is not an essential aspect of the game of golf and that Martin's accommodation would not fundamentally alter the nature of PGA events.[23]

Before addressing the specific inquiries of the case, Justice Stevens, writing for the majority, investigated the purpose and application of the ADA.[24] The Court recognized that Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled persons based on a realization that discrimination against the disabled was becoming a widespread and pervasive social problem.[25] Congress thus concluded that there was compelling evidence that a nationwide mandatory agenda must be instituted to remedy discrimination and integrate disabled individuals "into the economic and social mainstream of American society."[26] The majority identified the "comprehensive character" of the ADA as one of its "impressive strengths" and as evidence that the Congress intended the ADA to "effectuate a sweeping purpose."[27]

Title III of the ADA generally prohibits discrimination on the

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

20. *PGA Tour, Inc.*, 121 S. Ct. at 1889. In a similar case against the USGA, the Seventh Circuit held that the modification of the walking rule would fundamentally alter the nature of competitions by eliminating the critical factor of fatigue. Ollinger v. United States Golf Assn., 205 F.3d 1001 (7th Cir. 2000).

21. *PGA Tour, Inc.*, 121 S. Ct. at 1884.

22. *Id.* at 1890.

23. *Id.* at 1897.

24. *Id.* at 1889.

25. *Id.*

26. *PGA Tour, Inc.*, 121 S. Ct. at 1889.

27. *Id.* The ADA prohibits the unequal treatment of disabled persons in employment (Title I), public services (Title II), and public accommodations (Title III). *Id.*

basis of disability in the "full and equal enjoyment of goods, services, or facilities of any place of public accommodation."[28] The legislation provides twelve categories of accommodations, to which legislative history indicates courts should apply a liberal construction.[29] The ADA expressly lists golf courses within the list of public accommodations and the Supreme Court found the PGA golf tours to fit squarely within the ADA definition.[30] The majority also noted that the PGA "leases and operates" properties on which to conduct its Q-School and tours, in which large numbers of the general public vie for the privilege to compete.[31] The PGA, in its distribution of this privilege, cannot provide unequal treatment to disabled individuals in the "full and equal use of goods, facilities, or services."[32] The majority found that Martin was clearly included in this class and Title III clearly forbids the PGA from refusing Martin entrance to its tours.[33]

The PGA fostered the argument that the competing golfers were not members of the class protected under the scope of the ADA.[34] The PGA argued that Title III concerns "clients or customers" of public accommodations and that the PGA operates a place of entertainment, in which Martin's discrimination claim would be job related and barred by Title I application.[35]

Justice Stevens rejected the PGA's argument and found that the PGA offers simultaneously at least two privileges; that of (1) viewing the tournament; and (2) actively competing in its tournaments, regardless of classification as either a golf course or place of entertainment.[36] The Court reasoned that the PGA opened both its Q-School and qualifying tournaments to the members of the general public and may not discriminate against those players exercising their opportunity to compete.[37]

The Court found the PGA's position to be in conflict with the literal text of the ADA, as well as its liberal purpose, to read Title

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28. *Id.* *See supra* note 9.

29. *Id.* at 1890. *See supra* note 16.

30. *Id.*

31. *PGA Tour, Inc.*, 121 S. Ct. at 1890.

32. *Id.*

33. *Id.*

34. *Id.* at 1891.

35. *Id.* Title I would not apply to Martin since the district court had concluded that Martin was considered an independent contractor, and independent contractors do not fall within the protection of the ADA. *Id.*

36. *PGA Tour, Inc.*, 121 S. Ct. at 1892.

37. *Id.*

III's coverage any less broadly.[38] The majority noted that its application of Title III was consistent with precedent in the analogous context of the Civil Rights Act of 1964, which similarly prohibited public accommodations from discriminating on the basis of race, religion, or national origin.[39]

After determining that the PGA fell within the scope of Title III, the majority moved to define the proper interpretation of the term "discrimination" within the ADA.[40] The PGA did not contest that a motorized cart is a reasonable modification necessary for Martin to compete, but narrowed the issue on appeal to whether the accommodation to Martin would "fundamentally alter the nature" of PGA Tour events.[41]

The majority stated that a modification may fundamentally alter the game by changing an essential aspect of play for all competitors or alternatively by slightly modifying play for a disabled golfer in a manner that would provide an advantage over other competitors.[42] The Court found that modification of the walking rule, as applied to Martin, would not work a fundamental alteration to tournament play in either sense.[43]

Justice Stevens observed that the use of a cart is not incompatible with the essential character of the sport of golf.[44] The majority noted that the game of golf has metamorphosed over the years by adapting rules, altering equipment, modifying course

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38. *Id.*

39. *Id. See also* Daniel v. Paul, 395 U.S. 298 (1969) (holding that the definition of "place of entertainment" as a public accommodation, applied to competitors in sport, as well as spectators); Evans v. Laurel Links, Inc., 261 F. Supp. 474, 477 (E.D. Va. 1966) (holding that Title II of CRA is not limited to spectators if place of exhibition provides facilities for the public to participate in the entertainment).

40. *PGA Tour, Inc.*, 121 S. Ct. at 1893. The proper interpretation of discrimination is essential to determine whether the PGA as a public accommodation discriminated against Martin under 42 U.S.C. § 12182(a). *Id.* Title III defines discrimination as

> 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) (1990).

41. *PGA Tour, Inc.*, 121 S. Ct. at 1893.

