

NOTES

CREATING AN UNCOMFORTABLE FIT IN APPLYING THE ADA TO PROFESSIONAL SPORTS

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Fact is, every day your body feels a little different and golf is such a finite game that a little off can translate into a lot. One or two degrees here and there can mean from four to seven yards. That's not a whole lot but it's magnified due to the precision the game demands.¹

INTRODUCTION

In May 2001, the Supreme Court had the opportunity to determine how several provisions of the Americans with Disabilities Act (ADA),² specifically “public accommodation,” “fundamental alteration,” and “private entity” should fit into athletic competition when it decided *PGA Tour, Inc. v. Martin*.³ Instead, the Supreme Court imposed the ADA on professional sports organizations without appreciating the basics of the game of golf—or the law. The Supreme Court's expansive interpretations of “reasonable accommodation” and “fundamental alteration” under the ADA, as well as the Court's assumption that nine reclusive jurists could decide what constitutes a fundamental alteration to a professional sport, have potential implications on how the laws governing disabled Americans relate to competitive sports at all levels of society, from mere recreation and exercise to professional athletics. These potential implications cannot be what Congress intended when passing the bill in 1990.

This Note examines Casey Martin's case against the PGA Tour as a foundation for analyzing the application of the ADA to professional sports, arguing that courts must distinguish competitive sports from forms of recreation and exercise when determining fundamental alterations. *Martin* is distinguishable from typical reasonable accommodation and fundamental alteration cases. In professional golf, as in all professional sports, the essence of the activity is competition.⁴ When a governing authority is forced to alter an

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1. TIGER WOODS, TIGER WOODS: HOW I PLAY GOLF 9 (2001).

2. 42 U.S.C. § 12101 (1994).

3. 532 U.S. 661 (2001).

4. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass'n, Amici Curiae at 3,

existing rule of a sport in order to accommodate the disabled, that change, no matter how small, will often result in a fundamental alteration of the event. This rule change, mandated by a court unfamiliar with the rules of the sport and the role they play in competition, creates a scenario where other participants are at a competitive disadvantage due to the waiver of a rule for a single participant.

When the Court fails to consider competition as an integral part of the sport, as opposed to mere recreation or exercise, the ADA ceases to be fair to fellow competitors. The purpose of the ADA, after all, is to provide *equal access, not equal opportunities to win*. Admittedly, there are circumstances when the ADA may be applied in competitive settings: the ADA will never allow a complete denial of access to a sport. Access is either denied to an individual or it is not, and if it is denied, the ADA applies. The question the courts must face becomes how to properly *weigh* the other side of the equation: the impact on the affected activity—in this instance, professional golf. Courts must attempt to balance the nature of the impairment on the disabled player as against the nature of the impairment on the quality of play and the nature of the sport—whether there is a fundamental alteration. Courts must be sensitive to the potential implications a reasonable accommodation may create in competitive settings, where if applied to only one individual, it may affect the nature of play to the detriment of all competitors.

This Note is not meant to discredit the purpose of the ADA and the many successes it has had in providing disabled Americans opportunities they would otherwise not have had. Nor is the purpose of this Note to argue that the ADA should never be applied to professional sports. Instead, this Note uses Casey Martin's three-year battle against the PGA Tour as a foundation to promote two separate arguments. First, under the provisions of the ADA, the PGA Tour does not qualify as a place of public accommodation. The goal of the ADA is commendable, but extending it to private organizations and clubs like the PGA Tour is not.⁵ The Supreme Court must distinguish between providing mere accessibility on the public golf course and changing the rules and nature of the sport's highest level of competition.⁶ The public golf course operator can and should expect to make reasonable accommodations for those disabled and desiring access to the sport.⁷ However, an otherwise private organization should not change its rules simply because it operates a course for a very limited period

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) (No. 00-24), noting that

[a]thletic competition is based on nothing more than an agreed-upon set of uniform rules, all of which, in interplay with one another, define the game. At bottom, the singularity of a sports competition and the autonomy of its rules compel the conclusion that any court-imposed modification or abrogation of a rule of how the game is played changes its fundamental nature. Such fundamental alteration is not required by the ADA.

5. Nikos Leverenz, *Americans with Disabilities Act Must Not Be Used to Change the Rules of Professional Sports*, at <http://www.pacificlegal.org>.

6. *Id.*

7. *Id.*

of time.⁸

Second, the Court failed to distinguish adequately the applicability of the ADA to competitive settings from its applicability to recreational exercise when it determined what constitutes a fundamental alteration under the ADA. Specifically, the Supreme Court failed to recognize that the nature of a professional golf event is based solely on competition. By applying the ADA's reasonable accommodation requirement to the PGA Tour, courts will inadvertently erode the fundamental fairness of competition and alter the sport in a way only those competitors directly involved can recognize. An elite group of golfers has the "total package" to play at a level worthy of earning millions of dollars and travel throughout the world to compete.⁹ Professional play takes place at a vastly more elevated level than that of recreational golfers. Only professional golfers know what is needed and what changes affect their level of competition. Only their sport's governing body has the expertise and ability to dictate the rules and truly recognize what is essential to a sport, and determine what "fundamentally alters" an event.

For these reasons, this Note discusses why the ADA does not comfortably fit in professional sports and explores possible implications of *Martin's* expansive interpretation in other professional and competitive sport settings. Part I of this Note first analyzes the history and purpose of the ADA, specifically Title III, which is most applicable to *Martin* and professional sports settings.¹⁰ This analysis gives the proper background to explain why the PGA Tour should not have been considered a public accommodation under the ADA. Part II explains the story of Casey Martin and sets out the legal history of his case against the PGA Tour. Part III of this Note examines how courts have historically applied the ADA in competitive sports settings. Part IV discusses the recent decision of the Supreme Court, examining the strengths and oversights of the majority and dissent.

After this background of the ADA and the Supreme Court's decision in *Martin*, Part V of this Note examines and critiques the Supreme Court's expansive interpretation in three respects: 1) the scope of "reasonable accommodation" as it applies to the PGA Tour and other professional sports organizations, 2) what constitutes a "fundamental alteration" in a professional

8. *Id.*

9. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass'n, Amici Curiae at 10, *Martin* (No. 00-24), stating,

the fact that Martin was substantially disadvantaged by application of this uniform rule is precisely the point: athletes who, for whatever reason, cannot perform as well as others when measured against the uniform rules of the game are not supposed to win! In fact, if their particular physical traits (e.g., height, weight, strength, endurance) or psychological characteristics (e.g., ability to concentrate, risk aversion, "mental toughness") create sufficient barriers, they may not be able to compete effectively at all. The "game" is designed to test for those characteristics and to make them outcome determinative, not to compensate for individual differences.

10. See 42 U.S.C. § 12182(a) (1995).

sports setting, and 3) what body is in the best position to determine what constitutes a fundamental alteration. This section includes a discussion of why such decisions should be entrusted to the sport's own governing body for reasons of institutional competence. Finally, Part VI discusses the potential implications of the Supreme Court's decision in *Martin* on professional sports organizations and other levels of athletic competition. This part also discusses the Supreme Court's application of the ADA in a recent case and its attempt to potentially narrow the reach of the ADA in all areas of law, including athletic competitions.

The ADA does not fit as comfortably into competitive settings as into traditional employment and recreational applications. As Tiger Woods observed, a small change may not seem like much to the spectator, but every change is magnified for the player due to the precision of the game,¹¹ often resulting in a fundamental alteration that only those familiar with the sport can sense.¹² Athletics played at the sport's highest level are clearly different than sports played for recreation, exercise, or as a hobby.¹³ Professional sports are games of precision and are decided by the slightest of margins. The Court should recognize this distinction and apply the ADA accordingly.

