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James B. York

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And the Winner Is . . . Trial Lawyers: When Does an Accommodation Under Title III of the ADA Represent a Fundamental Alteration of Competitive Sports?

*PGA Tour, Inc. v. Martin*¹

I. INTRODUCTION

It is a beautiful day at the ball park, the sun is shining high in the sky and a father and son are enjoying a day together watching the great American pastime. The bases are loaded, the game is tied, there are two outs, the count is full, and the home team is up to bat. With sweat dripping off his cap, the opposing pitcher hurls a fastball down the middle of the plate as the umpire cries "strike three." The boy's head drops in disappointment, but his father quickly reminds him that the batter suffers from attention deficit disorder and, because of his disability, he gets an extra strike.²

Baseball fans would certainly agree that limiting a batter to three strikes is an essential and fundamental rule of baseball. Surely, anyone who would actually seek a modification of this rule—a rule as old as the game itself—because of a disability, would be laughed out of court, right? Prior to the United States Supreme Court's decision in *PGA Tour, Inc. v. Martin*, fans could rest comfortably knowing that their games would stay true to the traditions they hold dear. After the decision, however, it appears that no rule, no matter how well established, is safe from a judicial determination that the rule is not fundamental and, thus, may be altered to accommodate individuals with disabilities. In *PGA Tour*, the Supreme Court forever changed when a proposed modification in competitive sports will be denied based on the fundamental alteration defense³ under Title III of the Americans With Disabilities Act

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2. See *id.* at 702-03 (Scalia, J., dissenting). In his dissent, Justice Scalia wrote that "[o]ne can envision the parents of a Little League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball. (If they are successful, the only thing that could prevent a court order giving the kid four strikes would be a judicial determination that, in baseball, three strikes are metaphysically necessary, which is quite absurd.)." *Id.*
With the decision, the Supreme Court opened the floodgates for possible litigation while hurting both competitive sports and disabled athletes.

II. FACTS AND HOLDING

PGA Tour, Inc. ("PGA Tour") is a nonprofit organization that sponsors professional golf tournaments and events presented in three annually occurring tours. There are various ways for players to qualify for these tours, the most common being known as the "Q-School." Any individual may enter the Q-School by obtaining the necessary letters of recommendation and paying the $3,000 entry fee. According to PGA Tour rules, golf carts are permitted during the first two stages of the Q-School. Since 1997, however, golf carts are prohibited during the third and final stage.

Casey Martin is a professional golfer with a disability that falls squarely within the definition set forth in the Americans with Disabilities Act of 1990. Martin has Klippel-Trenaunay-Weber Syndrome, a progressive circulatory disorder resulting in severe pain and atrophy in his right leg. Not only does his disorder make walking painful, but it creates "a significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might

5. PGA Tour, Inc., 532 U.S. at 691-705 (Scalia, J., dissenting).
6. Id. at 665.
7. Id. at 665-66. The Q-School is a three-stage process. Id. Every year, over a thousand contestants begin the first stage, consisting of four, eighteen-hole rounds at various locations with roughly half the contestants qualifying for the second stage, where the field is further narrowed. Id. at 666. Finally, approximately 168 players advance to the final stage, where a 108-hole tournament is played. Id. Typically, the top twenty-five percent gain membership in the PGA Tour, with the rest of the finalists obtaining membership in the NIKE Tour (now called the BUY.com tour). Id.
8. Id. at 665-66.
9. Id.
10. Id. at 666. There are three sets of rules that govern PGA Tour events. Id. The "Rules of Golf" apply to both amateur and professional events and do not prohibit the use of golf carts. Id. The "hard card" on the other hand, applies specifically to PGA professional tours and prohibits the use of golf carts in tournaments except in "open qualifying" events and the seniors tour. Id. at 666-67. Finally, "notices to competitors" are rules designed for particular tournaments and specific conditions within those tournaments. Id. at 667.
11. Id. at 668. "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." Id. (quoting 42 U.S.C. § 12102(2) (2000)).
12. Id. Specifically, Martin's disability "obstructs the flow of blood from his right leg back to his heart." Id.
be required." Because of his disability, Martin was permitted the use of a cart throughout his collegiate career and, after he became a professional, was permitted to use a cart during the first two stages of the PGA’s Q-School. Upon qualifying for the third stage of the Q-School, Martin submitted a request with supporting detailed medical records for permission to utilize a golf cart during the third stage. PGA Tour did not review Martin’s medical records and refused to waive its no cart rule for the final stage of qualification.

Martin filed his original action seeking a permanent injunction in the United States District Court for the District of Oregon, based on the premise that, because PGA Tour is a commercial entity and a public accommodation, it is subject to the ADA’s prohibition of discrimination on the basis of a disability. The honorable Thomas M. Coffin, United States Magistrate Judge, entered partial summary judgment for Martin and, after a bench trial, entered a permanent injunction requiring PGA Tour to allow Martin the use of a cart.