42. *Id.*

43. *Id.*

44. *Id.* at 1894. Justice Stevens noted that the essence of the game was reflected in the original Rules of Golf, which describe the essential aspect to be the use of shot-making in order to progress the ball to the hole in as few strokes as possible in accordance with the rules. *Id.*

design, and finally in adopting the use of the motorized cart.[45] The Court noted the use of carts is so popular that it is encouraged in many levels of golf and the Rules of Golf, which govern amateur and professional play worldwide, neither forbids, nor penalizes a player for using a cart.[46] Thus, the majority found the PGA's walking rule an unessential factor in the game of tournament golf.[47]

Justice Stevens subsequently stated that the walking rule was not an indispensable aspect of PGA tournament play, citing many instances in which PGA-sponsored golf events permit the use of carts.[48] PGA contended that golf at its highest level, including the PGA and Nike Tours, is distinguishable from golf as generally played.[49] The goal at this highest level, PGA argued, is to assess performance levels of the competitors, a task that is only accurate if players are subject to identical rules.[50] The PGA stated that waiver of the walking rule would dismiss the element of fatigue from the skill of shot-making for a contestant, and would contradict the purpose of the highest level of golf in assessing skill on equal ground.[51] Similarly, the PGA asserted that variance in conditions resulting from the waiver of the walking rule would have a definite outcome-affecting nature, which would fundamentally alter the nature of the PGA's highest level of competition.[52]

The majority of the Court dismissed the PGA's arguments, stating that golf is a game in which it is impossible to guarantee that competitors will perform under identical conditions or that ability will be the sole means of determination of outcome.[53] The Court next reinforced the district court's finding that the fatigue endured by competitors in walking the course on the PGA's four-day

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45. *Id.*

46. *PGA Tour, Inc.*, 121 S. Ct. at 1894. The PGA's "hard card" rule outlawing carts in tournament play is based on an optional condition, located in an appendix to the Rules of Golf. *Id.* at 1895.

47. *Id.*

48. *Id.* The PGA permits carts in its Senior PGA Tour, open qualifying events for tournaments, the first two stages of Q-School, the third stage of Q-School until 1997, and during certain rounds in PGA and Nike Tours. *Id.*

49. *Id.*

50. *Id.*

51. *PGA Tour, Inc.*, 121 S. Ct. at 1894.

52. *Id.* at 1895.

53. *Id.* Justice Stevens cited weather, course conditions, and luck as variables that may essentially vary conditions in assessing the competitor's skills. *Id.* The Court also found that chance may have a more definite impact on outcome at its highest level than fatigue that results from the PGA's walking rule. *Id.*

tournaments could not be deemed to be significant.[54] Justice Stevens found that the extended time duration for walking the course and the numerous opportunities for refreshment make fatigue even less significant, and he argued that the most significant impact on a golfer's fatigue results from the psychological stress that burdens the competitor.[55] The majority also recognized that even when offered the use of a cart the majority of competitors refuse, often to alleviate stress factors or for other strategic reasons.[56]

The majority next noted that even if the fatigue were to be determined as a significant aspect of tournament play, the PGA's failure to consider Martin's individual circumstances in the decision to accommodate his disability is in contradiction to the text and intent of the ADA.[57] Justice Stevens recognized that for the PGA to be in accord with the ADA, an individual inquiry must be made to evaluate whether a modification for a particular individual's disability would be reasonable and necessary in the particular circumstances, and yet not act as a critical alteration to the nature of the service provided.[58] The Court stated that elimination of an "essential rule" would fundamentally alter the nature of the competition, but the cart prohibition is at best peripheral to PGA competitions, and thus may be waived in individual circumstances and not provide a fundamental modification to tournament play.[59]

The PGA argued that rules for its elite competitions cannot be altered under any circumstance without altering the nature of the game, and such rules are therefore exempt from the reasonable modification doctrine under Title III.[60] The majority noted that Title III carves out no exception for professional athletics, but that the

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54. *Id.* at 1896. The Court cited expert testimony on fatigue and physiology from the district court, which provided that the calories expended walking an 18-hole course (approximately five miles) to be around 500 Calories, which would be nutritionally less than the energy contained in a Big Mac. *Id.*

55. *Id.* The majority also cited that even under the greatest conditions of heat and humidity, fatigue is more significantly effected by dehydration than by walking. *Id.*

56. *PGA Tour, Inc.*, 121 S. Ct. at 1896. A Nike Tour member testified in district court that he preferred walking to keep rhythm, stay warm in lower temperatures, and to develop an increased sense for the elements and the course. *Id.*

57. *Id.* The majority reiterated that the ADA was passed to prevent discrimination against "individuals" as pertinent to provide equal accessibility unless the modification would fundamentally alter the nature of the privilege offered. *Id.*

58. *Id. See* S.Rep. No. 101-116, at 61; H.R.Rep. No. 101-485, pt. 2, at 102; U.S. Code Cong. & Admin. News 1990, pt. 2, at pp. 303, 385 (stating that public accommodations are required to make decisions based on facts applicable to individuals).

59. *PGA Tour, Inc.*, 121 S. Ct. at 1896.

60. *Id.*

ADA expressly cites places of entertainment and golf courses, depicting the intention of Congress to apply the statute to the PGA's competitions.[61]

In applying the ADA to Martin in an individual capacity, the majority found no evidence that modification of the walking rule would fundamentally alter PGA tournament play.[62] Justice Stevens claimed that even if fatigue could influence the outcome of the competition, it was an unchallenged finding of the district court that Martin experiences greater fatigue with the use of a cart, due to his disability, than his fellow competitors experience without the use of a cart.[63] The purpose of the walking rule is, in effect, not compromised by the modification afforded to Martin.[64] The modification afforded to Martin can only be said to allow Martin to compete in tournaments the PGA offers to the general public possessing the requisite skills, which is precisely the requirement of the ADA.[65] The Court held that Martin's petition for the waiver of the PGA's walking rule should have been granted.[66]

In their dissent, Justice Scalia and Justice Thomas found that the majority had incorrectly distorted the literal text of the ADA and expanded the ADA's scope beyond that intended by Congress.[67] The minority opinion first challenged the majority's holding that a professional sport is included as a place of public accommodation and that the expansive purpose of the ADA must cover Martin as a "client or customer."[68]

Justice Scalia argued that if an expansive reading of Title III were rendered, it might be argued that a place of accommodation denying any disabled individual anything that might be considered a privilege would be a violation of the ADA.[69] Such a liberal reading

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61. *Id.* at 1896-97. The Court recognized the precedent that the statute can be applied even to those circumstances not expressly recognized by Congress. Pa. Dep't of Corrections v. Yesky, 524 U.S. 206, 212 (1998).

