BRIEF OF THE KLIPPEL-TRENAUNAY SYNDROME SUPPORT GROUP, AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE*

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INTERESTS OF THE *AMICUS CURIAE*[1]

The Klippel-Trenaunay Syndrome Support Group ("Support Group") is a private, unincorporated, not-for-profit membership association that was founded in 1986, with a principal office in Edina, Minnesota. The Support Group's mission is to provide support for Klippel-Trenaunay ("K-T") Syndrome patients and their families.[2] The Support Group is an associate member of the National Organization of Rare Disorders. Among its activities, the Support Group provides the following: a clearinghouse for correspondence between members; maintains and makes available a list of current medical literature pertaining to K-T Syndrome; conducts biannual meetings of patients and families in Rochester, Minnesota, in conjunction with optional medical appointments at the Mayo Clinic; distributes a periodic newsletter of shared experiences; maintains an internet web page;[3] and generally acts as a support group for sharing experiences and information about this rare disorder.

The Support Group is the most knowledgeable entity in the country with respect to the extremely rare disability that affects the Appellee, Casey Martin. Although no two cases of K-T Syndrome are exactly alike, Support Group families know well the physical, emotional, and spiritual endurance and stamina required to live every day with this rare, complex, disfiguring, and often disabling condition of birth.

An inability to walk distances is frequently associated with K-T Syndrome when the condition affects the person's legs or feet. Due to a host of complicating factors — such as bone anomalies, bleeding and clotting disorders, blood pooling, poor circulation, lymphedema, and pain — many persons with K-T Syndrome, like Casey Martin, must often limit extensive walking, running, jumping, and other strenuous physical activities. Because of the availability of

1. The parties have consented to the filing of this brief. Their stipulations are included in the addendum to this brief.

2. As discussed in Appellee Casey Martin's brief, Martin has been diagnosed with Klippel-Trenaunay-Weber Syndrome. The medical community has frequently used the terms Klippel-Trenaunay Syndrome and Klippel-Trenaunay-Weber Syndrome interchangeably. See Description of Klippel-Trenaunay Syndrome <http://www.k-t.org/description.html> (including a detailed description of the symptoms and etiology of K-T Syndrome). K-T Syndrome has been defined as "a rare congenital malformation characterized by the triad of arteriovenous or capillary vascular malformations, atypical varicosities, and bony or soft tissue hypertrophy usually affecting one extremity." Anila G. Jacob et al., Klippel-Trenaunay Syndrome: Its Spectrum and Management <http://www.k-t.org/proceed.html> (discussing a Mayo Clinic study of 252 K-T Syndrome patients seen from 1956-1995).

3. See Klippel-Trenaunay Syndrome Support Group Home Page <http://www.k-t.org>.

golf carts, however, golf is one competitive sport in which such persons can fully participate.

SUMMARY OF ARGUMENT

Put simply, this case is about discrimination. Plaintiff/Appellee Casey Martin overwhelmingly proved to the district court that he has a disability that affects his ability to walk, that he is capable of excellence in the sport of golf, that a modest modification — the use of a golf cart — will permit him to compete in competitions and on golf courses operated by Defendant/Appellant PGA Tour, Inc. ("PGA"), and that this modification is not a fundamental alteration of the game. Nonetheless, the PGA would like this Court to allow it to be able to discriminate against Casey Martin on the basis of his disability.

Title III of the ADA applies to the PGA in its operation of golf courses for purposes of its competitive events. This conclusion is compelled by the plain meaning of Title III which precludes discrimination "on the basis of disability" by any person who "operates a place of public accommodation" with respect to the "full and equal enjoyment of... the services, facilities, privileges, advantages, or accommodations" of the "place of public accommodation." 42 U.S.C. §12182(a) (1994). The statute specifically lists a "golf course" as a place of public accommodation; thus, owners and operators of golf courses are covered by Title III.