The district court rejected PGA Tour’s argument in its summary judgment motion that Title III of the ADA did not apply to PGA Tour because it was a “private club or establishment” or that the areas reserved for tour competition did not constitute places of public accommodation within the scope of that title. Magistrate Judge Coffin reasoned that PGA Tour is a commercial enterprise rather than a private club, that the statutory definition of public accommodation included golf courses, and that operators of public accommodations could not, 

13. Id.
14. Id. at 668-69. Martin attended Stanford University, which requested and received a waiver from the National Collegiate Athletics Association (“NCAA”) of the rule requiring players to walk and carry their own clubs. Id. at 668. The hard card rules permit the use of carts during the first two stages of the Q-School. Id. at 669.
15. Id.
16. Id.
18. Id. at 1323.
19. Id. at 1327.
20. Id.
in his view, relegate the ADA to only certain areas within a facility by creating separate enclaves within the accommodation.\textsuperscript{24}

At trial, PGA Tour argued that walking the course during a round of golf in a tournament is a crucial element of the competition and part of the substantive rules of the game, and, thus, any waiver of the rule would present a fundamental alteration of the nature of that competition.\textsuperscript{25} Rejecting PGA Tour’s argument, the district court held that the walking-the-course rule was designed to inject an element of fatigue into the game, but that the element of fatigue could not be deemed significant.\textsuperscript{26} The district court further reasoned that, even with a cart, Martin would have to walk approximately twenty-five percent of the course or roughly one and one-fourth miles.\textsuperscript{27} Thus, because of Martin’s condition, he actually experienced a greater amount of pain and fatigue than the other players, and accommodating him with a cart would not fundamentally alter the nature of PGA Tour’s game.\textsuperscript{28}

PGA Tour appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the district court’s ruling.\textsuperscript{29} In the case, PGA Tour renewed its claim that the area of the tournament reserved for tour competition is not a public accommodation because, generally, that area is off limits to the public.\textsuperscript{30} The court of appeals rejected this argument, reasoning that, because any member of the public has a right to pay the entry fee and try out in the Q-School, the behind-the-ropes portion of the tournament is a public accommodation,\textsuperscript{31} and the fact that users of a facility must compete to qualify does not mean that the facility cannot be a public accommodation.\textsuperscript{32} In an analysis similar to that used by the district court, the court of appeals viewed the issue “not [as] whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so.”\textsuperscript{33}

\begin{thebibliography}{9}
\bibitem{24} \textit{Martin}, 984 F. Supp. at 1326-27.
\bibitem{26} \textit{Id.}
\bibitem{27} \textit{Id. at} 1251.
\bibitem{28} \textit{See id. at} 1253.
\bibitem{29} Martin v. PGA Tour, Inc., 204 F.3d 994, 995 (9th Cir. 2000), \textit{aff’d}, 532 U.S. 661 (2001).
\bibitem{30} \textit{Id. at} 997.
\bibitem{31} \textit{Id. at} 999.
\bibitem{32} \textit{Id. at} 998. The court of appeals compared the PGA Tour tournaments to a private university, explaining “[f]or example, Title III includes in its definition ‘secondary, undergraduate, or postgraduate private school[s].’ 42 U.S.C. § 12181(7)(J). The competition to enter the most elite private universities is intense, and a relatively select few are admitted. The fact does not remove the universities from the statute’s definition as places of public accommodation.” \textit{Id.}
\bibitem{33} \textit{Id. at} 1001.
\end{thebibliography}
The Supreme Court granted certiorari and affirmed the Ninth Circuit's decision. The Supreme Court held that when golfers pay PGA Tour a fee for the chance to compete in its competitions and subsequent tour events, it is appropriate to classify those golfers as "clients or customers" under Title III of the ADA, and allowing a golfer with a disability the use of a cart despite the tour walking requirement is not a modification that would "fundamentally alter the nature" of the competition and, thus, is required by Title III of the ADA.

III. LEGAL BACKGROUND

A. Foundation: The Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") was enacted in 1990 with a broad congressional goal of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards." The ADA defines discrimination as a "failure to make reasonable modifications," and liability for such failure may only be avoided if the modification "would fundamentally alter" the good or service.

In order to achieve its broad goals, Congress designed the ADA to cover a wide range of disabilities, as well as specific types of entities subject to the ADA's regulations. The ADA is separated into four titles, each distinguished

34. PGA Tour, Inc. v. Martin, 532 U.S. 661, 691 (2001). Justice Stevens wrote the opinion of the Court. Justice Scalia, with whom Justice Thomas joined, filed a dissenting opinion. Id. at 664.
35. Id. at 679-81.
36. Id. at 689-91.
38. 42 U.S.C. § 12101(b)(1)-(2) (2000). The Act provides:
   It is the purpose of the chapter—
   (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
   (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
   (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
   (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.
39. See Roy R. Galewski, The Casey Martin and Ford Olinger Cases: The
by the type of entity being regulated. Title I of the statute is applicable to
discrimination within an employment relationship. Discrimination involving
a "public entity" is covered under Title II of the statute. A "public entity" is a
function of any State or local government, including agencies and departments.
The requirements for providing telecommunications access are covered under
Title IV of the ADA and most commonly cover services to individuals suffering from hearing or speech-impaired disabilities.