62. *PGA Tour, Inc.*, 121 S. Ct. at 1897.

63. *Id.*

64. *Id.* The majority found that a modification to a peripheral rule without altering its purpose cannot be said to provide a fundamental alteration. *Id.*

65. *Id.*

66. *Id.* The majority recognized that providing individual attention to a handful of requests, which the PGA might receive from talented disabled athletes, to determine whether the waiver of a rule would be tolerable would not provide the PGA with a substantial burden. *Id.* at 1897-98.

67. *PGA Tour, Inc.*, 121 S. Ct. at 1897-98 (Scalia, J., dissenting).

68. *Id.* at 1898 (Scalia, J., dissenting).

69. *Id.* (Scalia, J., dissenting). The minority noted that Title I of the ADA deals with employment discrimination, Title II covers government discrimination (irrelevant at present), and that Title III deals with public accommodation discrimination. *Id.* at 1898 (Scalia, J., dissenting). Justice Scalia emphasized that independent contractors are not covered by Title

has the effect of bringing employees and independent contractors of all public accommodations within Title III because they enjoy the privilege of labor.[70]

The dissenters further found the majority's liberal interpretation of Title III unfounded.[71] Rather, the minority contended that the public accommodation law in its traditional interpretation only applies to customers.[72] Justice Scalia found the text of the statute applicable only to the enjoyment of goods and services, and that Congress plainly intended the person enjoying the service to be a customer.[73] The minority stated that where Title III addresses discrimination by public accommodations in contractual agreements, the other party to the contract is not afforded protection, but only those clients of the contracting public accommodation.[74]

Justice Scalia contended that Title III has absolutely no application to either employees or independent contractors.[75] The dissent claimed that if Title III were expanded beyond the scope of clients and customers, the intention of the ADA would be confused.[76] Likewise, the dissent conveyed that Congress's limitation of Title I to employers with more than 15 employees is intended to protect small public accommodations from altering their nonpublic areas to adapt for a disabled employee.[77] The

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I, and that the district court had already determined that Martin was an independent contractor. *See e.g.*, Birchen v. Knights of Columbus, 116 F.3d 310, 312 (8th Cir. 1997).

70. *PGA Tour, Inc.*, 121 S. Ct. at 1898 (Scalia, J., dissenting).

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

72. *Id.* (Scalia, J., dissenting). The dissenting Justices provided, for example, the common law rule prohibiting innkeepers and other public establishments from refusing to serve a customer without cause, which reinforces a narrow interpretation of the ADA. *See* Hurley v. Irish Am. Gay, Lesbian, and Bisexual Group of Boston, Inc., 515 U.S. 557, 571(1995); Heart of Atlanta Motel v. United States, 379 U.S. 241(1964).

73. *PGA Tour, Inc.*, 121 S. Ct. at 1898-99 (Scalia, J., dissenting). The justices cited, as an example, the application of a place of public gathering, in which Title III would cover the persons gathering at an auditorium, but those who contract to clean the auditorium would not. *Id.* at 1899 (Scalia, J., dissenting).

74. *Id.* (Scalia, J., dissenting). Justice Scalia looked further, to the Department of Justice regulations, to reinforce the conclusion that Title III only applies to customers. *Id.* The regulations state that the public accommodations requirement is to provide accessibility to goods offered. *Id.* (citing 28 C.F.R., Ch. 1, pt. 36, App. B, p. 650 (2000)).

75. *PGA Tour, Inc.*, 121 S. Ct. at 1899 (Scalia, J., dissenting).

76. *Id.* (Scalia, J., dissenting). The ADA must be read in context and in line with the intended statutory scheme. *See* Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989).

77. *PGA Tour, Inc.*, 121 S. Ct. at 1899 (Scalia, J., dissenting). The minority cited examples of a small grocery store or laundromat as a proper exclusion. *Id.* (Scalia, J., dissenting). Justice Scalia also contended that a business need not make accommodations for disabled workers when hiring a painter, electrician, or other independent worker. *Id.*

dissent found it ludicrous to eliminate the exceptions expressly provided in Title I by engaging in a liberal reading of Title III, which would enforce the ADA with respect to any public accommodation offering the privilege of employment.[78] Justice Scalia found it incongruous to place the effect of Title III upon a business merely due to its public service when other non-public businesses are outside the scope of the Title.[79]

Justice Scalia rejected the argument of the majority that Martin could be classified as a customer of the PGA.[80] He contended that professional golfers participating in the PGA tour are no more enjoying the entertainment of the tour than professional baseball players enjoy the games in which they compete.[81] The dissent found no merit in the claim that because golfers' remuneration is contingent they should be given customer status, while those who play in other professional fields for a fixed salary should not.[82] Justice Scalia also noted that the listing of a golf course in Title III is included under the subdivision of recreation, and contended that it cannot be argued that Martin desired recreation from the PGA Tour.[83] The minority rejected the majority's reliance on the Civil Rights Act because a professional golfer practicing his profession is not comparable to an ordinary individual attending an amusement park.[84]

Justice Scalia also rejected the majority argument that the Q-School offers privileges to the general public and found the skill necessitated for entry into the school eliminates it as a public

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(Scalia, J., dissenting).