Despite this explicit coverage in the statute, the PGA has urged this Court to find that a golf course is not really a golf course during PGA events because the general public is not invited to engage in exercise or recreation on the course during the PGA events and must remain behind gallery ropes. These arguments lack support in both the legislative history and subsequent interpretations. By including "golf courses" in a listing of public accommodations alongside gymnasiums, health spas, bowling alleys, and "other place[s] of exercise or recreation," Congress intended only to delineate certain examples within a larger category — not to create artificial limits within each identified place of accommodation. Similarly, by attempting to bifurcate the golf course into zones covered by Title III and playing areas somehow exempt from the ADA, the PGA has misconstrued the law. The ADA was not intended solely to increase access for persons with disabilities to *attend* places of public accommodation as spectators; it also speaks to *participation* in public accommodations by persons with disabilities. A decision that Title III does not reach the playing areas during PGA events would give the PGA carte blanche to discriminate not only against Casey Martin, but against any and all persons with disabilities who otherwise

meet the qualifications to compete, to serve as caddies, to serve as scorekeepers, or for any other position ordinarily found "inside the gallery ropes."

The district court also correctly found that, in light of Casey Martin's disability, the use of a golf cart is a reasonable modification that does not fundamentally alter the game of golf. The PGA has conceded that Martin has a disability that is covered by the ADA. Once Martin introduced evidence that a golf cart would be a reasonable modification to accommodate his disability in the general sense, the PGA then had the burden of proving that cart use by Martin would fundamentally alter the nature of the public accommodation. The PGA did not meet that burden. Indeed, the PGA adamantly refused to make any type of individualized inquiry about Martin's specific condition or how his request for a cart related to his disability.

The game of golf, even at its most prestigious levels, is all about shot-making and getting the ball from the tee to the green, and then into the hole in the fewest strokes. It is not about walking, and it is not about how one gets from one shot to the next. Even the PGA allows cart use for all golfers in its Senior Tour and in portions of its Qualifying Tournament. Martin's use of a cart for moving about the course does not alter the competition at all — much less in some fundamental way. Martin did not request to get a "head start" on each hole by teeing his ball from a different spot from other competitors, and he did not ask to throw the ball instead of striking it with a club. He wants to compete in a sport in which he has mastered the primary and fundamental skills: striking and putting the golf ball with a minimum number of strokes. Because of his disability, however, he simply cannot walk the full course. Allowing him to ride a cart is a simple accommodation for his disability, and it allows him a chance to compete on a level playing field. It provides no advantage; it just gives him the type of opportunity that the ADA is all about.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT TITLE III OF THE ADA APPLIES TO THE PGA BECAUSE IT OWNS, LEASES, AND OPERATES PLACES OF PUBLIC ACCOMMODATION

A. Title III Plainly Applies to the PGA

A statute must be accorded its plain meaning. In the ADA context, a unanimous Supreme Court recently determined that notwithstanding contentions

that Congress did not "envisio[n] that the ADA would be applied to [the

> matter under review]," in the context of *an unambiguous statutory text* that is *irrelevant*. As we have said before, the fact that a statute can be "applied in situations not expressly anticipated by Congress does *not demonstrate ambiguity. It demonstrates breadth.*"

Pennsylvania Dep't of Corrections v. Yeskey, 118 S.Ct. 1952, 1955-56 (1998) (citations omitted) (emphasis added) (applying Title II of the ADA to state prisoners).

Title III of the ADA provides that "[n]o 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 . . . operates a place of public accommodation." 42 U.S.C. §12182(a). In turn, the statute defines "discrimination" to include the failure by a private entity that owns, leases, or operates places of public accommodation "to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities" absent a showing by the private entity that "making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." Id. §12182(b)(2)(A)(ii).

Moreover, Title III expansively defines "public accommodation" to include twelve categories of private entities and specifically identifies "a gymnasium, health spa, bowling alley, *golf course*, or other place of exercise or recreation." Id. §12181(7)(L) (emphasis added).[4] As an owner or operator of golf courses,

4. The term "public accommodation" is defined in §12181(7) to include:

> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;
>
> (B) a restaurant, bar, or other establishment serving food or drink;
>
> (C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
>
> (D) an auditorium, convention center, lecture hall, or other place of public gathering;
>
> (E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
>
> (F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
>
> (G) a terminal, depot, or other station used for specified public transportation;
>
> (H) a museum, library, gallery, or other place of public display or collection;
>
> (I) a park, zoo, amusement park, or other place of recreation;
>
> (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or

the PGA is plainly covered by Title III.