I. BACKGROUND OF THE ADA

A. General Purpose

Congress enacted the Americans with Disabilities Act¹⁴ in 1990 to "assure equality of opportunity."¹⁵ The purpose of the ADA was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹⁶ The ADA prohibits discrimination based on disability. Unlike the ADA, other employment discrimination laws forbid employers to take into account a particular disability of an employee,¹⁷ while the

11. Brief for Petitioner at 37 n.25, *PGA Tour, Inc. v. Casey Martin*, 532 U.S. 661 (2001) (No. 00-24) (noting "the effect need not be great to have a significant impact on the competition. In 1997, for example, the difference in average score between the number one and number 100 PGA TOUR scoring leaders was 2.32 strokes per round over the course of the entire year.").

12. WOODS, *supra* note 1.

13. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass'n, *Amici Curiae* at 3, *Martin*, (No. 00-24) (noting "[a]thletic competition is supposed to favor the more skilled and physically able. It is a test of who is the 'best' at mastering the game as defined by its rules, and it is this characteristic that makes it compelling to both competitors and spectators.").

14. See 42 U.S.C. §12101.

15. Alex B. Long, *A Good Walk Spoiled: Casey Martin and the ADA's Reasonable Accommodation Requirement in Competitive Settings*, 77 OR. L. REV. 1337, 1342 (1998) (quoting 136 Cong. Rec. S9694 (daily ed. July 13, 1990)).

16. *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1247 (D. Or. 1998) (quoting 42 U.S.C. § 12101(b)(1) (1995)).

17. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e (1994); see also Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1994).

ADA expressly requires employers to make reasonable accommodations for disabled employees.¹⁸

Title I of the ADA pertains to discrimination in the workplace.¹⁹ Since its passage in 1990, Title I of the ADA has impacted labor law, preventing covered entities from discriminating against a disabled individual in the areas of job hiring, advancement, and other facets of employment.²⁰

“Title II is targeted at public entities, making it unlawful for them to discriminate against or exclude qualified, disabled individuals from participating in or receiving the benefits of their services, programs, or activities.”²¹ The definition section provides that Title II is meant for those “who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”²² Title III applies to private entities providing places of public accommodation,²³ and Title IV relates to telecommunications.²⁴ Title IV applies to the Federal Communications Commission, and addresses the retaliation, coercion, state immunity and discrimination in that area.²⁵

1. *Title III.*—Title III is the most relevant section of the ADA for the Martin case and other situations involving disabled Americans and competitive settings. Title III constitutes “perhaps the most ambitious section of the ADA, granting rights to disabled customers who would not otherwise have been permitted to participate in the central activities of mainstream society.”²⁶ Title III prohibits discrimination against disabled persons in the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by or any person who owns, leases (or leases to), or operates a place of public accommodation.”²⁷ Private clubs are exempt from Title III provisions, a vital and often overlooked argument presented by the PGA Tour in *Martin*.²⁸ Discrimination is defined in these circumstances as the use of any eligibility requirement that as a result screens out disabled persons from their equal enjoyment of the public accommodation.²⁹ Title III also covers the failure

18. See Long, *supra* note 15, at 1343 (citing 42 U.S.C. §§ 12112(b)(5)(A), 12182(b)(2)(A)(ii)).

19. 42 U.S.C. § 12181(7).

20. Christopher M. Parent, *A Misapplication of the Americans with Disabilities Act*, 26 J. LEGIS. 123, 129 (2000).

21. *Id.* at 131.

22. *Id.*

23. 42 U.S.C. § 12182(a) (2002).

24. *Id.* § 12201-12213.

25. *Id.*

26. Parent, *supra* note 20, at 131.

27. 42 U.S.C. § 12182(a) (2002).

28. *Id.* § 12187.

29. *Id.* § 12182(b)(2)(a)(I).

to make reasonable accommodations to the disabled person in situations that are necessary to provide services and goods to the disabled individual.³⁰ The only defense by employers or clubs under Title III, which was an argument by PGA Tour in the case of *Martin*, is if they can demonstrate that such a modification would “fundamentally alter” the nature of such goods or services.³¹

A “private entity” under Title III is “any entity other than a public entity.”³² A “public entity” is “any State or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government.”³³ If that were the extent of what constitutes a public entity, there would not have been a question as to whether the PGA Tour must accommodate Martin. Instead, immediately following the public entity section, Title III lists various private entities that the ADA will consider public for purposes of providing accommodations to disabled Americans. This list contains, among other places, hotels, restaurants, movie theatres and stadiums.³⁴ This list concludes by expressly naming golf courses as private entities that the ADA considers a public entity.³⁵

Titles I and III of the ADA also state that private entities must make reasonable modifications “unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”³⁶ A public entity’s claim of fundamental alteration or undue burden is the only defense a public entity can claim from the requirements of the ADA. Is walking a golf course a fundamental alteration to the game? Arguably, yes. More importantly, should a non-profit, private entity, which merely uses a public golf course for four days a year and prohibits the public from access to the playing areas, be considered a public entity? The Supreme Court found so, to the surprise of many spectators of the sport and the Court alike.

II. GOLF AND LEGAL HISTORY OF CASEY MARTIN

On May 29, 2001, Casey Martin prevailed over the PGA Tour when the U.S. Supreme Court ruled that Martin was entitled to use a golf cart while playing on

30. *Id.* § 12182(b)(2)(a)(ii).

31. *Id.*

32. 42 U.S.C. § 12181(6).

33. *Id.* § 12131(1)(A),(B).

34. Scotta A. Weinberg, *Analysis of Martin v. Professional Golfers’ Ass’n, Inc.—Applying the ADA to the PGA is a Hole in One for Disabled Golfer*, 38 BRANDEIS L.J. 757 (2000) (citing 42 U.S.C. § 12181(7) (2002)).

35. *Id.* (citing 42 U.S.C. § 12181(7)(L)).

36. 42 U.S.C. § 12182(2)(A)(iii); Parent, *supra* note 20, at 132 (noting that “Titles I and III are closely linked as they demand many of the same requirements on the covered entity, primarily that ‘reasonable accommodations’ be made and that any eligibility criteria intended to screen out an individual with a disability are eliminated.”).

the PGA Tour.³⁷ *PGA Tour, Inc. v. Martin* was the first case in which a party asked the Supreme Court to apply the ADA to a competitor in a professional sports organization.

Casey Martin suffers from Klippel-Trenaunay-Weber Syndrome, a rare vascular congenital defect that causes a lack of blood circulation leading to bone deterioration and muscle atrophy wherever the disease is found.³⁸ Martin suffers from this disease in his right leg, which causes severe pain and discomfort while walking.³⁹ Martin's defect has progressed to the point at which it is unsafe for him to walk for any significant period of time without the possibility of fracturing his leg.⁴⁰

Casey Martin can hit golf balls well enough to be part of an elite group of players throughout the world able to earn a living playing golf at its highest level. There is no dispute Martin is a very talented golfer and has the ability to compete with other professional athletes on the PGA Tour. However, Martin's degenerative leg condition substantially limits the amount of walking he is capable of doing, especially the amount of walking necessary to compete on the PGA Tour. An average PGA Tour event normally involves walking twenty to twenty-five miles over the four day period.⁴¹ When Martin played collegiate golf at Stanford University, he was noticeably in pain from walking according to his competitors.⁴² Even his opposition begged their coaches to lift the mandatory-walking rule so that Martin could ride a cart.⁴³ The coaches allowed Martin to ride a golf cart while his competitors walked the course, and the National Collegiate Athletic Association agreed with the waiver.⁴⁴ Upon winning the 1994 NCAA Championship with Stanford, Martin pursued a career as a professional golfer at the highest level of competition, the PGA Tour.⁴⁵

With a chance to play on the PGA Tour, Martin decided to challenge the PGA Tour's rule requiring all competitors to walk the course during all tournaments. Martin requested to use a golf cart during a qualifying tournament and the PGA Tour denied his request.⁴⁶ Martin sought and was granted a

37. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

38. *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1243 (D. Or. 1998) (summary of Casey Martin's disorder and its side effects).