Title III, the provision of the ADA applied in PGA Tour, Inc. v. Martin, prohibits discrimination by "public accommodations." The statute does not
define "public accommodation." Rather, it provides an exhaustive list of the
types of entities that will be considered public accommodations. A golf course
is specifically listed within the statute, along with other types of recreational
facilities. The primary purpose of Title III is to allow those individuals with
a disability the "full and equal enjoyment" of the services offered by the public accommodations without being subject to discrimination. The statute provides
a broad description of what constitutes discrimination, including the "failure to
make reasonable modifications in policies, practices, or procedures ... unless the
entity can demonstrate that making such modifications would fundamentally
alter the nature of such goods, services, facilities, privileges, advantages, or
accommodations."

44.  See Galewski, supra note 39, at 427.
46.  42 U.S.C. § 12182(a) (2000). "No individual shall be discriminated against on
the basis of disability in the full and equal enjoyment of the goods, services, facilities,
privileges, advantages, or accommodations of any place of public accommodation by any
person who owns, leases (or leases to), or operates a place of public accommodation."
accommodation includes: "a gymnasium, health spa, bowling alley, golf course, or other
50.  42 U.S.C. § 12182(a) (2000); see supra note 46.
The Rehabilitation Act of 1973 served as the foundation for the Americans with Disabilities Act. With its original goal of protecting government employees, the Rehabilitation Act has proved a valuable tool in interpreting the provisions of the ADA. Particularly, courts have used the language of the Rehabilitation Act to interpret the requirements for providing "reasonable accommodations" for individuals with disabilities without causing an "undue hardship" on the public accommodation. In *Southeastern Community College v. Davis* the Supreme Court grappled with these issues and forever linked the Rehabilitation Act to the ADA. In that case, the Supreme Court reasoned that, by the plain meaning of the Rehabilitation Act, the word "reasonable" could not include any action that would present undue financial and administrative burdens on the accommodation or that would result in any "fundamental alteration in the nature" of the accommodation. Following this decision, Congress included the "fundamental alteration" language in the ADA when it was enacted in 1990, but left the term largely undefined, and, thus, open to court analysis.

**B. The Supreme Court Analyzes the "Fundamentally Alters" Exception**

The Supreme Court began its analysis of the "fundamentally alters" exception with a discussion of its *Southeastern Community College v. Davis* opinion. In *Davis*, the Supreme Court held that the modifications necessary for a nursing school to admit a student with a serious hearing disability and train

53. See Galewski, supra note 39, at 428.
54. See Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995).
58. Justice Powell wrote the opinion of the Court. *Davis*, 442 U.S. at 400.
59. Id. at 410.
60. See id.
63. Id. at 400. Francis B. Davis was diagnosed with a "bilateral, sensori-neural hearing loss," and a hearing aid helped her in recognizing "gross sounds occurring in the
that individual properly under the Rehabilitation Act would result in a "fundamental alteration in the nature" of the nursing program and was far more than the "modification" the language of the Rehabilitation Act required.

In its decision, the Supreme Court analyzed two important factors. First, the Court went into a detailed analysis of the individual student with the disability. The Court considered the extent of the individual's disability, as well as the possibility of technological advancements that would aid the individual disability. The individual's specific abilities in lipreading and effective communication skills were also analyzed. Second, the Court examined the character of the nursing program in detail. The Court went to great lengths to describe the nature of the nursing program and the importance of the curriculum and effective communications, especially in emergency situations. With these considerations in mind, the Court concluded that the modifications to the nursing program would be so extensive that they would essentially alter the very nature of the program itself. There is a difference, the Court noted, between "evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps." The latter would require such modifications as to put an undue hardship on individual accommodations.

When considering a case under the Rehabilitation Act, the Supreme Court found "two powerful but countervailing considerations." In Alexander v. Choate, the Court noted that there is a continuing tension between individual analysis of the disabled person as required by the statute and the analysis of the accommodation, which is necessary to keep the statute within "manageable bounds." Without this consideration, "[t]he formalization and policing of this
process could lead to a wholly unwieldy administrative and adjudicative burden." 77

After its decision in Alexander v. Choate, however, the Supreme Court began to shift the balance of its analysis, placing more weight on the consideration of the disabled individual. The change in the balance began in School Board of Nassau County v. Arline. 78 In that case, the Supreme Court again considered a disability under the Rehabilitation Act and determined that a detailed analysis of the facts surrounding the individual's disability is essential to achieve the goal of "protecting handicapped individuals from deprivations." 79 Only after engaging in this detailed analysis will the Court then look to the two-part test cited in Davis 80 to determine if the accommodation is reasonable and would not result in a fundamental alteration of the entity. 81 The case marked the beginning of a permanent shift in the "fundamental alteration" analysis.