The PGA has attempted to give the definition in 42 U.S.C. §12181(7)(L) a narrow reading by suggesting that the act only reaches golf courses when they are being used as places of exercise or recreation. This construction is in conflict with the statute. There was no intent for the language, "other place of exercise or recreation," to be limiting. Instead, for each of the twelve categories of public accommodation, "the legislation only lists a few examples and then, in most cases, adds the phrase 'other similar' entities." Staff of House Comm. on Educ. & Labor, 101st Cong., Legis. History of P.L. 101-336, at 157 (Comm. Print 102-A) (from Senate Report). Congress intended "that the 'other similar' terminology should be construed liberally." Id. With regard to this specific subsection, the legislative history reveals:

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

Id.

This reveals a clear intention to address a wide variety of places and has nothing to do with particular uses within those places. Indeed, the drafters of the ADA intended to expand significantly from the public accommodations covered under the Civil Rights Act of 1964 (limited to lodging, eating, and entertainment). See National Council on Disability, Equality of Opportunity: The Making of the Americans with Disabilities Act 101-02 (1997).

B. The District Court Correctly Rejected the PGA's Attempt to Bifurcate the Golf Course into Areas Covered by Title III and Areas That Are Not Covered.

The PGA also attempts to create an artificial distinction between those parts of the golf course that are set up for spectators during its tournaments ("outside the gallery ropes"), and the playing areas of the course ("inside the ropes"). In

> other place of education;
> (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
> (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

this regard, the PGA likens the area outside the ropes to the seating area in a stadium or auditorium and suggests that Title III applies only to spectator areas, not places "inside the ropes" that are for the competitors. This is a mistaken interpretation of the ADA. Title III was not intended solely to increase access for persons with disabilities to *attend* places of public accommodation; it also addresses *participation* in public accommodations. Title III identifies as discriminatory "a denial of the opportunity" for a person with a disability "to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations" of the covered entity. 42 U.S.C. §12182(b)(1)(A)(i). During the legislative process, Congress took note of then-Attorney General Thornburgh's testimony "that we must bring Americans with disabilities into the mainstream of society 'in other words, *full participation in* and access to all aspects of society.'" Staff of House Comm. on Educ. & Labor, 101st Cong., Legis. History of P.L. 101-336, at 308 (Comm. Print 102-A) (from House Report) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 267, 317. In the ADA, Congress also responded to testimony that identified discrimination as "the failure to make reasonable modifications in policies to allow *participation*" by people with disabilities, and observed that "it can constitute a violation [of Title III] to impose criteria that limit the *participation* of people with disabilities." Id. at 309, 378 (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. at 319, 388.

There is nothing in the legislative history to suggest that Congress intended to exempt the sports world from the general application of Title III. Indeed, one of the original bill sponsors offered the following testimony:

> Society has neglected to challenge itself and its misconceptions about people with disabilities. When people don't see the disabled among our co-workers, or on the bus, or at the *sports field*, or in a movie theater, most Americans think it's because they can't. It's time to break this myth. The real reason people don't see the disabled among their co-workers, or on the bus, or at the *sports field*, or in a movie theater is because of barriers and discrimination. Nothing more.

Staff of House Comm. on Educ. & Labor, 101st Cong., Legis. History OF P.L. 101-336, at 943 (Comm. Print 102-B) (emphasis added) (statement of former House Majority Whip Tony Coehlo, who also revealed his battle with epilepsy).

The PGA's argument that the only area of the golf course that is covered by Title III is that "outside the ropes" cannot withstand close scrutiny. For example, in *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Ariz. 1992), the court made no distinction between the playing field and the seating area in finding that the Little League's policy limiting coaches in wheelchairs to

the dugout — and not on the field in the coaches' box — was in violation of Title III.