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

79. *Id.* (Scalia, J., dissenting). The United States filed an amicus brief recognizing that employees are not covered under Title III, but that claims of independent contractors are cognizable. *Id.* (Scalia, J., dissenting). The United States based its argument on the inclusion of independent contractors in Title II, but the minority found the argument frivolous because it provided no possible interpretation of Title III that would simultaneously exclude employees while providing coverage to independent contractors. *Id.* at 1900 (Scalia, J., dissenting).

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

81. *Id.* (Scalia, J., dissenting). Scalia conceded that professional players participate in the game and use the facilities, but no one could logically conclude they are customers of the professional sports club to which they belong. *Id.* (Scalia, J., dissenting).

82. *PGA Tour, Inc.*, 121 S. Ct. at 1900 (Scalia, J., dissenting). Justice Scalia stated that many independent contractors' salaries are contingent upon their success. *Id.* (Scalia, J., dissenting).

83. *Id.* (Scalia, J., dissenting). The dissent stated that Martin was not a golfer buying recreation, but rather a professional selling it. *Id.* (Scalia, J., dissenting).

84. *Id.* (Scalia, J., dissenting) (citing *Daniel*, 395 U.S. at 301).

privilege.[85] In doing so, Justice Scalia indicated that the essence of a tryout is not to entertain, but to hire, and that tryouts are not distinguishable from open applications for any position at a place of public accommodation.[86] Justice Scalia held improper the rationale that a business not only exists to sell goods or services, but to provide the privilege of employment.[87]

The minority also found error in the majority's interpretation of the "reasonable modifications" provision of the ADA.[88] The ADA only requires accessibility to public accommodations and not an alteration of the general function of the facility to accommodate a disabled patron.[89] Justice Scalia contended that even if it is conceded that Martin is a consumer, the PGA still has no duty to alter the rules of the competition.[90] The determination that the walking rule is essential to the game is irrelevant to the PGA's compliance with the statute because the statute only requires access for Martin and not a game different than that provided to the other competitors.[91]

The dissent stipulated that nowhere is it required the PGA must follow the classic "essential" rules of golf, and that any government division cannot deem rules, arbitrary in nature themselves, non-essential.[92] If it is assumed that the PGA must follow the script of classic golf, the Court must essentially decide the meaning of golf.[93] Justice Scalia sarcastically inferred that the Supreme Court was overstepping its power in the determination of whether walking is a fundamental aspect of golf.[94] The minority maintained that the Court should avoid the determination of this question because it is the nature of a game to have no object but amusement, and it is extremely difficult to determine whether any

85. *Id.* (Scalia, J., dissenting). Justice Scalia claimed bar exams, professional sports tryouts, and movie auditions are all examples of tryouts, which would not be public in nature. *Id.* (Scalia, J., dissenting).

86. *Id.* at 1901 (Scalia, J., dissenting).

87. *PGA Tour, Inc.*, 121 S. Ct. at 1901 (Scalia, J., dissenting).

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

89. *Id.* at 1902 (Scalia, J., dissenting). Justice Scalia depicted that the content of the goods or services is not required to be altered. *Id.* (Scalia, J., dissenting). For example, a photography store may not refuse the patronage of a disabled individual, but it is not required to supply specially adapted cameras for the disabled. *Id.* (Scalia, J., dissenting).

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

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

92. *PGA Tour, Inc.*, 121 S. Ct. at 1902 (Scalia, J., dissenting).

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

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

of a game's arbitrary rules are essential.[95] The minority argued that at some point in continual minor modification of the rules, the game would not be considered the same game.[96]

The dissent then moved on to address the issue of whether the modification provided Martin with a significant advantage over the other players.[97] Justice Scalia rejected the majority's contention that chance is an uncontrollable variable, and instead claimed that Martin's use of a cart would continually increase his chance of winning during the entire competition.[98] The dissent also argued that the majority's decision to decide each case based on individualized factual findings might result in a slippery slope that would produce excess litigation.[99] Justice Scalia found no basis in the statute for the application of an individualized inquiry and contended that the statute only requires equal access, and not an equal chance to win.[100] The dissent claimed it is essential to the nature of a sport that measurement is determined by unevenly distributed excellence, and that by eliminating any player's weakness the fundamental nature of sport will be destroyed.[101]

One should not take Justice Scalia's disagreement with the majority to mean that the PGA ought not allow Martin the use of a cart.[102] The minority concluded that the sport's governing body must decide that question, and was thus outside the scope of review of the Supreme Court.[103] Justice Scalia promoted a strong stance by sports organizations against judicial interference with the organization's autonomy.[104] Justice Scalia found that the decision in this case would provide a negative precedent, which would cause sporting organizations to restrict voluntary grants of modifications

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95. *Id.* at 1903 (Scalia, J., dissenting). The minority exposed 18-hole golf courses, 100-yard fields, and 90-foot baselines as all arbitrary rules, and noted that the only solid backing for them is tradition and insistence by the ruling body within a sport. *Id.* (Scalia, J., dissenting).

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

97. *PGA Tour, Inc.*, 121 S. Ct. at 1903 (Scalia, J., dissenting).

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

99. *Id.* at 1904 (Scalia, J., dissenting). The Court expressed the worry that litigation could result, for example, from the parents of a little league player bringing suit to provide four strikes for their child with attention deficit disorder. *Id.* (Scalia, J., dissenting).

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

101. *Id.* (Scalia, J., dissenting). The minority found ridiculous a promulgation of a separate set of rules for the disabled than for those able bodied players. *Id.* (Scalia, J., dissenting).

102. *PGA Tour, Inc.*, 121 S. Ct. at 1904 (Scalia, J., dissenting).