39. *Id.*

40. *Id.*

41. Brief for Petitioner at 4, *Martin* (No. 00-24) (noting that "during four days of competition, a golfer typically must walk twenty to twenty-five miles, often in intense heat, in inclement weather, or over hilly terrain. The cumulative fatigue resulting from this requirement may, and frequently does, affect golfers' concentration, shot-making ability, and overall performance.").

42. Marcia Chambers, *The Martin Decision*, GOLF DIGEST, Aug. 2001, at 60.

43. *Id.*

44. *Martin*, 532 U.S. at 668.

45. *Id.*

46. *Id.* at 662.

preliminary injunction allowing him to use a golf cart.⁴⁷ After qualifying for the Nike Tour, a tour co-sponsored by the PGA and governed by PGA rules, the United States District Court for Oregon extended the preliminary injunction for the first two tournaments on the Nike Tour.⁴⁸ By qualifying for this PGA sponsored tour, which complies with mandatory-walking rule of the PGA Tour, Martin was able to bring an ADA-based suit against the PGA Tour.⁴⁹ Martin contended that by failing to provide him with a cart while playing, the PGA Tour failed to make its tournaments accessible to individuals with disabilities, in violation of the ADA.⁵⁰

The PGA Tour is a non-profit entity that was formed in 1968.⁵¹ The PGA Tour is made up of three annual tours, the PGA Tour, the Nike Tour (currently the "Buy.com Tour") and the Senior PGA Tour, which use sponsors and co-sponsors to fund their various tournaments throughout the year. Approximately 200 golfers participate on the PGA Tour, roughly 170 on the Buy.com Tour and about 100 on the Senior PGA Tour.⁵² The PGA Tour operates tournaments that are mostly four-day events and played on courses leased and operated by the PGA Tour.⁵³ Spectators are able to purchase tickets to the tournaments, but their access is strictly limited. Only PGA Tour players, caddies, and various officials are allowed "between the ropes."

There are several ways for competitors to gain entry into the three PGA-sponsored tours.⁵⁴ If a player wins three Buy.com Tour events in the same year, or is among the top fifteen money winners on the Buy.com Tour, he earns a "PGA Tour Card."⁵⁵ This simply means that he has earned the right to play in all the tournaments provided by the PGA Tour. A golfer may obtain a spot in an individual tournament through "competing in 'open' qualifying rounds, which are conducted the week before each tournament."⁵⁶

However, the most common method of earning a PGA Tour Card is by competing in a three stage-qualifying tournament known as "Q-School."⁵⁷ Any member of the public whose "golf handicap" is below a set standard may enter Q-School by paying a \$3000 entry fee and submitting two letters of reference.⁵⁸ This fee covers the player's cost to play and use of golf carts, which are permitted during the first two stages of Q-School, but have been prohibited

47. PGA Tour, Inc. v. Martin, 984 F. Supp. 1320, 1327 (D. Or. 1998).

48. Parent, *supra* note 20, at 133.

49. *Id.* at 132.

50. *Id.* at 133.

51. *Martin*, 532 U.S. at 665.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 665.

58. *Id.*

during the final stage since 1997.⁵⁹ Over a thousand participants enter the first stage, and only 168 enter the final stage. From the final stage, only a quarter qualify for PGA Tour membership, while those remaining enter the Buy.com Tour.⁶⁰

Everyone would like to see someone with Martin's talent and persistence achieve success at the highest level of his profession.⁶¹ Putting aside the human dimension of the case, though, and basing the argument solely on the legal issues, the PGA Tour was correct in rejecting Martin's request to use a golf cart during the PGA Tour events. Though Martin could drive, chip, and putt as well as other players on the PGA Tour, he lacked the ability to walk the course, a prerequisite for all players competing at golf's highest level.⁶² Whether this ability is as essential to the game as driving, putting and chipping is not the issue. Rather, in a game where the slightest alteration to the rules and a change in the way one person is allowed to play is made, the results are magnified due to the quantifiable numbers used to determine who wins. Following this logic, permitting Casey Martin to ride a golf cart during tournaments fundamentally alters the competitive nature of the game.

III. PRIOR ADA APPLICATIONS IN COMPETITIVE SETTINGS

Martin was the first opportunity for the Supreme Court to interpret some of the basic provisions of the ADA as they apply to professional sports organizations. However, several recent decisions show that courts must be careful when attempting to make a reasonable accommodation for a disabled athlete without fundamentally altering an athletic competition.⁶³

In *Slaby v. Berkshire* the U.S. District Court of Maryland addressed a similar situation to that of Casey Martin.⁶⁴ Members of a golf club brought suit when the club erected rope barriers around the golf course and enacted rules limiting carts on the course. Mr. Slaby was required to use a golf cart to play golf because he had three heart operations, was diabetic, suffered from hypertension, and was classified as permanently disabled by Social Security.⁶⁵ The court held that the rope barriers were only a minor inconvenience for the golfers and did not prevent the other members from playing golf, which is all that is required under the ADA in this application.⁶⁶

*Sandison v. Michigan High School Athletic Ass'n*⁶⁷ demonstrates that an

59. *Id.*

60. *Id.*

61. Parent, *supra* note 20, at 136 (noting Martin took part in Nike's recent golf advertising campaign with inspirational messages such as "I can" and "Anything is possible.").

62. *Id.* at 145.

63. Long, *supra* note 15, at 1359.

64. 928 F. Supp. 613 (D. Md. 1996).

65. *Id.* at 614.

66. *Id.* at 615.

67. 64 F.3d 1026, 1035 (6th Cir. 1995).

exception to an established rule of a sport organization would not only create a fundamental alteration to the nature of the event, but would constitute an undue burden on the governing body.⁶⁸ In *Sandison*, plaintiffs were two disabled high school students who were two years behind in school, leaving them nineteen years old in their senior year.⁶⁹ Both were prevented from competing in cross-country events because the Michigan High School Athletic Association (MHSAA) prohibited any student over nineteen from competing.⁷⁰ The Sixth Circuit held that the effect of allowing these students to compete would create both a fundamental alteration to the event as well as an undue administrative burden because no one, including the MHSAA, can make the determination of whether something is unfair to other competitors without creating an undue burden.⁷¹

Finally, perhaps the most pertinent language used in recent case law regarding the applicability of the ADA to professional sports was in *Stoutenborough v. National Football League*.⁷² In *Stoutenborough*, a citizen with a hearing impairment claimed that individuals with hearing impairments were effectively prevented from listening to blacked-out football games over the radio and were denied access to the games.⁷³ Though the Sixth Circuit held that there was no statutory basis for the claim, it provided important language when referring to Stoutenborough's Title III claim.⁷⁴ The court found that the NFL was not covered by the ADA.⁷⁵ The Sixth Circuit found that although football games are played in a place of public accommodation and can be viewed on television in other places of public accommodation, these circumstances do not support a Title III claim.⁷⁶ Because *Stoutenborough* did not involve the ADA being applied directly to an athlete, its application is limited with regard to *Martin*; however, its language is still persuasive and applicable to *Martin*. Despite tournaments being played on a place of public accommodation and being viewed on televisions in similar places, under *Stoutenborough* the PGA Tour should not be considered a place of public accommodation.

The most important lesson from these cases and *Martin* is the importance

68. Long, *supra* note 15, at 1363.

69. *Id.* at 1362.

70. *Id.*

71. *Id.*

[I]n order to conclude that the plaintiffs' age would not provide them with an unfair advantage, coaches and physicians would have to consider the skill level of each member of an opposing team, the overall skill level of each opposing team, and the skill level of each student whom the older student displaced from the team. Therefore, permitting older students to compete would fundamentally alter the nature of the program and constitute an undue administrative burden.

72. 59 F.3d 580 (6th Cir. 1995).

73. *Id.* at 582.

74. *Id.*

75. *Id.*

76. *Id.*

of courts' awareness that the ADA's reasonable accommodation requirement within the employment (Title I) and recreational settings must be distinguished from competitive and professional sport settings in order to effectively determine whether the accommodation is creating a fundamental alteration to the event. Courts must recognize that although a change in a recreational setting may not alter the nature of the event, the same change may distort the rules and strategies of a competitive setting.