Similarly, the PGA has insisted that Title III applies only to the seating areas of sports arenas, not to any of the areas "between the bleachers" or "inside the ropes." The trial court rejected this contention by observing that a disabled manager of a professional baseball team would have to be accommodated in accessing the dugout. *Martin v. PGA Tour, Inc.*, 984 F. Supp. 1320, 1327 (D. Or. 1998). This interpretation has other support in the law. In 1996, the United States reached a settlement agreement with the Atlanta Committee for the Olympic Games regarding an ADA dispute concerning construction of the Olympic Stadium for the 1996 Atlanta Olympics. In addition to provisions relating to accessible seating for fans, that agreement addressed accessibility for the dugouts, locker rooms, dressing rooms, and accessible routes to each dugout from the playing field. See Settlement Agreement Concerning the Olympic Stadium (May 15, 1996) <http://www.usdoj.gov/crt/ada/stadiumo.htm>. Similarly, the Disability Rights Section of the Civil Rights Division of the Justice Department has issued a policy statement regarding the ADA requirements for the construction of new sports stadiums. That guide not only addresses accessible seating, but also requires accessible routes that "connect the wheelchair seating locations with the stage(s), performing areas, arena or stadium floor, dressing or locker rooms, and other spaces used by performers." U.S. Dep't of Justice, Accessible Stadiums 2, <http://www.usdoj.gov/crt/ada/stadium.pdf>. Another section of this policy statement specifically addresses access to playing fields, lockers, and spaces used by players and performers. Id. at 3.[5] Also, the Recreation Access Advisory Committee of the U.S. Architectural and Transportation Barriers Compliance Board has issued advisory guidelines for sports facilities that include recommendations for access to such places as dugouts and the field-of-play. See Recreation Access Advisory Committee, Recommendations for Accessibility Guidelines: Recreational Facilities and Outdoor Developed Areas, at 2, 6 (July 1994) (developed for U.S. Arch. and Transp. Barriers Compliance Board).

Many other people participate "inside the ropes" of sporting events in addition to the players. For example, in professional football it is not unusual, and even expected, for one to see coaches, managers, referees, trainers, and even

5. In 1996 the Justice Department communicated these guidelines to Acting Commissioner Selig of Major League Baseball with respect to stadium construction for both major league and minor league stadiums. Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Allan L. Selig, Acting Commissioner of Baseball (Oct. 22, 1996) <http://www.usdoj.gov/crt/foia/cltr196.txt>.

team owners in the area not open to the general public. And this list does not begin to include the array of band members, cheerleaders,[6] photographers, and other members of the press who are a regular part of every game. Given the PGA's analysis, Title III would not be applicable to any such persons with disabilities.

Other examples point out the fallacy of the PGA's attempt to exempt from the ADA all non-public portions of otherwise covered places of public accommodations. Private auditoriums, concert halls, convention centers, and lecture halls are all covered places of public accommodation. 42 U.S.C. §§12181(7)(C)-(D). Under the PGA's strained line of reasoning, only the areas of public seating in such facilities would be subject to Title III given that the general public is ordinarily not invited to be at the lectern or on stage for speeches or performances. But suppose that a featured speaker at a continuing legal education course has a disability and is in a wheelchair,[7] or an accomplished pianist must make use of a wheelchair. Surely, Title III requires the facilities to make the speaking areas or performing areas accessible. Indeed, the implementing regulations require access to "performing areas" in assembly facilities. See 28 C.F.R. Part 36, Appendix A, §4.1.3(5)(a) (1997). Similarly, there are many private schools, colleges, law schools, and graduate schools in this country that are very selective and limited in their enrollment, yet they are clearly covered by Title III. See 42 U.S.C. §12181(7)(J); *Martin*, 984 F. Supp. at 1327 (discussing application of ADA to private schools even though their "corridors, classrooms, and restrooms" are off-limits to the general public).

The PGA has taken the position that persons with disabilities can have no place in professional or "elite" sports competitions. However, other professional sports leagues have had a more accommodating attitude. For example, Jim Abbott, who was born without a right hand, was able to pitch for many years for the New York Yankees and Anaheim Angels. Indeed, the American League adjusted its rules for Jim Abbott. As Mr. Abbott stated,

> It allowed me to spin the ball even though the strictest interpretation of the rules state that a pitcher must remain completely still before his delivery. But since I couldn't keep the ball in my glove — I had to switch the glove to my left hand immediately after I finished my release

6. Cf. Sue Anne Pressley, A "Safety Blitz; Texas Cheerleader Loses Status After Others' Parents Complain," Washington Post, Nov. 12, 1996, at A1 (discussing issues regarding removal from cheerleading squad of a Texas high school cheerleader born with cerebral palsy who uses a wheelchair).

7. For example, Texas Supreme Court Justice Greg Abbott must use a wheelchair for his disability; he is a frequent speaker throughout Texas.

to the plate — baseball made an exception.

Jim Abbott, It's Easy to Accommodate, *Golf World*, Feb. 20, 1998, at 92.

