No. 00-24

In the Supreme Court of the United States

PGA TOUR, INC., PETITIONER

v.

CASEY MARTIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181 to 12189 (1994 & Supp. IV 1998), regulates standards for competitors in athletic competitions held at places of public accommodation.

2. Whether Title III may require a professional sports organization to accommodate a disabled competitor by waiving a rule of athletic competition.

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INTEREST OF THE UNITED STATES

This case presents important questions concerning the application of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181 to 12189 (1994 & Supp. IV 1998), to athletic competitions held at places of public accommodation. Pursuant to 42 U.S.C. 12186(b), the Department of Justice has promulgated regulations that implement Title III's provisions, see 28 C.F.R. Pt. 36. The Attorney General also has substantial enforcement responsibilities under Title III. 42 U.S.C. 12188(b). This Court's decision on the scope of Title III's coverage and its construction of the "fundamental alteration" defense in the context of competitive events could have a significant impact on the Department's ability to enforce Title III's protections.

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as * * * public accommodations * * * [and] recreation." 42 U.S.C. 12101(a)(3).

Title III of the Act mandates 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 owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182(a). Congress identified twelve broad categories of "public accommodation[s]" covered by Title III, including "a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment"; an

"auditorium, convention center, lecture hall, or other place of public gathering"; and a "gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation." 42 U.S.C. 12181(7)(C), (D) and (L).[1] Congress then identified specific conduct that would violate the general prohibition against discrimination, including

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. 12182(b)(2)(A)(ii).

2. Petitioner is a non-profit association of professional golfers organized "to promote and operate tournaments for the economic benefit of its members." Pet. App. 46a. Petitioner sponsors three golf tours. Its most elite competition is the PGA Tour, followed by the Nike Tour, and the Senior Tour for golfers over age 50. *Id.* at 2a. Petitioner leases and operates golf courses across the country for its competitions. *Ibid.* The primary means of gaining entry to the PGA and Nike Tours is to compete in petitioner's three-stage qualifying school tournament. The competition is open to any member of the public who pays the entry fee and submits two letters of reference. *Id.* at 41a-42a.

Respondent is a professional golfer who has a circulatory disorder in his right leg that makes it medically necessary for him to use a golf cart rather than walk the golf course. Pet. App. 2a, 18a. In 1997, respondent competed successfully in the first two rounds of petitioner's qualifying school

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[1] Title III exempts from its coverage certain public accommodations controlled by religious organizations and private clubs. 42 U.S.C. 12187.

tournament and advanced to the final round. That same year, petitioner abandoned its historic practice of permitting golf-cart usage in the final round of its tournament, J.A. 267, and refused to make an exception for respondent, Pet. App. 3a.

Respondent filed suit under Title III of the Disabilities Act seeking an injunction requiring petitioner to permit him to use a golf cart during competitions. J.A. 97. The district court granted partial summary judgment for respondent, Pet. App. 41a-55a, holding that petitioner operates a place of "public accommodation" at the golf courses at which it conducts its tournaments. *Id.* at 51a-55a. Following a bench trial, the district court ruled that petitioner's failure to modify its walking rule to accommodate respondent's disability violated Title III. Pet. App. 16a-40a. Accepting petitioner's assertion that the walking rule is designed "to inject the element of fatigue into the skill of shot-making," *id.* at 32a, the court concluded that the fatigue caused by walking "cannot be deemed significant under normal circumstances," *id.* at 33a, and that permitting respondent to use a cart would not give him a competitive advantage because "[t]he fatigue [respondent] endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot," *id.* at 35a.

3. The court of appeals affirmed. Pet. App. 1a-15a. The court held that the golf courses remain places of public accommodation during petitioner's tournaments, *id.* at 4a-8a, reasoning that the "fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation," especially where "[a]ny member of the public" who pays the entry fee and supplies letters of recommendation may compete, *id.* at 7a. The court also ruled that permitting respondent to use a cart was a "reasonable" modification, which did not "fundamentally alter the nature of the PGA and Nike Tour tournaments," *id.* at 8a-15a,

because permitting respondent to use a cart would not give him an advantage over other golfers in "[t]he central competition [of] shot-making," *id.* at 10-11.

SUMMARY OF ARGUMENT

1. Petitioner's operation of golf courses during its tournaments falls squarely within Title III's compass. Title III expressly identifies "golf courses," places of "exercise," and "any place of exhibition or entertainment," as "public accommodations" subject to Title III's terms. Petitioner's suggestion that only spectators at such venues enjoy Title III's protections cannot be reconciled with that straightforward statutory text. Furthermore, Congress's express purpose to afford individuals with disabilities comprehensive protection against discrimination and to promote social and economic integration foreclose the unnaturally narrow construction of that language that petitioner proposes.