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

104. *Id.* at 1905 (Scalia, J., dissenting).

and open tryouts.[105] The minority contended that the incentives created by the majority would eventually negatively affect disabled athletes.[106]

Discrimination against individuals possessing disabilities has arisen in American society as a "serious and pervasive social problem."[107] The Civil Rights Act and its subsequent case law set the backdrop for the establishment of legislation for the protection of disabled persons, and close similarities appear in the judicial interpretation of both statutes.[108] The first case testing Congress's power to enact legislation to remedy discrimination was *Heart of Atlanta Motel, Inc. v. United States*.[109] An Atlanta motel owner brought a declaratory judgment action attacking the constitutionality of the Civil Rights Act of 1964 ("CRA"), in order to continue a business practice to refuse accommodation to people of color.[110] The plaintiff contended that Congress exceeded the commerce power delegated to it by the Constitution.[111] The Court found that Congress had not exceeded its power under the Commerce Clause by regulating the motel, which serves interstate travelers, and that the motel clearly fell within broad definition of public accommodation provided in Title II of the CRA.[112] The majority explained that Congress may have exercised other means to remedy the disruption to interstate commerce, but that this was a matter of policy outside the scope of judicial interpretation.[113]

Following its declaration that Congress did have the power to regulate discrimination under the Commerce Clause, the Court defined the scope of the public accommodation provision contained in the Civil Rights Act in an even broader fashion in *Daniel v.*

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

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

107. 42 U.S.C. § 12101 (1990). Congress recognized that 43,000,000 Americans suffer from some manner of physical or mental disability and that these individuals suffer discrimination in areas such as "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." *Id.*

108. *PGA Tour, Inc.*, 121 S. Ct. at 1892. The Civil Rights Act ("CRA") of 1964 is similar in its construction to the Americans with Disabilities Act of 1990. 42 U.S.C. § 2000. Title II of the CRA prohibits discrimination on the basis of race, color, religion, or national origin by places of public accommodation. *Id.*

109. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 241.

110. *Id.* at 243.

111. *Id.* at 244. The Constitution provides in part, "[t]he Congress shall have the power to regulate Commerce with foreign Nations; and among the several States, and with the Indian Tribes." U.S. CONST. Art. I, § 8, cl. 3

112. *Heart of Atlanta Motel, Inc.*, 379 U.S. at 261.

113. *Id.* at 262.

Paul.[114] In *Daniel*, a group of African-American residents brought an action to enjoin the defendant from denying them entry to his park, which contained accommodations such as swimming, boating, miniature golf, and a snack bar.[115] The majority established that the snack bar was covered as a public accommodation under Title II, and the status of the snack bar automatically brought the entire park under the regulation of the ADA.[116] Justice Brennan's rationale for the majority recognized that the overriding intent of Congress, to eradicate discrimination demanded a broad judicial interpretation of a public accommodation under Title II.[117] The broad construction of public accommodation within the CRA sufficiently demonstrated Congress's intent when it enacted legislation for the protection of the disabled a few years later.[118]

In the wake of these landmark Civil Rights Act cases, Congress made its first substantial step in protecting the disabled from discrimination by enacting the Rehabilitation Act of 1973.[119] After two presidential vetoes in 1972, the Rehabilitation Act was signed into law by President Nixon in September of 1973, and though lacking force in many areas, the Act was a first major step in the elimination of discrimination against the disabled, and acted as an impetus for individual state actions.[120] The Act only prohibited discrimination by federal executive agencies, federal grantees, and federal contractors.[121] Many deficiencies have been found that support the Act's classification as toothless legislation.[122] Its limited

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114. *Daniel*, 395 U.S. at 298. The Civil Rights Act states: "All Persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, . . . , without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000 §§ 201 (1964).

115. *Daniel*, 395 U.S. at 300-01.

116. *Id.* at 304-05.

117. *Id.* at 307.

118. Roy R. Galewski, *The Casey Martin and Ford Olinger Cases: The Supreme Court Takes a Swing at ADA Uncertainty*, 21 PACE L. REV. 411, 433 (2001).

119. Pub.L. No. 93-112, 87 Stat. 355 (1973). The antidiscrimination sections are covered under 29 U.S.C. §§ 791, 793, 794 (1982).

120. Robert E. Rains, *A Pre-History of the Americans with Disabilities Act and some Initial Thoughts as to its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 189 (1992). The lack of coverage beyond federal associated parties, lack of significant enforcement mechanisms, and lack of adequate funding were the significant deficiencies of the Act, which worked against the goal of alleviating discrimination against disabled individuals. *Id.* at 189-90.

121. *Id.* at 190.

122. *Id.*

coverage was one of the primary problems that faced the Act.[123] The second problem was that the Act had an inadequate enforcement mechanism to which the subsequent case law applied a strict construction.[124] The final disabling quality of the legislation was its lack of funding allocated to help address the problems of discrimination.[125] These deficiencies worked as a major roadblock in the goal of eliminating discrimination, and subsequent case law continued to hinder the legislation by applying to it a narrow judicial interpretation.[126]

The Supreme Court addressed the scope of the Rehabilitation Act of 1973 in the case of *Southeast Community College v. Davis*.[127] The Court was presented with the issue of whether a private cause of action existed under the Rehabilitation Act of 1973 when Davis was refused admission to a college-nursing program due to a hearing disability.[128] The Court refused to recognize a cause of action under the Rehabilitation Act, but disposed of the case by finding that the Rehabilitation Act did not require the college to extend affirmative action for the disabled and that the institution was free to enact reasonable physical qualifications for admission.[129] The majority established that the line will not always be clear between refusal to extend affirmative action and illegal discrimination, and that the college's unwillingness to make major modifications did not amount to discrimination.[130] The Court also stated that the purpose of the program was to train persons to serve in the nursing profession and substantial modifications made to reduce the qualifications for a disabled person would frustrate the goals of the program.[131]

Over a decade after passage of the Rehabilitation Act, the Court finally recognized a private cause of action thereunder in *Consolidated Rail Corp. v. Darrone*.[132] The issue presented to the Court was whether a private citizen may bring an action for back pay on the basis of discrimination under the Rehabilitation Act.[133]