There may be occasions where the ADA will be correctly applied to athletic competitions. The ADA was intended to apply and will be applied to remove artificial, man-made barriers, such as the lack of wheelchair ramps or arbitrary physical requirements. Martin's condition that made him unable to play, however, was his disease, not neutrally applied rules. The application of the ADA in this sense is analogous to equal protection law. In *Washington v. Davis*, the Supreme Court stated "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."⁷⁷ Discriminatory impact alone, without proof of invidious intent, raises no constitutional issue.⁷⁸ The law must and does recognize that not all participants are similarly situated. In fact, that is the very premise of competition.

IV. SUPREME COURT'S DECISION

The PGA Tour did not argue that Casey Martin was not a person with a disability covered by the ADA.⁷⁹ Rather, its initial argument was that the PGA Tour does not constitute a "place[] of public accommodation" as defined under Title III of the ADA.⁸⁰ Secondly, the PGA Tour argued that walking the golf course is essential to the game of golf at the PGA Tour level and to allow Martin to ride a golf cart would fundamentally alter the game at that level.⁸¹

This is the first time the Supreme Court has been asked to apply the ADA to a professional sports setting. There is little precedent as to not only how the Court should apply the ADA to *Martin*, but perhaps more importantly, as to what role, if any, the Court should play in determining whether riding a golf cart would be a fundamental alteration.

Although the Supreme Court had not dealt with athletic competitors and the ADA prior to *Martin*, the Supreme Court had indicated a desire to interpret the ADA in a very broad manner in prior decisions.⁸² In *Bragdon v. Abbott*, a dentist

77. 426 U.S. 229, 242 (1976).

78. *Id.*

79. Tim A. Baker, *The Law and the Links: How Casey Martin Prevailed in His Legal Battles with the PGA Tour*, RES GESTAE, Sept., 2001, at 17.

80. *Id.*

81. *Id.*

82. *Id.*

refused to treat a patient who was infected with HIV.⁸³ The Court concluded that HIV was an impairment from the moment of infection that substantially limited respondent's ability to reproduce, which was a major life activity.⁸⁴ The Court held that a person diagnosed with HIV is a disabled person under the ADA even though the patient's infection had not yet progressed to the symptomatic phase.⁸⁵

Further, the Court unanimously held in *Pennsylvania Department of Corrections v. Yeskey* that state prisons and prisoners are included within the coverage of the ADA.⁸⁶ In *Yeskey*, respondent prisoner was eligible for the Pennsylvania Motivational Boot Camp under a Pennsylvania statute.⁸⁷ However, because petitioner Department of Corrections refused his admission to the program due to his hypertension, respondent brought action challenging petitioner's denial of his access to the boot camp as a violation of the ADA.⁸⁸ Petitioner claimed that the ADA did not govern it or the program.⁸⁹ The Court held that state prisons were clearly subject to the ADA, and that the boot camp was an ADA-protected voluntary program by virtue of its definition in the Pennsylvania statute.⁹⁰

Despite the trend of a broad reading of the ADA, the Supreme Court has never applied the ADA to an organization that is, arguably, a private entity. Additionally, the Court has never delved into an area where any modification of the rules would fundamentally alter the landscape of a sporting event allowing one person to change the playing field and putting fellow competitors at an inherent disadvantage that directly affects their livelihood.

A. *Brief Summary of the Majority Opinion*

The Supreme Court decided two distinct issues in holding that the PGA Tour was required to allow Casey Martin to ride a golf cart: "1) whether the ADA protects access to professional golf tournaments by a qualified entrant with a disability; and 2) whether a disabled contestant may be denied the use of a golf cart because it would 'fundamentally alter the nature' of the tournaments. . . ."⁹¹

The PGA Tour first argued that because "Title III [of the ADA] is concerned with discrimination against 'clients and customers' seeking to obtain 'goods and services' at places of public accommodation," Martin could not bring a Title III claim because he was not such a client or customer of the PGA Tour.⁹² Title III states "the term 'individual or class of individuals' refers to the clients or

83. 524 U.S. 624 (1998).

84. *Id.*

85. *Id.*

86. 524 U.S. 206 (1998).

87. *Id.* at 208.

88. *Id.*

89. *Id.*

90. *Id.* at 210.

91. Baker, *supra* note 79 (quoting *PGA Tour, Inc., v. Martin*, 532 U.S. 661, 664-65 (2001)).

92. *Id.* (citing *Martin*, 532 U.S. at 678).

customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.”⁹³ The majority held, however, that [the PGA Tour] offers the public the privilege of both watching the golf competition and competing in it. “Although the latter is more difficult and more expensive to obtain than the former, it is nonetheless a privilege that the PGA Tour makes available to members of the general public.”⁹⁴

The second issue decided by the majority was whether the use of a golf cart fundamentally alters the nature of professional golf tournaments. The majority concluded that the essence of golf has always been “shot-making.”⁹⁵ The majority rejected testimony from the district court that stressed the history and tradition of walking the course in the highest level of golf competition.⁹⁶ The majority ruled that the fatigue factor involved was not a large enough factor to create a fundamental alteration of the sport.⁹⁷ Finding that “shot-making” was the essence of golf, the Court found that allowing Martin to use a cart would not fundamentally alter the game of golf.

B. Brief Summary of the Dissent

In his dissent, Justice Scalia, joined by Justice Thomas, made clear that he did not necessarily believe that Casey Martin should not be able to ride a golf cart.⁹⁸ According to Justice Scalia, the legal principles on which the majority decided the case were flawed. To begin, the majority’s opinion, in Scalia’s view, was not based on the legal principles, but instead were based on the Court’s morals and compassion for the disabled golfer.⁹⁹

According to Justice Scalia, “The [Americans with Disabilities Act] seeks to assure that a disabled person’s disability will not deny him *equal access* to (among other things) competitive sporting events—not that his disability will not deny him *an equal chance to win* competitive sporting events.”¹⁰⁰ Everyone should have the right to not only be able to play golf on public golf courses, but everyone should have the right to try to compete at the sport’s highest level. In Justice Scalia’s view, the law does not permit someone to have equal opportunity

93. 42 U.S.C. 12182(b)(1)(A)(iv).

94. *Martin*, 532 U.S. at 680.

95. *Id.* at 683.

96. *Id.* at 685.

97. *Id.* at 683.

98. *Id.* at 704 (“My belief that today’s judgment is clearly in error should not be mistaken for a belief that the PGA TOUR clearly *ought not* allow respondent to use a golf cart. That is a close question, on which even those who compete in the PGA TOUR are apparently divided, but it is a *different question* from the one before the Court.”) (Scalia, J., dissenting).

99. *Id.* at 691 (“[T]oday’s opinion exercises a benevolent compassion that the law does not place within our power to impose.”) (Scalia, J., dissenting); *id.* at 704 (“I have no doubt Congress did not authorize misty-eyed judicial supervision of such a revolution.”) (Scalia, J., dissenting).

100. *Id.* at 703.

to win at that level and, in essence, level the playing field.¹⁰¹ Competition, at its core, is created by people of different abilities. To take away that inherent competition and level the playing field, Justice Scalia concluded, is to destroy the essence of golf and all of competitive athletics.¹⁰²

V. ANALYSIS OF SUPREME COURT'S OPINION

Casey Martin's story of overcoming adversity is inspirational for all people with or without a disability, regardless of whether one is an athlete. Unfortunately, the Supreme Court's broad interpretation of the ADA in *Martin* has expanded the intent of the ADA, which was to ensure that disabled Americans receive equal access to everyday activities. While pursuing golf simply as recreation or at the highest level as a professional is a right that ought to be guaranteed to all citizens, playing on the PGA Tour is not. Rather, it is a privilege that ought to be granted only to those who meet all of the necessary qualifications, and the private governing body ought to have the authority to determine what those necessary qualifications are.¹⁰³ As stated in the brief of the PGA Tour:

Individual competitors may or may not be able to compensate for those physical disadvantages, but, if they cannot, the resulting "inequality" is not discrimination in any meaningful sense (including the sense contemplated by Title III), but simply a reflection of the varying challenges faced, to a greater or lesser degree, by all athletes in elite athletic competitions. Those competitions reward superior physical performance, without adjusting the standards from competitor to competitor to allow for more equal results.¹⁰⁴

The Court did try to narrow the scope of its ruling, stating that its holding pertained specifically to Martin using a golf cart on the PGA Tour, and not the general use of carts on the PGA Tour.¹⁰⁵ Regardless of the Court's intent, their application of the ADA shows that "few human activities are currently beyond

101. *Id.* ("[T]he very nature of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence.") (Scalia, J., dissenting).