C. The Exception Applied to Competitive Sports

Prior to the decision in PGA Tour, Inc. v. Martin, 82 the Supreme Court had yet to hear a case applying Title III of the ADA to competitive sports. There were, however, a number of federal circuit court of appeal and district court decisions on the issue. Through these cases, a specific analysis was developed in which the nature of the individual accommodation is considered in detail.

In Sandison v. Michigan High School Athletic Association, Inc. ("MHSAA"), 83 two high school students challenged the MHSAA's rule prohibiting students from competing after reaching the age of nineteen. 84 Both students suffered from learning disabilities, causing them to fall behind the rest of their class and, thus, they were already nineteen when their senior year began. 85 The students sued under the ADA and the Rehabilitation Act and the district court granted a preliminary injunction allowing them to compete in high school sports. 86 Reversing this decision, the United States Court of Appeals for Sixth Circuit held that any waiver of the age rule would fundamentally alter the

77. Id. at 298.
79. See id. at 287.
81. Arline, 480 U.S. at 287.
83. 64 F.3d 1026 (6th Cir. 1995).
84. Id. at 1028.
85. Id.
86. Id.
MHSAA’s sports program. The Sixth Circuit held that, in applying Title III of the ADA, the “critical inquiry will typically be the nature of the place to which the disabled individual alleges unequal access.” Specifically, Title III of the ADA protects individuals with disabilities from “unequal enjoyment of ‘place[s] of public accommodation.’” The court focused on the purposes behind the age restriction and noted that it would be a “daunting task” to conduct an individual evaluation of every student affected by the age restriction to determine if accommodation would be unreasonable. Thus, the court found that such a waiver would result in a fundamental alteration.

The Sixth Circuit heard a similar case involving MHSAA’s age restriction in McPherson v. Michigan High School Athletic Association, Inc. Under the rule challenged in that case, students were limited to eight semesters of high school eligibility. A student with a learning disability brought suit under the ADA and Rehabilitation Act, challenging the rule. Citing Sandison, the court held that imposing a duty on the MHSAA to make an individual inquiry into each student’s level of maturity and athletic ability would force “near-impossible determinations” and impose an “immense financial and administrative burden.”

The Eighth Circuit Court of Appeals weighed in on high school athletic age restrictions in Pottgen v. Missouri State High School Activities Association (“MSHSAA”). Again, a student with a learning disability that forced him to repeat two grade levels challenged the MSHSAA’s rule limiting participation to students eighteen years of age and under. In approving the association’s denial of a waiver, the Eighth Circuit determined that the rule was critical and that waiving it would result in a fundamental alteration of the program. The court examined the facts surrounding the association, explaining that if individual

87. Id. at 1035.
88. Id. at 1036.
89. Id. (quoting 42 U.S.C. § 12182(a) (2000)).
90. Id. at 1035. The purpose of the age restriction is to prevent injury to players and to avoid the advantage an older, more physically mature, athlete might have. Id.
91. Id. at 1037.
92. Id.
93. Id.
94. 119 F.3d 453 (6th Cir. 1997).
95. Id. at 455.
96. Id. at 457.
97. Id. at 462 (citing Sandison, 64 F.3d at 1028).
98. 40 F.3d 926 (8th Cir. 1994).
99. Id. at 928.
100. Id. at 931.
inquiries were required of every student athlete, the association would face an "undue financial and administrative burden."\textsuperscript{101}

Finally, in \textit{Olinger v. U.S. Golf Association},\textsuperscript{102} ("USGA") the United States Court of Appeals for the Seventh Circuit faced a case of a disabled golfer challenging the association’s no-cart rule.\textsuperscript{103} Considering facts almost identical to those in \textit{PGA Tour}, the court upheld the decision to deny the waiver of the no-cart rule.\textsuperscript{104} In the opinion, the court focused on the specific program involved and not the specific circumstances of the disabled individual.\textsuperscript{105} Primarily, the court determined that allowing a disabled individual to ride a cart was not unreasonable in the general sense, but forcing the USGA to analyze every disabled individual that applied to ride in a cart in order to make sure that the individual would not have an advantage over the other players would result in an unreasonable administrative burden on the program.\textsuperscript{106} Furthermore, the only way the USGA could effectively deal with this problem was to offer every player the option of riding in a cart, which would be a fundamental alteration.\textsuperscript{107}

\textbf{IV. \textsc{The Instant Decision}}

\textbf{A. The Majority}

In \textit{PGA Tour, Inc. v. Martin},\textsuperscript{108} the United States Supreme Court began by stating that the ADA was enacted to curb the ongoing discrimination of individuals with disabilities\textsuperscript{109} by eliminating the isolation and segregation of those individuals in the critical areas of society.\textsuperscript{110} Furthermore, the Court noted that the ADA created a "broad mandate"\textsuperscript{111} to deal with discrimination and that the Act's "most impressive strengths" were its "comprehensive character."\textsuperscript{112}