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123. *Id.*
124. *Id.*
125. Rains, *supra* note 119, at 190.
126. *Id.* at 189.
127. 442 U.S. 397 (1979).
128. *Southeast Cmty. Coll.*, 442 U.S. at 400.
129. *Id.* at 414.
130. *Id.* at 412-13.
131. *Id.* at 413.
132. 465 U.S. 624 (1984).
133. *Consolidated Rail Corp.*, 465 U.S. at 630. The Court's decision took into

The plaintiff was terminated by Consolidated after the plaintiff lost his arm in an accident, although Consolidated had no justification for a determination that the plaintiff was unfit for his occupation.[134] The majority found the disabled worker did have standing under the Rehabilitation Act and he was entitled to back pay for being discriminatorily dismissed.[135] Consolidated fostered the argument that under Title VI of the Rehabilitation Act, the Act only applies when the "primary objective" of federal assistance is to promote employment.[136] The Supreme Court rejected this application of Title VI and provided that neither the legislative history, nor the express language, placed any such limitation on the power of the Rehabilitation Act.[137]

The Supreme Court continued its quest to discern the scope of the Rehabilitation Act in *School Board of Nassau County, Florida v. Arline*.[138] A schoolteacher suffering from a susceptibility to tuberculosis was terminated from her teaching position solely on the basis of her medical condition.[139] The Court was presented with the issue of whether a person suffering from a contagious disease would qualify as a disabled individual under the Rehabilitation Act of 1973.[140] The majority found that the schoolteacher was substantially limited by her deficiency and that her record of impairment qualified her as disabled under the Rehabilitation Act.[141] The Court also recognized that permitting discrimination based on the contagious condition of a disability would thwart the basic intention of the Rehabilitation Act, which is to eliminate all forms of discrimination against the disabled.[142]

The majority resolved the case by determining that an individual inquiry must be accorded to the schoolteacher to determine if the teacher would be qualified to work in the school atmosphere.[143]

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consideration a 1978 amendment to the Rehabilitation Act, which incorporated the remedies, procedures, and rights of the Civil Rights Act of 1964. *Id.* at 626.

134. *Id.* at 628.

135. *Id.* at 637. The Court recognized the standing of a private plaintiff without concrete analysis, but reinforced that the protection of the Rehabilitation Act would be afforded to individuals discriminated against by any federally funded program regardless of whether employment was the primary purpose of the funding. *Id.*

136. *Id.* at 631.

137. *Id.* at 633.

138. 480 U.S. 273 (1987).

139. *Sch. Bd. of Nassau County, Fla.*, 480 U.S. at 276.

140. *Id.* at 277.

141. *Id.* at 281.

142. *Id.* at 284.

143. *Id.* at 287.

This inquiry must evaluate the nature, duration, and contagiousness of the impairment.[144] The Court took a major stride in the elimination of discrimination by finding that contagious diseases were protected under the Rehabilitation Act.[145]

After the shortfalls of the Rehabilitation Act became evident, Congress realized that a stronger piece of legislation was necessary to "remedy widespread discrimination against disabled individuals" in private enterprises.[146] Congress recognized a "compelling need" for a "clear and comprehensive national mandate" to eradicate discrimination perpetrated against disabled individuals.[147] Congress introduced the Americans with Disabilities Act ("ADA") in 1988, and President Bush signed it into law in 1990.[148]

In passing the ADA, Congress recognized that forty-three million Americans have a physical or mental disability, and historically the disabled were isolated and segregated by society, which treatment continues to be a "serious and pervasive social problem."[149] The legislation also listed four main goals, including: "1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, 2) to enact stricter standards, 3) to assure a central role of federal government, and 4) to invoke the sweep of Congressional authority."[150] The ADA, in its broad scope, worked to afford disabled individuals the opportunity to function on an equal basis and with open access to areas whose previous inaccessibility limited the opportunities afforded to the disabled.[151] The ADA provided a broad mandate in which the judiciary would have substantial deference to loosely apply the provisions of the ADA.[152]

One of the most important cases that expressed the breadth of the ADA was *Pennsylvania Department of Corrections v. Yesky*.[153] The issue before the Court was whether Title II of the ADA applied to inmates within state-controlled prisons.[154] Yesky was sentenced

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144. *Sch. Bd. of Nassau County, Fla.*, 480 U.S. at 288.

145. *Id.* at 273-74.

146. *PGA Tour, Inc.*, 121 S. Ct. at 1889.

147. *Id.*

148. Julie L. Livergood, *Walking with Tradition v. Riding into Tomorrow: Ollinger v. United States Golf Association*, 51 DEPAUL L. REV. 125, 131 (2001).

149. 42 U.S.C. § 12101 (1990).

150. *Id.*

151. Livergood, *supra* note 147, at 132.

152. *PGA Tour, Inc.*, 121 S. Ct. at 1889.

153. *Pa. Dep't of Corrections*, 524 U.S. at 206.

154. *Id.* at 208. Title II requires that: "No qualified individual with a disability shall be . . . excluded from participation in or be denied benefits of the services, programs, or

to a motivational boot camp for first-time offenders, but was rejected due to a medical history of high blood pressure.[155] Justice Scalia stated that the express language of the ADA was unambiguous and that it clearly covered state discrimination against a state penal inmate.[156] The state argued that prisoners were not included under the ADA because they were not expressly mentioned in the statute.[157]

The majority rejected this argument by contending "[the fact that] a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[158] Justice Scalia also recognized that the activities provided by a prison system to inmates did fall under the scope of Title II as benefits or services.[159] *Pennsylvania Department of Corrections* established a strong precedent for the judiciary to apply a broad construction to the ADA in order to effectuate the goals established by Congress.