Jim Abbott is not the only person with a disability to play in the Major League. Curtis Pride is currently an outfielder for the Atlanta Braves — he happens to be deaf. Similarly, Kenny Walker, who is deaf, enjoyed success with the Denver Broncos in the National Football League "often while using a sign language interpreter on the sidelines." Ted Curtis, "Cart" Blanche, ABA Journal, April 1998, at 34. Tom Dempsey, a former kicker for the New Orleans Saints who still shares the record for the longest field goal in the National Football League, was allowed to wear a special shoe to accommodate his disabled foot. See Murray Chass, Pro Football: 63-Yard Field Goal, N.Y. Times, Nov. 9, 1970, *reprinted in* N.Y. Times Encyclopedia of Sports Vol. I, at 149-50 (Gene Brown ed., Arno Press 1979) (describing record kick and special kicking shoe for Dempsey, who "was born with half a right foot"). Additionally, the National Basketball Association welcomed Magic Johnson back to the sport after he revealed his HIV status.

At the collegiate level, the courts have recognized Title III's applicability to the governing body, the NCAA, as an operator of places of public accommodation. See *Tatum v. NCAA*, 992 F. Supp. 1114, 1121 (E.D. Mo. 1998); *Ganden v. NCAA*, 1996 WL 680000, at *9-11 (N.D. Ill. 1996); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 487-489 (D. N.J. 1998) (denying NCAA motion for summary judgment). The NCAA, of course, operates "elite" national championships, including men's and women's golf championships. As described in detail in Appellee Casey Martin's brief, the NCAA permitted him the use of a golf cart in its events that determined the collegiate national championship.[8]

Even within the ambit of "elite" professional golf tournaments, one past champion with a disability stands out. Tommy Armour, a member of the PGA Hall of Fame and World Golf Hall of Fame, won the 1927 U.S. Open, the 1930 PGA Championship, and the 1931 British Open. Armour played his "entire career with one eye and metal plates in his head and left arm — the results of injuries sustained in the British tank corps in World War I." George Peper et al., Golf in America: The First One Hundred Years, at 236-37 (Abrams 1994). Given the PGA's argument, the PGA *could*, if they so chose, discriminate

8. It is interesting to note that the 1999 NCAA Men's Golf Championship will be held at Hazeltine National Golf Club in Chaska, Minnesota. That same course hosted the United States Open (conducted by *Amicus Curiae* USGA) in both 1991 and 1970. Surely the *same* golf course cannot be fully covered by Title III when operated by the NCAA for its collegiate national championship, yet not covered when operated by the USGA for its national championship.

against the next Tommy Armour. At its most basic level, this case is about *discrimination.* The PGA has chosen to discriminate against Casey Martin because of his disability. If the PGA's approach to Title III and its "inside the ropes" argument is sustained, the PGA *could* adopt rules that would preclude persons with visual disabilities from playing the game. The PGA *could* bar golfers with epilepsy. The PGA *could* bar deaf golfers. In fact, at the summary judgment hearing below, counsel for the PGA "categorically" asserted that a "handicapped caddie would not have to be accommodated" because the tournament playing area "is not a place of public accommodation where the handicapped caddie is. It is not an area that is open to the general public." SER 4 [hearing tr. 76]. The trial court properly rejected this contention. Title III applies to the PGA as it operates its golf tournaments, and discrimination because of disability is unwarranted and unlawful.

II. THE DISTRICT COURT CORRECTLY FOUND THAT PERMITTING CASEY MARTIN TO USE A GOLF CART IN PGA EVENTS IS A REASONABLE ACCOMMODATION THAT DOES NOT FUNDAMENTALLY ALTER THE GAME OF GOLF

Title III prohibits the "failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford . . . services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . services, facilities, privileges, advantages, or accommodations." 42 U.S.C. §12182(b)(2)(A)(ii) (1994). With respect to the burdens of proof required by this section, the trial court relied on *Johnson v. Gambrinus Co./Spoetzel Brewery*, 116 F.3d 1052, 1059 (5th Cir. 1997) (holding that a brewery's refusal to allow a blind individual to take his guide dog on a tour of the brewery violated Title III notwithstanding the brewery's blanket "no animals" policy). Under *Johnson*, the Title III plaintiff, once having established a disability, must prove that "a modification was requested and that the requested modification is reasonable. The plaintiff meets this burden by introducing evidence that the requested modification is reasonable in the general sense, that is, reasonable in the run of cases." Id. On this element the trial court found that "the use of a golf cart is certainly not unreasonable in the game of golf" and that "a cart is a reasonable modification to accommodate his disability in the game of golf in the general sense, that is in the general run of cases." *Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1248 (D. Or. 1998).