102. *Id.* ("[B]y giving one or another player exemption from a rule that emphasizes his particular weakness . . . is to destroy the game.") (Scalia, J., dissenting).

103. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass'n, *Amici Curiae* at 3, *Martin*, (No. 00-24), noting,

A competition judicially managed to eliminate this or that "unfairness" may appear more "fair" in the view of a court because less skilled or less able-bodied individuals may be able to compete, but it is not the same athletic competition envisioned by the creators and fans of the game. The fundamental fairness of the game—i.e., that all the rules apply equally to all competitors—has changed, and we no longer have a competition that tests who is the "best" at that particular game.

104. Brief for Petitioner at 33-34, *Martin* (No. 00-24).

105. Leverenz, *supra* note 5.

scope of either legislative regulation or judicial incursion.”¹⁰⁶

Three issues arise out of the *Martin* case. The first issue, and arguably the most overlooked aspect of the decision, was the holding by the Supreme Court that the PGA Tour was not a private club for purposes of the ADA and therefore not immune from its coverage.¹⁰⁷ The second issue, the Court’s conclusion requiring the PGA to accommodate Martin by allowing him to ride in a golf cart because it would not alter the fundamental nature of the competition, drew wide praise and criticism.¹⁰⁸ Golfing traditionalists and historians criticized the Supreme Court’s rulings while the general public found the requirement to be the proper application of the ADA. Finally, the issue left open by the majority is what role, if any, the governing body should have in determining fundamental alterations in competitive settings, including the PGA Tour and other professional organizations. Did the Supreme Court go beyond its reach and decide an issue better left to the sport’s governing body?

A. Critique of Court’s Reasonable Accommodation Interpretation

The most common debate stemming from the *Martin* decision was the Court’s determination that allowing the use of a cart was not a fundamental alteration of the sport. Many golf and sport enthusiasts at all levels of competition were upset at the determination that an organization designed to establish the rules of a game, an organization that has had that sole authority since its inception, could be required by the judicial system to alter those rules. On the other hand, many were inspired by Martin’s persistence and agreed that Martin was a perfect example of how the ADA can serve its original purpose.

The issue of whether the PGA Tour was a place of public accommodation or a private entity is a question that the majority superficially addressed. The issue of whether riding a golf cart is a fundamental alteration will always be debated. However, the issue of whether the PGA Tour should even be held to the ADA standards is, arguably, the tougher issue for the majority to defend.

The Supreme Court established what constituted a “private club” in *Moose Lodge No. 107 v. Irvis*.¹⁰⁹ There, the Supreme Court created a list of factors to determine whether a club is private: 1) whether the club has well-defined requirements for membership; 2) whether the club conducts all of its activities in a privately owned building or grounds; 3) whether it is not publicly funded; and 4) whether only members and guests are permitted in the club and may become a member upon invitation.¹¹⁰ Under these general guidelines and another

106. *Id.*

107. Long, *supra* note 15, at 1338.

108. *Id.*

109. Todd A. Hentges, *Driving in the Fairway Incurs No Penalty: Martin v. PGA Tour, Inc. and the Discriminatory Boundaries in the Americans with Disabilities Act*, 18 LAW & INEQ. 131, 158 (2000) (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1965)).

110. *Moose Lodge No. 107*, 407 U.S. at 171.

private membership test set forth by the Ninth Circuit,¹¹¹ the PGA Tour could quite easily be considered a private club. The PGA Tour provides no services to the public and membership to the PGA Tour is based solely on the golf score a player shoots.¹¹² In the majority opinion, Justice Stevens focused on the Q-School factor, which allows any member of the public to enter Q-School if they pay \$3000 and have two letters of reference.¹¹³ By allowing the public access to Q-School, the PGA Tour does provide access to the public that classifies the PGA Tour as a place of public accommodation.

This reasoning by the majority does not put the issue of Q-School in the proper perspective. The majority later found that the essence of the game of golf is shot-making, and that there is restricted access to the playing areas during competition.¹¹⁴ The use of Q-School to gain entry to the PGA Tour is analogous to professional baseball teams holding open tryouts to the public. These tryouts occur throughout the year and in various parts of the country. As long as an applicant falls within the age range that the specific team sets forth, anyone may try out to play professional baseball. Is this the customary way to gain access to professional baseball? Absolutely not. Just as in golf, there are several other ways to make a team and be considered a professional. Under this law, professional baseball should be held to the same standards, though it is not. Therefore, the public's participation in the Q-School hardly establishes the PGA Tour as a place of public accommodation. The access to the playing areas only by the competitors should play a more important factor in determining what constitutes a place of public accommodation.

To be clear, the PGA Tour did not claim that it was a private club altogether exempt from Title III's coverage.¹¹⁵ The PGA Tour admitted that its tournaments take place at places of public accommodation.¹¹⁶ This argument is worthy of elaboration, though it was not addressed by either party. Instead, the issue presented by the PGA Tour was that "the competing golfers are not members of the class protected by Title III. . . ."¹¹⁷ In supporting its position that it is not a public accommodation under the ADA, the PGA Tour argued that Title III is concerned with discrimination against "clients and customers" seeking to obtain "goods and services" at places of public accommodation,¹¹⁸ and Title I applies

111. Hentges, *supra* note 109, at 158 (citing *Richard v. Friar's Club*, 124 F.3d 212, 217 (9th Cir. 1997) (defining the test of a private club as whether the organization: 1) is a club in the ordinary sense of the word, 2) is private, and 3) requires meaningful conditions of limited membership)).

112. *Id.* (noting that membership in the PGA Tour is highly selective and based on criteria that is clearly quantifiable and does not allow for any type of discrimination).

113. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 680 (2001).

114. *Id.* at 683.

115. *Id.* at 677.

116. *Id.*

117. *Id.* at 678.

118. 42 U.S.C. 12182(b)(1)(A)(iv).

to the people who work at these public accommodations.¹¹⁹ “Title III is intended to confer enforceable rights on clients and customers of places of public accommodation, not on persons working to provide those clients and customers with the relevant goods and services.”¹²⁰ The majority held, however, that the PGA Tour’s argument fails in this respect because it offers the public the privilege of both watching the golf competition and competing in it.¹²¹

This reasoning is flawed for a number of reasons. First, the ADA should not be applicable “inside the ropes” because the paying public is not allowed in any playing area. There is exclusivity between the clients and customers and the players.¹²² The customers, as the public, are forced to stay “outside the ropes,” clearly distinguishing clients and customers from professional golfers such as Casey Martin.¹²³ The PGA Tour distinguished areas of play from areas outside the boundaries of play “by noting that in a typical ballpark, the stands must be accessible to the disabled because this is where the public is allowed. On the contrary . . . dugouts are not subject to the ADA because the public is not allowed there.”¹²⁴

“Golf courses are specifically mentioned in Title III because disabled individuals should be provided with the opportunity to engage in the recreation of their choice.”¹²⁵ The ADA was enacted to provide the Casey Martins of the world the opportunity to play golf at courses throughout the country.¹²⁶ The

119. *Id.*

120. Brief for Petitioner at 11, *Martin* (No. 00-24) (noting that respondent is not in the category of customer, “[l]ike a concert hall performer, or actor in a theatre production, respondent is helping to supply the entertainment at Tour events, not seeking to enjoy it.”).