\begin{flushleft}
\textsuperscript{101} \textit{Id.}\\
\textsuperscript{102} 205 F.3d 1001 (7th Cir. 2000), \textit{vacated by} 532 U.S. 1064 (2001).\\
\textsuperscript{103} \textit{Id.} at 1001. Olinger suffered from "bilateral avascular necrosis," which significantly impaired his ability to walk. \textit{Id.}\\
\textsuperscript{104} \textit{Id.} at 1001-07.\\
\textsuperscript{105} \textit{Id.}\\
\textsuperscript{106} \textit{Id.} at 1006-07.\\
\textsuperscript{107} \textit{Id.}\\
\textsuperscript{108} 532 U.S. 661 (2001).\\
\textsuperscript{109} \textit{Id.} at 675 (citing S. REP. NO. 101-116, at 20 (1989)); \textit{see also} H.R. REP. NO. 101-485, pt. 2, at 50 (1990).\\
\textsuperscript{110} \textit{PGA Tour, Inc.}, 532 U.S. at 674-75; \textit{see also} 42 U.S.C. § 12101(a)(2), (3) (2000).\\
\textsuperscript{111} \textit{PGA Tour, Inc.}, 532 U.S. at 675; \textit{see also} 42 U.S.C. § 12101(b) (2000).\\
\textsuperscript{112} \textit{PGA Tour, Inc.}, 532 U.S. at 675 (quoting Hearing Before the Subcomm. on the Handicapped on the Senate Comm. on Labor and Human Res., 101st Cong. 197
\end{flushleft}
After deciding that Title III applied to PGA Tour events as a public accommodation, the Supreme Court turned its analysis to PGA Tour's "fundamentally alters" defense. The Court stated that a two-part test must be considered when deciding if a particular modification of a rule would fundamentally alter the game itself. First, a court must consider if the proposed modification would fundamentally alter the nature of the game or "might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally." Second, the court must consider whether, even if the accommodation does not fundamentally alter the game, it would have the effect of giving a disabled player an advantage over the other athletes. In doing this, the personal circumstances of the individual disability must be evaluated so as not to run "counter to the clear language and purpose of the ADA."\(^\text{115}\)

Initially, the Court determined that the "essence of the game has been shot-making—using clubs" so that the use of carts is not counter to the fundamental character of the game of golf. In fact, the Court stated that in today's game, carts are encouraged because they often speed up play and are sources of revenue. Furthermore, the "Rules of Golf" does not forbid the use of carts, and, because PGA Tour's walking rule is based on optional provisions in the appendix to the Rules of Golf, it is not an essential element of the game. This was established by the fact that golf carts are used in the Senior PGA Tour, the open qualifying events for PGA Tour's tournaments, the first two stages of the Q-School, and, until 1997, the third stage of the Q-School as well.\(^\text{119}\)

Next, the Court turned to PGA Tour's arguments. First, the Court dismissed PGA Tour's position that the game of golf played professionally is different and distinguished from the game played by thousands of amateurs across the globe. PGA Tour argued that "[t]he goal of the highest-level competitive athletics is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to

\(^{113}\) Id. at 680-90.

\(^{114}\) Id. at 682.

\(^{115}\) Id. at 688.

\(^{116}\) Id. at 683.

\(^{117}\) Id. at 685.

\(^{118}\) Id.

\(^{119}\) Id. at 685-86.

\(^{120}\) Id. at 686-88.
identical substantive rules." Any waiver of those rules, PGA Tour argued, would fundamentally alter the nature of the game.

Instead of analyzing the game of golf and the similarities and differences between golf played professionally and played by amateurs, the Court focused on the walking rule and its effect on the game of golf generally. PGA Tour submitted that the walking rule is in place to "inject the element of fatigue into the skill of shot-making." As a result, PGA Tour argued that allowing Martin to use a cart would fundamentally alter the game because he would not be subject to the fatigue the other players must endure. The Supreme Court rejected PGA Tour's walking rule argument on three bases. First, the Court held that in the game of golf, it is impossible to guarantee that all competitors will play under the same conditions every time. Moreover, the Court noted that changes in the weather, luck, and chance also play a part in determining the final outcome. In fact, the Court found that these factors may have a "greater impact" on the outcome of a golf tournament than the fatigue resulting from the walking rule.

Next, the Court agreed with the district court finding that the fatigue the players have as a result of the walking rule is insignificant. Relying on expert testimony, the Court analyzed the effects of walking the course and concluded that "because golf is a low intensity activity, fatigue from the game is primarily a psychological phenomenon." The Court stressed that when players are given the option of riding in a cart, most golfers still choose to walk, either as a stress reliever or to get a better feel for the conditions of the course. As a result, the