The legislative history and consistent regulatory interpretation confirm that Congress meant exactly what it said. Discrimination in access to athletic services and facilities, not just for spectators but also for participants, was one of the problems considered by Congress. Congress also specifically addressed the application of the Disabilities Act to rules imposed by professional sports organizations on their athletes. Further, the Department of Justice's implementing regulations, technical guidance, and enforcement activities have long interpreted and applied Title III as pertaining to competitive athletics.

Finally, petitioner's arguments that respondent is denied protection under the Disabilities Act because respondent is an independent contractor, rather than a "client or customer" of petitioner, fail. The assumption that respondent is an "independent contractor" and not a "client" is dubious, and petitioner's independent contractor argument ignores the statutory text, structure, and relevant administrative interpretations. Likewise, the contention that Title III

protects only an economic marketplace of "clients and customers" lacks any viable anchor in the statutory text and is foreclosed by legislative history and rudimentary principles of statutory construction.

2. The district court and court of appeals appropriately considered the relevant factors in concluding that a waiver of petitioner's walking rule would not fundamentally alter its competitions. The courts below found that no written rules or other documentation supported the claim that the game of competitive golf is intended to measure walking endurance, rather than shot-making skills. Furthermore, given respondent's disability, use of a cart would afford him no competitive advantage; indeed, most golfers prefer to walk for tactical reasons. Finally, numerous exceptions already are made to the walking rule both by other competitive golfing organizations and by petitioner, including exceptions for when balls are lost or long distances separate holes. Given that record, the courts below reasonably concluded that, if petitioner can accommodate players who lose their golf balls, it can equally accommodate respondent's disability.

ARGUMENT

I. THE GOLF COURSES ON WHICH PETITIONER CONDUCTS ITS COMPETITIONS ARE PUBLIC ACCOMMODATIONS SUBJECT TO TITLE III OF THE AMERICANS WITH DISABILITIES ACT

A. Petitioner's Golf Course Operations Fall Squarely Within The Language Of Title III

The plain text of Title III encompasses petitioner's tournaments conducted at golf courses. Title III broadly prohibits (1) "any person who owns, leases (or leases to), or operates" (2) a "place of public accommodation" from discriminating against an individual on the basis of that individual's disability (3) in the provision of "goods, services, facilities, privileges, advantages, or accommodations." 42

U.S.C. 12182(a). First, the district court and court of appeals found (Pet. App. 2a, 51a), and petitioner does not dispute, that it is a private entity (42 U.S.C. 12181(6)) that "leases" and "operates" golf courses during its tournaments.[2]

Second, the golf courses on which petitioner conducts its tournaments are "place[s] of public accommodation." Title III expressly lists a "golf course, or other place of exercise or recreation" as a covered public accommodation. 42 U.S.C. 12181(7)(L). Moreover, during competitions, the golf course also operates as a covered "place of exhibition or entertainment," 42 U.S.C. 12181(7)(C), in the same manner as a sports stadium or concert hall. See also Pet. Br. 10 ("The PGA TOUR is 'part of the entertainment industry.'").

Third, the opportunity to compete in petitioner's tournaments for prize money and professional advancement is a "good," "service," "privilege," or "advantage" offered by the public accommodation, just as the opportunity to take college-admission tests and bar examinations, or to compete in a beauty pageant or casino night may be offered by an auditorium or other "place of public gathering" (42 U.S.C. 12181(7)(D)).

That straightforward reading of Title III's text comports with Congress's express findings and purpose in enacting the Disabilities Act. Congress intended that the Disabilities Act's coverage be "comprehensive," 42 U.S.C. 12101(b)(1), and ensure that individuals with disabilities enjoy "full participation" in society, rather than continue to be relegated to "lesser * * * programs [and] activities," 42 U.S.C. 12101(a)(5) and(8).

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[2] That petitioner's operation of the courses is temporary does not relieve it of its obligations under Title III. See 28 C.F.R. Pt. 36, App. B, at 629 (definition of covered persons "is quite extensive" and applies "even if the operation is only for a short time"); see also Dep't of Justice, *The Americans with Disabilities Act: Title III Technical Assistance Manual* 3 (Nov. 1993) (*Manual*).