Once an initial showing has been made that a requested modification is reasonable in a general sense, then *Johnson* instructs that "the defendant must make the requested modification unless the defendant pleads and meets its burden of proving that the requested modification would fundamentally alter the nature of the public accommodation." *Johnson*, 116 F.3d at 1059. Moreover, *Johnson* stresses that the defendant's burden regarding an alleged fundamental alteration must "focus[] on the *specifics of the plaintiff's or defendant's circumstances* and not on the general nature of the accommodation." Id. at 1060 (emphasis added).

Although the PGA has now conceded that Casey Martin's K-T Syndrome constitutes a disability for purposes of the ADA, it has never made an individualized inquiry about his specific condition or need for the requested modification. There is ample support for the requirement that an individualized assessment must be undertaken. See, e.g., *Crowder v. Kitagawa*, 81 F.3d 1480, 1486 (9th Cir. 1995) (stating "the determination of what constitutes reasonable modification is highly fact specific, requiring case-by-case inquiry"); *Anderson*, 794 F. Supp. at 345 (invalidating application of Little League's blanket rule banning coaches in wheelchairs from the coach's box where no individualized assessment was conducted). The legislative history is also instructive on this point. During the legislative process, Congress observed that "public accommodations are required to make decisions *based on facts applicable to individuals* and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do." Staff of House Comm. on Educ. & Labor, 101st Cong., Legis. History of P.L. 101-336, at 375 (Comm. Print 102-A) (from House Report) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 267, 385. That sentiment is emphasized repeatedly in the Congressional findings set forth in the ADA. 42 U.S.C. §12101(a) (1994).[9] It is also worth noting that the U.S. Justice Department and the NCAA recently entered into a Consent Decree in the U.S. District Court for the District of Columbia in which the NCAA has agreed to conduct *individualized* waiver determinations with respect to students with learning disabilities who do not meet the NCAA's initial-eligibility standards. See NCAA Consent Decree (May 26, 1998) <http://www.usdoj.gov/crt/ada/ncaa.htm>.

Allowing Casey Martin to use a cart as an accommodation for his disability

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

does not fundamentally alter the game of golf as it is played in PGA events. The game is defined as "playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the Rules." Rules of Golf, Rule 1-1 <http://www.usga.org/rules/rule/ index.html>. Nothing in the rules of the game requires walking. The "walking rule" was added by the PGA, but not even for all of its events. As found by the district court, there are exceptions for the Senior PGA Tour as well as the first two stages of the PGA's Qualifying School Tournament. *Martin*, 994 F. Supp. at 1248 n.9. The PGA imposes no penalty strokes on those who opt to use carts in such events. Id. at 1248. Indeed, the golfers who advance to the third and final stage of the Qualifying School become eligible for competing in either PGA Tour or Nike Tour events, depending on their performance in the third stage. Thus, golfers who use carts in the early rounds of the Qualifying School can become eligible to play in PGA-sponsored events. A player can also earn the right to play in a single PGA tournament by playing well in that week's qualifying event for the tournament, and carts are permitted for such qualifying rounds. Moreover, the PGA routinely permits players to ride in carts during PGA competitions for administrative convenience such as after a player retrieves a ball hit out of bounds and returns to the tee box or when a lengthy distance separates a green and the next tee. See Id. at 1249 (noting carts used "to shuttle players from the 9th green to the 10th tee where considerable distance is involved"). Cart use is simply not unknown in PGA events.[10]

The game of golf is about shot-making. Golf, even PGA-level competition, is not a contest in which speed, mobility, or quickness are essential (in contrast to sports such as tennis, soccer, basketball, football, and running). The lowest score wins in PGA events. There is no bonus reduction in strokes for fast play; there are no style points for speed or walking form; the golfers are not required to run between shots; and there is no addition of penalty strokes for moving up the fairway too slowly (although time limits apply once a ball has been reached and before it is struck). The game is about skilled shot-making, not walking.