121. Id. at 686 (quoting Brief for Petitioner at 13, PGA Tour, Inc., 532 U.S. 661 (2001) (No. 00-24)).
122. Id; see also Brief for Petitioner at 37, PGA Tour, Inc., 532 U.S. 661 (2001) (No. 00-24).
123. PGA Tour, Inc., 532 U.S. at 686-90; see also Galewski, supra note 39, at 416-20.
125. Id.
126. Id. at 686-87.
127. Id. at 687. In order to demonstrate that luck is a factor in the game of golf, the Court noted a story in which a player, after driving the ball 322 yards on a par four hole, saw his ball bounce off another player's putter and into the hole. Id. at 687 n.48.
128. Id. at 687.
129. Id.
131. PGA Tour, Inc., 532 U.S. at 687-88. Nike Tour golfer Eric Johnson testified in the district court proceeding that "walking allows him to keep in rhythm, stay warmer
Court found the walking rule not to be an "outcome affecting" rule, and, thus, its waiver would not fundamentally alter the nature of the game.\textsuperscript{132} The Court's third reason for rejecting PGA Tour's argument was that, assuming some element of fatigue is injected into the game by the walking rule, Martin easily endured greater fatigue, even with a cart, than his walking opponents did.\textsuperscript{133} The Court again relied on expert testimony from the district court proceeding to determine that Martin still must walk some portions of the course (from the cart to his ball and back) and due to Martin's disability, he actually suffered a greater amount of fatigue than the other players.\textsuperscript{134} Thus, the Court found the walking rule was not compromised by allowing Martin the use of a cart.\textsuperscript{135}

Finally, the Court looked at the language of the ADA\textsuperscript{136} and decided that PGA Tour failed to make an individual inquiry into Martin's disability.\textsuperscript{137} The Court held that under Title III of the ADA, an "individualized inquiry"\textsuperscript{138} must be made with regard to whether an entity can make modifications to accommodate a disability without fundamentally altering the entity itself. Finding that there is "no exemption for elite athletics"\textsuperscript{139} under Title III, the Court noted that waiving the walking rule could be done in "individual cases" without causing a fundamental alteration in the game.\textsuperscript{140} The Court admitted that this view of the ADA "imposes some administrative burdens" on PGA Tour but decided that Congress intended to place this burden on the operator of a public accommodation.\textsuperscript{141} The Court argued that a public accommodation such as PGA Tour might receive a "handful" of requests to modify its game due to a person's disability, so it would be able to make the necessary inquiry into the individuals with disabilities and modify or waive rules to give those individuals access to the competition.\textsuperscript{142}

\textsuperscript{132} Id. at 688-89.
\textsuperscript{133} Id. at 690.
\textsuperscript{134} Id.; see also Martin, 994 F. Supp. at 1252.
\textsuperscript{135} PGA Tour, Inc., 532 U.S. at 690.
\textsuperscript{137} PGA Tour, Inc., 532 U.S. at 688.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 689.
\textsuperscript{140} Id.
\textsuperscript{141} Id. at 690-91.
\textsuperscript{142} Id.
B. The Dissent

The dissent disagreed with the analysis of the majority as well as the "two-part test" it established to resolve such disputes. Justice Scalia began his dissent with the "fundamentally alters" issue by stating that the language of Title III "does not require a public accommodation to alter its inventory to include accessible or special goods with accessibility features that are designed for, or facilitate the use by, individuals with disabilities." The "common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated." Thus, the dissent argued there was no basis for considering an alteration of the rules of a competition because 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."146

Next, the dissent analyzed the first part of the two-part test developed by the majority. The dissent disagreed altogether with the first part of the test: whether or not an essential element of the game would be modified by the accommodation. First, the dissent argued that because all rules are arbitrary (essentially just made up by someone at some point in history), no court, not even the Supreme Court, can say that a rule is nonessential if the rules of the game deem it to be essential. Justice Scalia wrote that it is "silly" to engage in such analysis because it is quite absurd to say that any of a game's arbitrary rules are essential. Furthermore, the only support for the rules of any game is "tradition" and what the ruling bodies in each sport deem significant. For all of these reasons, the dissent agreed with PGA Tour's position that a modification of any rule is a fundamental alteration.

Turning its attention to the second prong of the majority's test, the dissent began by dismissing the majority's reliance on the idea that luck or chance is a critical factor of the game making it impossible to assure identical conditions for every player and holding that "individual ability may not be the sole determinant of the outcome." The dissent countered this position by noting that chance is randomly distributed, but that allowing Martin the use of a cart "gives him a

143. See id. at 691 (Scalia, J., dissenting). The dissent was joined by Justice Thomas.
144. Id. at 698 (Scalia, J., dissenting) (quoting 28 CFR § 36.307 (2000)).
145. Id. (Scalia, J., dissenting) (quoting Doe v. Mutual of Omaha Ins., 179 F.3d 557, 560 (7th Cir. 1999)).
146. Id. at 699 (Scalia, J., dissenting).
147. Id. at 699-701 (Scalia, J., dissenting).
148. Id. at 700-01 (Scalia, J., dissenting).
149. Id. at 701 (Scalia, J., dissenting).
150. Id. (Scalia, J., dissenting); see also id. at 687.
"lucky’ break every time he plays." 151 Furthermore, even if there are “nonhuman variables” to the game, those variables apply equally to all players and the “fact does not justify adding another variable that always favors one player.” 152