121. *Martin*, 532 U.S. at 680 (“Although the latter is more difficult and more expensive to obtain than the former, it is nonetheless a privilege that petitioner makes available to members of the general public.”).

122. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass’n, *Amici Curiae* at 4, *Martin* (No. 00-24), noting,

Simply because the sections of the course set aside for the gallery are open to the public does not render the competitive area where the public is not permitted (such as the playing area of an LPGA golf tournament, or the field of a professional baseball league, or the tennis courts at the National Tennis Center during the U.S. Open, or a bob-sled track during the Olympics) subject to the public accommodations provisions of Title III.

123. *Martin*, 532 U.S. at 693 (As Justice Scalia pointed out in his dissent, Title III covers only clients and customers of places of public accommodation. First, “[t]he persons ‘recreat[ing]’ at a ‘zoo’ are presumably covered [by the ADA], but the animal handlers bringing in the latest panda are not.”). *Id.* Justice Scalia continued, “To be sure, professional ballplayers participate in the games, and use the ball fields, but no one in his right mind would think that they are customers of the American League or of Yankee Stadium. They are themselves the entertainment that the customers pay to watch. And professional golfers are no different.” *Id.* at 695.

124. Weinberg, *supra* note 34 (quoting *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1326-7 (D. Or. 1998)).

125. Parent, *supra* note 20, at 137.

126. *Martin*, 532 U.S. at 699. “If a shoe store wishes to sell shoes only in pairs it may; and

ADA does not provide the opportunity to compete at the highest level of a sport, governed by a private entity, so long as he can fulfill the majority of the requirements needed to abide by the rules. The ADA only states that places of public accommodation include, but are not limited to, “a gymnasium, health spa, bowling alley, golf course, or other places of exercise or recreation.”¹²⁷ Similarly in *Slaby*, the court found that the golf course was not denying Slaby the right to exercise or recreate. He was allowed on the golf course as much as he wanted; the club was not infringing on his right to exercise or recreate at the club.¹²⁸

Casey Martin was not using the golf course to exercise or recreate; rather, he was using the golf course to compete at the sport’s highest level and earn a living.¹²⁹ Just because “golf courses” are specifically listed in the ADA, the Court should not automatically hold that a golf course is a place of public accommodation.¹³⁰ Instead, it should consider the purpose of use and the nature of the competition. The PGA Tour did not deny Martin the right to exercise or recreate on the golf course. It did deny him the right to compete at the highest level, which does not violate the ADA.

The PGA Tour is not itself a golf course and so is not among the items listed as public accommodations under the ADA. The PGA Tour is a membership organization that sponsors events open only to those who are qualified to participate. “Other than ensuring that particular courses used by the PGA Tour meet its strict standards and regulations during the event, the Tour cares little about how those courses operate during the rest of the year.”¹³¹ The ADA also requires an individualized inquiry to determine whether a specific accommodation for a specific person’s disability would be reasonable under the specific circumstances, without fundamentally altering the nature of the sport.¹³² The ADA’s requirement that each individual’s case be considered on its own facts and not governed by blanket rules was a factor in the Court’s holding that the PGA Tour must comply with the ADA. After finding that the ADA covered

if a golf tour (or a golf course) wishes to provide only walk-around golf, it may. The PGA TOUR cannot deny respondent access to that game because of his disability, but it need not provide him a game different (whether in its essentials or in its details) from that offered to everyone else.”

127. 42 U.S.C. § 12181 (7)(L).

128. 928 F. Supp. 613, 615 (D. Md. 1996).

129. *Martin*, 532 U.S. at 695. Justice Scalia pointed out in his dissent, Casey Martin “did not seek to ‘exercise’ or ‘recreate’ at the PGA TOUR events; he sought to make money (which is why he is called a *professional golfer*).”

130. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass’n, *Amici Curiae* at 13, *Martin*, (No. 00-24), noting,

notwithstanding that they may be specifically identified on the ADA’s list of public accommodations, places that are purely private in nature are not regulated places of public accommodation. For example, although a “library” is included on the list, a private library in an individual home is not a place of public accommodation because it is not a “place of public display.”

131. Parent, *supra* note 20, at 137.

132. Baker, *supra* note 79 (citing 42 U.S.C. § 12182(b)(2)(A)(ii)).

the PGA Tour and that walking the course was not fundamental to the game, the Court examined Martin's personal circumstances.¹³³

The Court criticized the PGA Tour for failing to look at Martin's individual circumstances.¹³⁴ However, because the PGA Tour originally believed it was not covered by the ADA, there was no need to evaluate the specific circumstances of Casey Martin. There was no reason compelling the PGA Tour to do so under these circumstances, since it considered itself a private entity under the ADA standards.¹³⁵ To criticize the PGA Tour for overlooking Casey Martin is to overlook the valid defense raised by the Tour, exempting it from the requirements of the ADA.

B. Critique of Court's Fundamental Alteration Interpretation

As the first case to apply the ADA to professional sports, "*Martin* had the opportunity to address the shortcomings of the statute in such a setting and to help define the contours of what 'reasonable accommodation' means in a situation that produces clear winners and losers based on quantifiable performance."¹³⁶

The most apparent flaw in the majority's decision in *Martin* was the Court's failure to fully address the inherent difference between recreational settings, and the case presented here—the highest level of competition—a professional sports organization. This distinction turns on the fact that a fundamental alteration is much more apparent and can be determined by a court more easily when presented with a general place of recreation, or a place intended for exercise, as the ADA intended.¹³⁷ However, in the case at bar and other cases involving high levels of competition, a court must be intimately familiar with the nuances of the sport and must be sensitive to any slight change in the rules that will alter the landscape of a level playing field for professional players, among whom there is so little disparity in performance.¹³⁸ Simply put, the Court is ill-equipped to decide what constitutes a "fundamental alteration."

133. *Martin*, 532 U.S. at 690.

134. *Id.*

135. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass'n, Amici Curiae at 9, 10, *Martin*, (No. 00-24), noting the Ninth Circuit's failure

to appreciate fully the essential characteristics of athletic competition is nowhere more obvious than in its conclusion that an "individualized inquiry" is necessary to determine, on a competitor-by-competitor basis, whether a relaxation or modification of a rule of the game for a disabled competitor would fundamentally alter the game, or give a particular disabled competitor an advantage.

136. Long, *supra* note 15, at 1339.

137. 42 U.S.C. § 12181(7)(L).

138. *Martin*, 532 U.S. at 699. "[R]ules 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' if the rule maker (here the PGA TOUR) deems it to be essential." (Scalia, J., dissenting).

The slightest unfairness could have “major quantifiable results for other competitors that are lacking in noncompetitive settings.”¹³⁹ The ADA requires the Court, not the PGA Tour, to determine the fatigue of Casey Martin and compare that to the “normal” fatigue of walking the course. For reasons of institutional incompetence, however, the Court is not the proper referee for this call; instead, it should defer to the PGA to determine what is a fundamental alteration to this private and specialized enterprise.¹⁴⁰

The essential question in determining what constitutes a fundamental alteration in golf depends on the definition of professional golf. This deceptively simple question can be debated among golfers just as passionately as it was before the Supreme Court. Professional golf consists of detail-specific rules that one must learn before he can simply go out and tee off on the PGA Tour. From rules regulating the number of clubs a player may have in a golf bag to rules stating who may carry the bag, professional golf is more than just “shot-making.” A player must be familiar with the rules, strategic in his club selection, and mentally prepared just to be able to play on the PGA Tour. Regardless of one’s interpretation and definition of professional golf, the sport differentiates winners and losers based on a specific number—the number of shots an individual takes throughout the tournament—which is a culmination of stamina, weight, weather, swing, equipment, and of course, skill. Recreational golf, on the other hand, is simply playing golf for enjoyment and trying to improve your game. Whether a player is riding a cart or walking, the bottom line is pleasure, not worrying about conforming with specific rules and competing for money. Recreational golf not only differs in degree from professional golf, but also in kind, where the many nuances at the professional level ultimately determine the final results.