Casey Martin is extremely skilled at shot-making in the game of golf; he has proven that he can meet the general qualifications of the PGA; he just has a disability that limits his ability to walk. A simple accommodation of the use of a cart allows him to play the game at the highest level, and does not alter the nature of the competition. There are many golfers, including the undersigned counsel, who are *excellent* walkers, but can only dream of playing golf with the

10. In addition, and apparently without any impairment to the integrity of the competition, both the NCAA and the PAC 10 athletic conference allowed carts to accommodate Martin at the collegiate level. See id. at 1248.

skills of Jack Nicklaus, Tiger Woods, or Casey Martin. Unlike the PGA's stars, these fine walkers, but lousy golfers, lack the shot-making skills that are the fundamental aspects of the game. In the words of one commentator:

> Of course Martin should get a cart. . . . Golf fans want to see golfers play golf. I've never heard anybody yet say, "Hey, let's go over to [hole] 9 and watch Seve walk!" Fans don't care if a pro walks, rides or pogo-sticks to the next shot — they just want to see him hit it. . . . Martin isn't asking for any help playing the game. He's only asking for a lift to his ball. Golf isn't an obstacle course.

Rick Reilly, Give Casey Martin a Lift, Sports Illustrated, Feb. 9, 1998, at 140.

The PGA has advanced a "slippery slope" argument that mandating the provision of a golf cart to Casey Martin would result in cases that would, for example, require the sport of basketball to move the three-point line forward for a disabled player, or direct that sponsors of swimming events give disabled swimmers a head start. Such hypotheticals are misplaced; they would alter the nature of the underlying competition. In fact, some accommodations in the game of golf might fundamentally alter the competition. For example, some persons with K-T Syndrome have the condition in their arm(s) or trunk. Their disability could keep them from being able to hit the ball very far. It might preclude their being able to swing the golf club at all. In those situations, accommodation requests to tee the ball much closer to the hole (like the PGA's suggestion of a head-start for the swimmer) or to throw or roll the ball instead of stroking it with a club could constitute fundamental alterations of the PGA's competitions.

Additionally, although the trial court found that the PGA's walking rule has a "cognizable purpose" of injecting "the element of fatigue into the skill of shot-making," the court further found that the fatigue factor involved in walking the golf course during PGA events "cannot be deemed significant under normal circumstances." *Martin*, 994 F. Supp. at 1250. As highlighted in Casey Martin's principal brief, the record is replete with evidence that the physical fatigue factor stemming from walking the course is minimal. Significantly, however, the PGA has glossed over and largely ignored the individual aspects of Casey Martin's disability: he endures substantial additional fatigue and significant pain associated with his disability even when accommodated with a cart. See Id. at 1251-52 ("fatigue plaintiff endures just from coping with his disability is undeniably greater" than ordinary walking of the course; "plaintiff is in significant pain when he walks and even when he is getting in and out of the cart"). In light of Casey Martin's substantial fatigue and pain caused by his disability, he might have asked to be allowed to play only 9 of the requisite 18 holes, then multiply his score by 2. But *that* would be a fundamental alteration

of the game of golf — his score would not be based on shot-making over the full course. Instead, he has merely asked for the use of a cart to transport him between shots.[11]

The PGA and USGA have also argued that cart use will give Casey Martin an advantage over other golfers. In making this assertion, the PGA apparently presumes that an able-bodied golfer, if permitted to use a cart, would have an advantage over other able-bodied golfers during a PGA tournament.[12] Even if a cart were to provide an advantage to another able-bodied golfer, the proper focus should be on whether the accommodation is a reasonable modification for the affected individual with the disability. The point of the ADA is to level the playing field for otherwise qualified individuals with disabilities. Cf. *Schmidt v. Methodist Hospital*, 89 F.3d 342, 344 (7th Cir. 1996) ("ADA is designed to level the playing field for the more than 43,000,000 Americans who have one or more physical or mental disabilities."). A cart does not give Casey Martin an advantage; it levels the playing field with able-bodied golfers by giving him the opportunity to compete.

An analogy to the education field is useful on this point. A common accommodation for a student with a learning disability is to provide additional time for examinations. See Laura F. Rothstein, Higher Education and Disabilities: Trends and Developments, 27 Stetson L. Rev. 119, 123 n.19 (1997); cf. *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 856-58 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1103 (finding accommodations such as extra examination time to be adequate, while rejecting additional requests for a part-time schedule and home-based exams). So, if a law school were to accommodate a student with dyslexia by providing time and a half for exams, that would be a typical accommodation to level the playing field for that student. Although the granting of extra time to a non-disabled student could well be an advantage, the same cannot be said with regard to the otherwise qualified student

11. It is worth noting that the Recreation Access Advisory Committee of the U.S. Architectural and Transportation Barriers Compliance Board has issued advisory guidelines for new golf course construction that "have as an underlying premise that the game of golf played by persons with disabilities *will be via the use of a golf car or similar means of mobility*" and state that "it is *unrealistic to believe* that persons with severe mobility impairments will be able to play a round of golf via manual ambulation." See Recreation Access Advisory Committee, Recommendations for Accessibility Guidelines: Recreational Facilities and Outdoor Developed Areas 106 (July 1994) (developed for U.S. Arch. and Transp. Barriers Compliance Board) (emphasis added).