Finally, the dissent argued that by analyzing the fatigue issue of the walking rule and holding that Martin would still be just as fatigued as every other player, the majority set a dangerous precedent. 153 By “measuring the athletic capacity of the requesting individual” and asking whether or not the proposed modification gives that individual a competitive advantage given his or her specific circumstances, the majority established that all future cases must be decided “on the basis of individualized factual findings,” making those future cases “numerous, and a rich source of lucrative litigation.” 154 Not only would this be an administrative nightmare, going above and beyond an undue burden, the statute itself “provides no basis for this individualized analysis.” 155 The dissent argued that, in fact, the statute is designed to allow a disabled individual equal access to the game, not to provide that individual with an equal chance at winning. 156 Furthermore, because competitive sport is the measurement, by uniform rules, of unevenly distributed talent, any effort to spread out that distribution “artificially” by giving players exemptions from particular rules will in effect “destroy the game.” 157

Justice Scalia further wrote that, in the long run, the majority’s analysis may have the net effect of harming players with disabilities. 158 Justice Scalia argued that, even though the majority’s decision will force sports organizations to review their rules and apply them equally at every level of competition, it also encourages organizations “never voluntarily to grant any modifications” and end tryouts that are available to the public at large. 159

V. COMMENT

The Supreme Court in PGA Tour, Inc. held that allowing Martin, a disabled individual, the use of a cart despite PGA Tour rules to the contrary did not represent a modification that would fundamentally alter the nature of PGA Tour,

151. Id. at 702 (Scalia, J., dissenting).
152. Id. (Scalia, J., dissenting).
153. Id. (Scalia, J., dissenting).
154. Id. at 702-03 (Scalia, J., dissenting).
155. Id. at 703 (Scalia, J., dissenting).
156. Id. (Scalia, J., dissenting).
157. Id. (Scalia, J., dissenting).
158. Id. (Scalia, J., dissenting).
159. Id. at 704-05 (Scalia, J., dissenting).
a public accommodation under Title III of the ADA. The Court developed a two-part test for analyzing similar situations involving the application of Title III to competitive sports. Under the first part of the test, a court must determine if the proposed modification is of a rule that is an essential aspect of the game. Then, under the second part, a court must look at the facts surrounding the disabled individual to determine if the modification would give that individual a competitive advantage over the other players. This test is a clear departure from the analysis used by the majority of courts in applying Title III and the fundamentally alters defense to competitive sports cases.

As the dissent recognized, the majority's analysis and the test it utilized will open the flood-gates of litigation. The Court failed to provide any standard that organizers of competitive sports or, for that matter, any business owner could possibly use to determine whether a particular accommodation would represent a fundamental alteration of the sport or business. In PGA Tour, Inc., PGA Tour argued that walking is fundamental to its tournaments. The Court, however, analyzed whether walking is fundamental to the game of golf in general. The majority failed to analyze the individual aspect of PGA Tour's business, instead focusing on the rules of the game of golf generally. This has the effect of allowing the judicial system to make ad hoc decisions of which elements of sports are fundamental to the general character of the game and which elements can be eliminated without recognizing the individual characteristics of the organizer. As the dissent noted, all athletic rules are arbitrary; a person at some point in time just made them up, so who is to say which rules are fundamental to the game?

In fact, when any sport is viewed in the abstract, it would not be difficult for judges to justify ad hoc decisions through a one-sided, detailed analysis of the individual's particular disability and how difficult it is for the individual to participate during the course of the game.

For example, suppose Martin was competing in a marathon and requested the use of a cart; surely everyone would argue that running is an essential

161. PGA Tour, Inc., 532 U.S. at 682-83.
162. Id. at 682.
163. Id. at 683.
165. PGA Tour, Inc., 532 U.S. at 686.
166. Id. at 683-88.
167. Id.
168. Id.
169. Id. at 700-01 (Scalia, J., dissenting).
element of the sport, but is the length of the marathon an essential element? What if a runner had difficulty with steep hills due to his or her disability? Would the courts decide that running marathons outdoors is not an essential element, forcing further competitions to be run inside so that every runner is affected equally? Using the majority's test, a judge could certainly say that the fundamental aspect of a marathon is running the required distance in the best possible time; therefore, accommodations made to the particular course would not represent a fundamental alteration. Ad hoc decisions such as this make it almost impossible for operators of athletic competitions to decide what accommodations must be made without enduring endless litigation. Justice Scalia is correct in stating that this will inevitably result in public accommodations refusing to modify any portion of athletic competitions and instead taking their chances in court.170

If, however, the court used a test that considered the individual aspects of the public accommodation, the organizers of sporting events would be better able to apply self-evaluation techniques to determine if the needed accommodation would represent a fundamental alteration. For example, in the marathon analogy above, the purpose of the particular marathon in question may be more than the actual event itself. The organizers may want to publicize the downtown area of a city or provide increased advertisement to local businesses. In that situation, running the marathon on the actual streets of the city may be a fundamental aspect of that particular race.