C. Critique of the Judiciary’s Role in Determining What Constitutes a Fundamental Alteration

Unless the ruling body who determines what is a fundamental alteration has the ability to differentiate a professional competitive setting, where a very slight change will result in a fundamental alteration, from a pure recreational setting, where it would take a more substantial change to constitute a fundamental alteration, simply applying the ADA to professional settings will be a misapplication of this far-reaching statute. Accordingly, the PGA Tour should be its own governing body.

The PGA considers professional golf a test of not only ball striking but also competition where the element of physical stress and fatigue are added with the addition of the walking rule.¹⁴¹ The PGA believed “the overall purpose of Title

139. Long, *supra* note 15, at 1378.

140. *Id.* (noting that the difficulty in dealing with the reasonable accommodation requirement of the ADA in competitive settings is that “the ADA essentially requires a court to measure an unquantifiable factor ‘the level of Casey Martin’s fatigue vs. the fatigue of able-bodied golfers’ in a program based on quantification (professional tournament golf).”).

141. Brief for Petitioner at 4, *Martin* (No. 00-24), noting, “[t]he extent of such fatigue is

III . . . was to insure that ‘public’ spaces are accessible to the disabled—not to regulate the entirely private areas and activities to which the public does not have access.”¹⁴² By suing for a waiver of a rule that applies to every other athlete, Martin is trying to force the private entity to change its competitions into a different kind of competition, one which will fundamentally alter the play and possibly the outcome.

The majority looked to the three sets of rules that generally govern golf. The “Rules of Golf,” the “hard card,” and the “Notices for Competitors” all set out general guidelines for professional golfers.¹⁴³ The Court relied on the fact that the rules never expressly prohibit the use of golf carts during competition. The majority stated, “There is nothing in the Rules of Golf that either forbids the use of carts, or penalizes a player for using a cart.”¹⁴⁴

More than any other point, this finding by the Court demonstrates its unfamiliarity with golf in particular and competitive sports in general, underscoring the need for an expert sports body to properly determine what constitutes a fundamental alteration. Within all sports, and especially at the highest level of competition, there are rules and understandings derived from the nature of play and the essence of competition created, in arguably an arbitrary manner, by a governing body.¹⁴⁵ “And that of course is part of the majesty of sport; it is anything the designers of the rules want it to be, autonomous and, within its realm, sovereign. As such, each variation heralds a new form of competition, a new game.”¹⁴⁶ Nowhere in the rules of baseball, for example, does it state that a catcher cannot sit on a stool in front of the umpire at times when his knees are hurting.¹⁴⁷ Nor do the rules of football prohibit a player from riding a golf cart on kickoff returns. Just because an activity is not prohibited by the rule book does not make it permitted. In such gray areas, only an expertise in and

impossible to quantify but will vary from golfer to golfer, depending upon factors like weather conditions, temperature, the terrain of the golf course, different golfers’ psychological ability to cope with stress, the golfers’ age and extent of physical conditioning, and so forth.”

142. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass’n, *Amici Curiae* at 10, *Martin* (No. 00-24).

143. *Martin*, 532 U.S. at 666-67.

144. *Id.* at 685.

145. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass’n, *Amici Curiae* at 5, *Martin* (No. 00-24), noting,

every competition or “game” is, in the end, nothing but a set of manufactured rules, with each rule contributing to, and therefore defining, the nature of the competition. Who can recall, or even know, why bases are ninety feet apart? Who can explain why a tennis player who touches the net during play automatically loses the point? These are simply the rules, and the point, of course, is that every rule of athletic competition is, by definition, fundamental to that game, whatever that game might be.

146. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass’n, *Amici Curiae* at 6, *Martin* (No. 00-24), noting, “Indeed, the rules of athletic competition are simply designed to provide a standard against which to distinguish among competitors.”

147. *Leverenz*, *supra* note 5.

sensitivity to the nuances of the sport empowers the decision-maker to consider whether the play has been fundamentally altered.

The argument that golf carts are used by all public courses throughout the country by the average golfer shows that walking is not a fundamental part of the game is simply not a correct analysis. When the same rule is applied to professionals, it changes the entire landscape. The players are competing for a living and any fundamental change will make the playing field uneven. The nature of golf played by the average fan who is out for a nice stroll with friends on the public course is much different than the game that is played by the game's elite, competing on the finest courses in the world for millions of dollars before countless spectators. This version of golf is played by professionals who have worked all their lives to play the game as a means to make money. Golf is a game that decides who wins based on concrete numbers - the competitor with the lowest score wins. To alter the rules for an individual, in a game that is decided by the slightest of margins, inherently puts other competitors at a disadvantage, constituting a fundamental alteration.

Finally, the holding in *Sandison* applies to the *Martin* case as well. In order to determine the fatigue factor and the way it applies to walking the course during tournaments would also constitute an undue burden on the PGA Tour. In *Sandison*, the Sixth Circuit held it would create an undue burden to require the MHSAA to compare the Plaintiff's effect on competition to each competitor as well as to each competing team.¹⁴⁸ Applying that standard to this case, it would require the PGA Tour to compare the fatigue factor of Martin to each of the other competitors and determine whether allowing Martin to ride a cart would put another competitor at a disadvantage. Would a chronic back problem warrant an exemption from the rule or disadvantage other players by justifying use of a cart? Each one of these cases would require the PGA Tour to evaluate how that disability effects every other competitor. That is simply an undue burden and not required under the ADA.

VI. POSSIBLE IMPLICATIONS ON PROFESSIONAL SPORTS

According to the PGA Tour, all competitors are required to walk during the four-day tournaments. The exhaustion that results from walking is intended to be part of the physical demands of the game. If a golfer does not experience that taxing part of the tournament others are forced to endure, he has gained a physical advantage. This advantage will lead to better shots and lower scores. Every aspect of the game that may not seem important to the recreational golfer may be essential to professional play and can only be determined by those who play at that elite level.

It was clear from the beginning of Casey Martin's case against the PGA Tour in 1998 that other professional sports organizations were concerned that a ruling in favor of Martin would be detrimental to their organizations as well.¹⁴⁹ What

148. 64 F.3d at 1035.

149. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass'n, Amici Curiae at 1,

impact the Martin decision will have on the judicial landscape and as a precedent for allowing the judiciary to control fundamental rules of a sport is still largely unclear.¹⁵⁰ Although persistence and overcoming adversity is admirable and everyone deserves the opportunity to play golf, playing golf on a professional tour is a privilege only an elite group can achieve.

“The true challenge courts face in addressing the ADA in competitive situations is . . . attempting to balance the fundamental notion of fair play in competition with the ADA’s fundamental goal of full participation.”¹⁵¹ There is a fine line the courts must not cross. “However laudable it might be for courts to create new sporting competitions, with constantly adapting rules so that disabled individuals might be able to compete more effectively, doing so is clearly beyond the intended scope of the ADA.”¹⁵² While trying to achieve the goals of the ADA, they should not alter fundamental aspects of a sport and not put other competitors at an inherent disadvantage by trying to give more than *equal access* to an individual.

To prevent future cases where the ADA places an individual at a competitive advantage over others, all parties have new responsibilities as a result of this decision. First, the judicial system should differentiate the application of the reasonable accommodation requirement between the traditional employment sphere and competitive athletic settings.¹⁵³ Secondly, organizations must make their rules clear and consistent at all levels of play.¹⁵⁴ As shown in this case, courts may interpret different rules for different levels of play as non-essential to the sport. Although these strategies may not seem like the best way of promoting athletics, it appears this is the only way for a governing authority to protect itself from judicial interference.¹⁵⁵

Martin (No. 00-24), noting that

The ATP Tour and the LPGA are similar to the PGA TOUR as that organization is the governing body in men’s professional golf in the United States. The ATP Tour and the LPGA have an interest in how the Americans With Disabilities Act (the “ADA”) is applied to professional sports competitions.