The Supreme Court next moved to determine the proper scope of the term "disabled" within the ADA in *Sutton v. U.S. Airlines, Inc.*[160] In *Sutton*, two applicants for the commercial airline pilot program were rejected from employment due to inadequate vision and the need for corrective lenses.[161] The issue for review was whether a person is to be evaluated, as to a disability under the ADA, in light of corrective measures taken to remedy the deficiency.[162] Justice O'Connor recognized that under the language of the ADA, the effect of corrective measures, both positive and negative, must be recognized in the determination of whether an individual is "substantially limited" in any major activity of daily life.[163] The majority also recognized the mandate that the determination of the existence of a disability must be made through an individual inquiry.[164] The Court concluded that the

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activities of a public entity . . . " *Id.*

155. *Id.*

156. *Id.* at 213.

157. *Id.* at 212.

158. *Pa. Dep't of Corrections*, 524 U.S. at 212.

159. *Id.* at 210.

160. 527 U.S. 471 (1999).

161. *Sutton*, 527 U.S. at 475.

162. *Id.* at 481. The definition of the "disability" within the ADA includes a "physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such impairment, or being regarded as having such an impairment." *Id.* at 478.

163. *Id.* at 482.

164. *Id.* at 483.

plaintiffs were not substantially limited by their vision problem and were not provided the protection of the ADA against U.S. Air's vision requirement provision.[165] The judicial delineation of the term "disability" within the statute was a major step for future application of the ADA. The Supreme Court has consistently eliminated areas of uncertainty in the ADA since its inception in 1990.

In the context of the history of the interpretation of disability legislation, a major question of the application of Title III of the ADA arose in the area of sports in *Sandison v. Michigan High School Athletic Assn.*[166] A number of the circuits addressed the issue in *Sandison* regarding whether a maximum age provision in interscholastic sports discriminates against disabled individuals held back due to a learning disability.[167] In *Sandison*, a student with an auditory input disability and a student with a learning disability were held back in grammar school, and subsequently sought an injunction against the athletic association for prohibiting their participation in athletics under a maximum age provision.[168] Applying Title III of the ADA, the majority found that the athletic association was not considered to be a place of public accommodation by recognizing the athletic association as a public entity, which is not covered under Title III.[169] The court also recognized that waiver of the age restriction would not reflect a reasonable modification.[170] The majority established that evaluation of the competitive advantage that an older student may possess would be a daunting and highly hypothetical task.[171] Second, it was established that a waiver of the age requirement would work as a fundamental alteration to the sports program because of drastic effect that age may play in the physical maturity of a high school student.[172] The court refused to recognize any discrimination by the athletic association under either the Rehabilitation Act or the ADA.[173]

By early 2000, the circuits were in conflict on the issue of whether the use of a motorized cart fundamentally altered the

165. *Id.* at 494.
166. 64 F.3d 1026 (6th Cir. 1995).
167. *Sandison*, 64 F.3d at 1029.
168. *Id.* at 1028.
169. *Id.* at 1036.
170. *Id.* at 1037.
171. *Id.*
172. *Sandison*, 64 F.3d at 1035.
173. *Id.* at 1037.

nature of professional golf tournaments.[174] A day after the Ninth Circuit recognized in *Martin* that the use of a cart did not alter the nature of professional golf tournaments, the Seventh Circuit reached a contradictory conclusion in *Olinger v. U.S. Golf Association* ("USGA").[175] Olinger suffered from bilateral avascular necrosis, which is a degenerative impairment that makes walking difficult.[176] Olinger applied to the USGA for a waiver of its walking rule for the U.S. Open, the men's national championship of golf.[177] When the USGA refused, Olinger successfully acquired a temporary injunction, which allowed him to compete in the qualifying events.[178] On appeal, the court decided that though the viewing public was covered by the ADA, the competitors behind the ropes were not covered under the public accommodation provision of Title III of the ADA.[179] The majority also recognized that elimination of the walking rule would work a fundamental alteration to the nature of the game by eliminating stamina as a major testing factor.[180] The court cited testimony of some of golf's greatest to relate the significant impact that stamina can play in the outcome of a tournament.[181] The court concluded that the USGA was not mandated in making an accommodation under the ADA, but suggested that the USGA should possibly voluntarily provide the accommodation.[182]

In response to the conflict that arose in the circuits on the determination of the scope of Title III, the Supreme Court found the issue of such significance to merit resolution. Armed with legal precedent from almost four decades of interpretation of discrimination legislation, the Court attempted to further define the breadth of the newly created ADA. In its analysis, the Court rendered its interpretation of the ADA with reference to the culmination of standards set in the Civil Rights Act, the Rehabilitation Act, and the early attempts to define other

174. *PGA Tour, Inc.*, 121 S. Ct. at 1888.

175. *Olinger*, 205 F.3d at 1001.

176. *Id.* at 1002.

177. *Id.*

178. *Id.* at 1004. Olinger failed to advance to the sectional of the tournament. *Id.* The trial court entered judgment in favor of the USGA, finding that the waiver would act as a fundamental alteration to the nature of the tournament. *Id.* at 1004.

179. *Id.*

180. *Olinger*, 205 F.3d at 1005.

181. *Id.* at 1006.

182. *Id.* at 1007. The Supreme Court held that the seventh circuit's judgment against Olinger should be vacated and that the case should be remanded for further review in light of the *PGA Tour, Inc. v. Martin*. Olinger v. U.S. Golf Ass'n., 121 S.Ct. 2212 (2001).

provisions of the ADA. The resolution of the scope of the ADA, within the arena of professional sports, has generated heated debate in the American public. The complexity and wide scope of judicial interpretation of the ADA has opened the Court to scrutiny from a large portion of the populace.