12. Even this surmise is without foundation. At trial it was revealed that once the preliminary injunction was issued in this cause to permit Casey Martin to use a cart during the 1997 Qualifying Tournament, the PGA made cart use optional for all 168 competitors; however, only a handful of the golfers chose to use one. If there were an advantage, surely many more of the golfers would have availed themselves of the opportunity.

with dyslexia. Just like the cart for Casey Martin, the extra time for the hypothetical student's reading disability simply gives him an opportunity to compete.

Another argument against cart use that has surfaced in this case is that of tradition, although it was specifically rejected by the trial court. *Martin*, 994 F. Supp. at 1250 n.11. Relying on tradition as a means of upholding a discriminatory practice rings hollow. Rules and policies based on long-standing tradition have certainly not negated laws prohibiting discrimination based on race or gender and cannot do so with respect to the ADA. Indeed, cart use is perhaps not steeped in long-standing tradition because it involves a relatively recent technological advance. Moreover, tradition has not kept the game of golf from evolving in other aspects. Clubs no longer have hickory shafts; those gave way first to steel, and later to graphite. Most players' woods now have metal or titanium heads rather than persimmon. Tradition simply has not halted alterations in either club or ball developments *even though* changing club and ball designs can have an impact on distance and scores — true fundamental aspects of the game.

Casey Martin's use of a golf cart in PGA events simply does not cause any fundamental alteration of the game. Golf, even professional golf, is not a speed sport; it is not an endurance sport. The method by which the players get to the ball is irrelevant. Winning is based on the total number of strokes, not the method of moving about the course. The trial court's findings should be upheld.

CONCLUSION

The ADA affects millions of people. At the time of its enactment, Congress found that some 43 million Americans have one or more disabilities. 42 U.S.C. §12101(a)(1) (1994). By the end of 1994, that number had risen to 54 million. John M. McNeil, Current Population Reports; Americans with Disabilities: 1994-95, at 1 (U.S. Dep't of Comm., Economics & Stat. Admin., Census Bureau) (Aug. 1997). With regard to the ages common for players in PGA events, the Census Bureau reported: "Among the 95 million people 22 to 44 years old, 14.9 percent had a disability, and 6.4 percent had a severe disability." Id. at 2. As Congress recognized in enacting the ADA, "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . . ." 42 U.S.C. §12101(a)(9).

The overarching purpose of the ADA is to grant persons with disabilities the

opportunity to participate fully in life, and not to be forced to the back rows or excluded entirely. Most PGA stars and celebrities started out as ordinary people who developed their shot-making skills to an extraordinary level. Casey Martin has similarly developed his golf skills to an exceptional level; however, he simply cannot walk the whole golf course. He should not be forced to the sidelines — outside the ropes. The ADA clearly allows Casey Martin the opportunity to compete on an equal basis with other professional golfers — particularly given that the simple accommodation of providing him a cart does not fundamentally alter the game.

Two of the ADA's sponsors, Senator Tom Harkin and former Senator Robert Dole, have been outspoken in their support for Casey Martin's legal position in this case. See Athelia Knight, Politicians Tee Off for Martin, Washington Post, Jan. 29, 1998, at C9. As Senator Dole observed about Martin, "PGA does not mean Please Go Away. He's here to play."

The ADA is all about inclusion and opportunity. As stated by Jim Abbott, the Major League pitcher who competed and succeeded although he lacked a right hand, "As a society, we are so much better off with people like Casey Martin, who show us that heart is just as important as talent, who only want an opportunity to compete against the best in their profession. That is what this case is about." Jim Abbott, It's Easy to Accommodate, Golf World, Feb. 20, 1998, at 92.

The district court's decisions in this matter should be affirmed.

Dated: August 17, 1998