150. Parent, *supra* note 20, at 145. “There are indications, however, that it has helped foster a sentiment within society that becoming a professional is a right to those who work hard, rather than a privilege offered to those who possess all of the necessary qualifications.”

151. Long, *supra* note 15, at 1377.

152. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass’n, Amici Curiae at 11, *Martin* (No. 00-24).

153. Long, *supra* note 15, at 1380. “When one leaves the sphere and enters more competitive settings—settings in which there are clearly defined winners and losers and in which an artificial advantage for one participant necessarily means a disadvantage for others—issues of fundamental fairness become more troubling.” *Id.*

154. PGA Tour, Inc. v. Martin, 532 U.S. 661, 705 (2001). “The lesson the PGA Tour and other sports organizations should take from this case is to make sure that the same written rules are set forth for all levels of play, and never voluntarily to grant modifications. The second lesson is to end open tryouts.” (Scalia, J., dissenting).

155. *Id.* “I doubt that, in the long run, even disabled athletes will be well served by these

Many anticipate the opening of the “floodgates” as a direct result of this decision by the Supreme Court. Athletes from all sports with various disabilities may attempt to change the rules of competitive settings and thereby change the nature of competitive sports. That should not be a concern as a result of *Martin*. First, the ADA specifically defines “disability” and limits what courts may consider as a disability under the statute.¹⁵⁶ The court looks at “the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment” to determine whether a given disability restricts the manner in which a person can participate in a major life activity.¹⁵⁷ Minor disabilities will not be recognized by the ADA, essentially eliminating any risk of a litigation frenzy. After all, the PGA Tour never argued that Martin was not “disabled” under the ADA. The real issue was whether the PGA Tour should be held to the ADA standards as a specialized, private entity.

A recent decision by the Supreme Court, despite falling under Title I of the ADA, may narrow the reach of the ADA and prevent the floodgates of litigation from opening as a result of *Martin*. In January, 2002, the Supreme Court held in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*¹⁵⁸ that “the [ADA] only covers impairments that affect a person’s daily life and does not apply to conditions that prevent a worker from performing a specific job-related task.”¹⁵⁹ Ella Williams stated that she was fired from a Toyota plant in Kentucky because a painful repetitive-stress injury to her arms and hands prevented her from doing her job: sponging 500 cars a day. The Court stated that “[m]erely having an impairment does not make one disabled for purposes of the ADA.”¹⁶⁰

The Supreme Court had to decide what an employee must prove to demonstrate that she is substantially limited in performing manual tasks. The Court found that it is not enough for an employee to show that she cannot perform the manual tasks her job requires. “To be substantially limited in the specific major life activity of performing manual tasks, . . . an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s lives. The impairment’s impact must also be permanent or long-term.”¹⁶¹ The Court pointed out that some jobs require unique manual tasks that are not necessarily an important part of most people’s lives and to say that people who cannot perform these tasks are

incentives that the Court has created.” (Scalia, J., dissenting).

156. Weinberg, *supra* note 34, at 773 (citing 42 U.S.C. § 12102(2) (defining “disability” as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.”)).

157. *Id.* (citing 28 C.F.R. § 36.104(1)).

158. 2002 WL 15402 (U.S. 2002).

159. Edward Walsh, *Supreme Court Narrows Reach of Disability Law*, WASH. POST, Jan. 8, 2002, available at <http://www.washingtonpost.com/wp-dyn/articles/A13467-2002Jan8.html>.

160. Toyota, 2002 WL 15402, at *8.

161. *Id.* at *1.

disabled would expand the reach of the ADA beyond what Congress intended when it passed the law.¹⁶²

Toyota focused on what constitutes a disability under the ADA. *Martin*, on the other hand, never addressed whether Martin was disabled under the statute and the issue was never challenged by the PGA Tour. While the *Martin* decision did not influence *Toyota*, the ruling in *Toyota* will severely impact the potential lawsuits from various athletes requesting a waiver of a rule under the ADA. The initial danger of the floodgates opening to more lawsuits within athletic competitions that many people expected after *Martin* should no longer be a major concern after *Toyota*. Unlike Martin, athletes will first have to prove to the court that the ADA covers their disability before they attempt to argue the issues presented in *Martin*.

Potential implications resulting from *Martin*, therefore, should not be the fear of more golfers wanting permission to ride carts during competition. Instead, the most dangerous implication of the *Martin* decision is the role the judiciary plays in deciding whether a waiver of a sports rule would fundamentally alter the nature of the competition. If nothing more, *Martin* demonstrates how this expansive power of the Court to decide what is fundamental to a sport is beyond the Court's judicial expertise and should be beyond its reach as well.¹⁶³ Does a Plaintiff have a disability under the ADA? Is a private entity considered a place of public accommodation under Title III, and, if so, what are its duties under the various provisions of the ADA? These are all questions that only a court can decide. It must, however, give ample deference to a governing body on what constitutes a fundamental alteration in this self-contained universe of sports.¹⁶⁴

162. *Id.*

163. Brief for the ATP Tour, Inc. and the Ladies Professional Golf Ass'n, Amici Curiae at 7, 8, *Martin* (No. 00-24), noting,

only those charged by tradition or agreement with enforcing the rules of the game may amend them, else the game itself is fundamentally changed. Since the game is but a collection of its rules, it is, in the end, only what those in charge say it is. The "keepers" of the game must therefore have ultimate control over what does or does not affect the nature of the competition, much the same way an umpire or referee is, by tradition and agreement, the final arbiter of an on-field dispute. It is not so much whether the runner stealing a base was "safe at second," or whether the tennis ball hit the line, as whether the umpire thought it so. In other words, the rule-making is itself part of the game, and its impact cannot be measured by objective criteria (or even, in the case of the stolen base or the long forehand, by absolute truth). It is only the convention that all will follow the same rules, determined by the same governing body, that gives meaning to the game.

164. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001). In asserting that the condition of walking is a substantive rule of competition and that waiving it as to any individual would fundamentally alter the nature of the competition, the PGA Tour's evidence included the testimony of the greatest golfers in history. Arnold Palmer, Jack Nicklaus, and Ken Venturi explained that fatigue can be a critical factor in a tournament, particularly on the last day when psychological pressure is at a maximum. They explained to the Court that allowing one person to use a cart might

The power the Court gave itself in making this decision is a dangerous trend for all professional organizations, which in turn will affect the rules of the sport at all levels of competition.

CONCLUSION

The ADA is an essential statute that, when applied correctly, can provide opportunities to disabled individuals and not put other employees or competitors at an inherent disadvantage. However, as Tiger Woods, the world's greatest golfer, observed, the slightest change can have a large impact in a game where small changes are magnified.¹⁶⁵ Courts must distinguish between recreational applications of the ADA and those associated with professional and competitive settings.

The ADA, for all its good intentions, should have only limited applicability to professional sports. As long as the ADA does not fundamentally alter the nature of the event—a question to be decided in the first instance by the governing body that has the expertise and intimate perspective on the sport—the ADA is needed to provide equal access. It is essential, however, that when applying the ADA to professional sports, courts understand that

[t]he long consistent history of requiring adherence to uniform rules, both in golf and in other sports, reflects a shared understanding of what high-level athletic competition is all about: a test of physical proficiency for different competitors under identical rules. It follows, therefore, that any waiver of a substantive rule for a given competitor is out of keeping with the fundamental premise of professional sports.¹⁶⁶

It is when *equal access turns into an equal opportunity to win* that the ADA is misapplied and the spirit of competition is crushed. Without fair and equal rules, the once-level playing field of competition is altered, to the detriment of all players, no matter their ability.

give a player an advantage over other players who must walk.

165. WOODS, *supra* note 1.

166. Brief for Petitioner at 34, *Martin* (No. 00-24).