Though the decision rendered in *PGA Tour, Inc.* appears to strike an equitable resolution to a heartfelt story of determination, the practice of law requires us to abandon our sympathies to interpret the desired intent of the authoring legislature. *PGA Tour, Inc.* presents a moving case that deserves recognition by the PGA, but it is outside of the scope of the ADA to provide a basis for relief. The express language of the ADA and the existing precedent under the discrimination cases provide that the ADA should not cover the members of Martin's class within professional sports.

Though the legislature had demonstrated that the ADA should be applied in a broad fashion, the courts must still enforce the unambiguous language of the ADA directly and interpret the ambiguous language of Title III in recognition of the overall statutory scheme. The delineation of examples of public accommodations within the statute is not an exclusive list, but any further additions must be made in light of the general characteristics of those provided on the list. The statute lists golf courses in the same category as a gymnasium, health spa, or bowling alley.[183] The general trait of the category is that each place therein is a place of recreation open to the public. The legislature clearly did not intend to encompass a place of professional sports competition within the category intended to govern public recreational activities. Further, Martin is a professional athlete seeking a livelihood, rather than the use of a public facility for recreation. It is recognized that the spectators viewing the tournament would come within the intent of "public recreation," but the area of professional competition inside the ropes will not fall within a place of public accommodation within the statute.

The definition of Martin as a client or customer is also offline with the general intent of the public accommodation provision. The Court has repeatedly determined Title III to refer only to clients and customers of the public accommodation. The basis of Title III is the protection of individuals from discrimination in places that provide services to the general public. Martin is a professional athlete who makes his living from participation in PGA events,

183. *PGA Tour, Inc.*, 121 S. Ct. at 1890.

from which he is receiving the privilege of work as an independent contractor and not as a client or customer of the services the PGA provides. The legislature clearly excluded independent contractors from the sweep of Title I (employment provisions), and their inclusion within Title III would run counter to the intent of Congress to carve out an exception for independent contractors.[184] The Court, in its overextension of the public accommodation language, disregarded the legislative purpose of the exception in eliminating burdensome remedial measures for those contracting with an outside party.[185] This may shift excessive financial burdens to small proprietors, which would frustrate the capabilities of their businesses. The Court's expansion of the statute has produced gray areas in the law in which parties may be uncertain as to their status under the ADA.

The Court also overstepped the express language of the statute in the interpretation of the duty of the public accommodation. The language of the statute provides only that the accommodation provide "access" to its services and not totally adapt the service to accommodate a disabled person's needs. In *Southeast Community College v. Davis*, the Court recognized that a college nursing program had no affirmative duty to act and that the nursing program had a legitimate purpose in enacting reasonable physical qualifications.[186] The PGA operates a tournament with the purpose of placing the elite of a sport in a fair competition, and the nature of the sport provides that it is necessary to have some physical qualifications. The ADA requires that the PGA not prohibit entrance to the competitions based on a disability, but it is not required to affirmatively act to alter the rules of the game to place Martin on an equal footing. The purpose of professional sports is to compare individuals in a game, taking into account their physical and mental strengths and weaknesses. The elimination of an element to place a player on an equal physical level would be counter to the nature of sport.

The determination by the Court of whether a fundamental alteration to the service occurred was also flawed. The rules of a

184. *Id.* at 1898 (Scalia, J., dissenting).

185. *Id.* (Scalia, J., dissenting). Presumably, those homeowners who contract with parties such as electricians or other home repairmen would be forced to take affirmative action to provide access to the job for any disabled contractor. Employers with fewer than 15 employees, which are exempt under Title I, would also be forced to take affirmative remedial measures since they provide the service of employment.

186. 442 U.S. at 397.

game are arbitrary in nature and modification of any of the rules takes away a characteristic of the game. The courts should not be provided the task of determining what rules are necessary or peripheral to a game; rather, such a determination should be left to the governing body of the sport. The arbitrary nature of rules in sport makes it folly for courts to attend to discerning the necessity of rules of a game. The Court also took a step in the wrong direction by prescribing that a court must make an individualized inquiry to determine whether a fundamental alteration has occurred. In *Arline* and *Sutton*, the court only recognized an individual inquiry for the determination of whether an individual's infirmity would be encompassed by the term "disability" in the statutory language.[187] The extension of an individualized inquiry to all areas of the application of the ADA will provide the courts with an excess of litigation and without the proper guidance in determining the presence of a fundamental alteration. Many intricate factual cases will need to be continually screened by the courts to monitor whether the alteration has a significant burden on the accommodation, which will consume a large portion of the judiciary.

The holding in *PGA Tour, Inc.* has thrown the state of the law under the ADA into disarray. The excessively broad interpretation of the statute provides little guidance as to the entities covered by the statute. The Court basically stated that though not in line with the express wording of the statute, it will expand the entities covered by the statute because the legislature generally intended to eliminate discrimination. This interpretation will leave those provided with exceptions to the ADA in doubt as to the application of the statute. The determination of the Court as to an individual inquiry will also leave the lower courts with little guidance as to the application of the ADA. The Court failed to set a standard or develop a test to assist the lower courts in the intricacies of the application of the statute. The wide discretion of the trial judges in the determinations of reasonable modifications may result in a slippery slope, which may overpower the intent of the statute. The *PGA Tour, Inc.* decision has provided the lower courts with the task of continually making decisions as to the breadth of the statute. The discretion of the court in the many fact finding cases, as to reasonable modifications, may allow the scope of the ADA to sweep like wildfire.

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187. *See Sch. Bd. of Nassau County, Fla.*, 480 U.S. at 276; *Sutton*, 527 U.S. at 475.

The final issue of importance is that the court's non-specific interpretation of the ADA will invoke a mass of litigation from all areas of the ADA. One can perceive a sea of litigation that will flow from the playgrounds, athletic fields, and professional sports arenas.

David A. Monaghan