In the PGA Tour, Inc. decision, the Court should have analyzed the individual aspects of PGA Tour's events, not the game of golf in general. In developing its test, the Court should have considered the differences between PGA Tour's professional events and the game of golf played on the amateur level across the country. In the arena of professional sports, owners and organizers of events are businesses. Those who participate are, for the most part, participating to make a living. Thus, organizers must consider the financial aspect of the event as much a part of the game as any of the actual rules of the game itself. In order to draw top players and survive as a business, organizers must attract advertising revenue and obtain a fan base for merchandising and ticket sales. Though it was not argued at trial,171 PGA Tour may have an interest in having players walk the course so that fans have a chance to interact with the players or so that advertisers have a better opportunity for their products to be seen. A high school athletic organization, on the other hand, would not have these concerns. Instead of revenue and advertising concerns, it would, for example, have an interest in seeing that its eligibility requirements are met.172

170. Id. at 704-05 (Scalia, J., dissenting).
While these are hypothetical interests, they are, however, examples of the types of interests that should be considered when analyzing areas of public accommodations. Thus, any test used must take into account each individual aspect of the public accommodation in order to determine which aspects are fundamental to the nature of those activities.

The real tragedy of the decision is that the majority had a clear opportunity to provide a rule that would allow operators of athletic competitions to decide for themselves what modifications would result in a fundamental alteration of their respective sports. The Supreme Court majority could have used an analysis similar to the analysis used by the courts in Sandison,\textsuperscript{173} McPhearson,\textsuperscript{174} and Pottgen,\textsuperscript{175} which looks at the individual aspects of the operator to determine if the proposed rule change would represent a fundamental alteration of that particular competition. The Court could have provided clear guidelines for operators of athletic competitions to evaluate themselves, avoiding undue administrative and financial burdens. By doing this, the Court would have provided a useful tool for operators of athletic competitions while still reaching a decision that allowed Martin the use of a cart in PGA Tour’s events.\textsuperscript{176}

All of this would have been accomplished by using a test much like that proposed by Justice Scalia in the dissent to determine whether a modification fundamentally alters an organizer’s game. By analyzing the game of golf as played on the PGA Tour and PGA Tour events, the Court could have concluded that PGA Tour’s use of carts in the first rounds of the “Q-school,” its hard card rules permitting carts in specific instances (to speed up play before or after a delay, etc.), and the use of carts in other PGA Tour events demonstrate that walking is not a fundamental aspect of the PGA Tour game of golf. There is no need to examine the “essence” of the game of golf generally; rather the focus is on the game as played by the particular accommodation.

The same sort of analysis should be used with respect to any public accommodations, not just competitive sports. For example, suppose a recent law school graduate, with a disability that limits his or her ability to work forty hours a week, signs a contract to work for a local law firm that requires attorneys to work more than fifty hours a week. Would requiring the law firm to change its policy in order to accommodate the new attorney represent a fundamental alteration of the firm’s business? Applying the test used in \textit{PGA Tour, Inc.},\textsuperscript{177}

\textsuperscript{173} Sandison v. Mich. High Sch. Athletic Ass’n, 64 F.3d 1026 (6th Cir. 1995).
\textsuperscript{174} 119 F.3d 453 (4th Cir. 1997).
\textsuperscript{175} 40 F.3d 926 (8th Cir. 1994).
\textsuperscript{176} PGA Tour, Inc. v. Martin, 532 U.S. 661, 690 (2001).
\textsuperscript{177} \textit{Id. at 682-83.}
a court would look at the general practice of law in the abstract and make an ad hoc determination of the fundamental nature of the length of legal work weeks. This is an absurd result. Instead, the court should use a test which takes into account the individual law firm and its interest in having a fifty-hour work week. It may be that the firm specializes in being available to its clients twenty-four hours a day and that such availability is fundamental to its business. On the other hand, the firm may just want to squeeze as many hours as it can out of young associates, an aspect that is most likely not fundamental to its practice. In any case, it is the individual business characteristics that are important in determining the fundamental aspects of an accommodation, and these characteristics should be the foundation of any test used by the courts to make a decision under Title III. The analysis of the Supreme Court in the PGA Tour, Inc. decision fails to do this and, instead, relies on ad hoc judicial determinations, opening the floodgates of potential litigation and creating uncertainty for all public accommodations.

VI. CONCLUSION

The holding in PGA Tour, Inc. v. Martin, though it ultimately reaches the correct result, fails to provide a standard that organizers of athletic competitions can use to make individual decisions whether or not proposed rule modifications would result in a fundamental alteration of their competition under Title III of the ADA. Instead, the decision provides a test by which judges make ad hoc determinations of whether the proposed rule to be changed is fundamental to the game in a general sense. The Court had the opportunity to follow the general analysis of other federal court decisions and provide an individualized test for organizers to apply but failed to do so. As a result, the Court has created uncertainty in this area of law and opened up the floodgates of potential Title III litigation. Operators of athletic competitions now have the incentive to refuse to modify voluntarily athletic competitions and take their chances in court. This is a loss for both public accommodations and disabled individuals, while the litigation business chalks up yet another victory.

JAMES B. YORK