Petitioner contends (Br. 22-23) that Title III's coverage of golf courses, stadiums, concert halls, and similar places is limited to the spectators who attend events at those locations. The short answer is that Title III's text contains no such qualification. To the contrary, the description of golf courses as places of "exercise" is most naturally read to refer to the playing course itself and not the gallery. Furthermore, the coverage of golf courses, stadiums, and concert halls is unqualified; if Congress wished to limit Title III's coverage to spectators, it could have said "the seating area of" or "the viewing area of" those facilities. But Congress did not. The Disabilities Act thus "plainly covers" golf courses, as facilities for recreation and for exhibition and entertainment, "*without* any exception that could cast the coverage of [petitioner] into doubt." *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 209 (1998).

B. The Legislative History Of The Disabilities Act Supports Its Application To The Playing Field For Competitive Athletics

The legislative history confirms what Title III's plain language says. "[B]ecause discrimination against people with disabilities is not limited to specific categories of public accommodations," S. Rep. No. 116, 101st Cong., 1st Sess. 11 (1989), Congress deliberately crafted a broad definition of public accommodations to provide "people with disabilities the opportunity to compete on an equal basis," 42 U.S.C. 12101(a)(9), and to ensure "access to all aspects of society," S. Rep. No. 116, *supra*, at 11. See also *id.* at 59 (definition of public accommodation "should be construed liberally"); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 35, 100 (1990). In particular, the Committee Reports left no doubt that coverage of sport facilities was intended to extend to the playing field. Both the House and Senate Reports specifically identify "driving ranges," "[t]ennis *courts*," and "basketball *courts*" as covered facilities. S. Rep. No. 116, *supra*, at 59

(emphasis added); H.R. Rep. No. 485, *supra*, Pt. 2, at 100 (emphasis added).

Title III's expansive coverage was the product of extensive congressional hearings at which persons with disabilities voiced their objections to exclusion from, among other things, participation in athletic events. One witness described the discriminatory exclusion of mentally retarded children from Little League baseball. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1058 (Comm. Print 1990) (*Leg. Hist.*). Another witness explained: "Competitive sports activities provide people with disabilities the opportunity to prove what we can do. Too often we are told that we cannot compete effectively in all aspects of life. We Can!" 3 *Leg. Hist.* 3077.[3]

Nor did Congress intend to limit coverage to amateur or recreational athletics. Congress specifically considered the implications of the Disabilities Act for drug-testing programs conducted by "professional sports leagues" (136 Cong. Rec. 17,373 (1990) (Sen. Hatch)):

> [T]he conferees recognize that professional sports organizations have promulgated policies to deter and treat

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[3] See also 2 *Leg. Hist.* 943 ("When people don't see the disabled among our co-workers, or on the bus, or at the sports field * * *, 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 * * * is because of barriers and discrimination. Nothing more."); 3 *Leg. Hist.* 2143 (discrimination prevents persons with disabilities from "participating in * * * sports"); 136 Cong. Rec. 11,453 (1990) (Rep. Morrison) ("[A]t one time, it was unheard of for individuals using wheelchairs to play tennis, and tennis court designers and managers never contemplated disabled players wanting courts. * * * [T]ennis courts should be wheelchair accessible."); 136 Cong. Rec. 11,437 (1990) (Sen. Simon) ("Through the visibility of athletics, the University of Illinois and other schools are demonstrating the capabilities of underused citizens.").

> substance abuse among athletes. * * * The House Committee on Education and Labor reviewed the policies in light of this legislation and found that the policies are entirely consistent with the non-discrimination provisions of the bill.

Ibid. (Sen. Harkin).[4] The Conference Report then stressed that "[t]he Act is not intended to disturb the legitimate and reasonable disciplinary rules and procedures established and enforced by professional sports leagues." H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 66 (1990). None of that discussion would have been necessary if Congress did not intend the Disabilities Act to regulate the standards established for competitors by professional sports organizations.

C. The Administrative Interpretation, Implementation, And Enforcement Of The Disabilities Act Reinforce The Act's Coverage Of Competitive Athletics

The Justice Department's consistent interpretation and implementation of Title III removes any remaining doubt that Title III's coverage extends "inside the ropes" (Pet. Br. 22) to competitive athletics and other performers in places of public accommodation. In the Disabilities Act, Congress expressly assigned responsibility to the Attorney General to issue regulations to carry out the provisions of Title III, 42 U.S.C. 12188(b), and to assist the public in complying with Title III's obligations through, among other things, the publication of a "technical assistance manual," 42 U.S.C. 12206(c)(2)(C) and (3). The Disabilities Act further charges the Architectural and Transportation Barriers Compliance

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[4] See also 136 Cong. Rec. E1915 (daily ed. June 13, 1990) (Rep. Hoyer) ("The Committee has reviewed these policies because the leagues have raised questions as to whether such policies comply with the act."); see also *id.* at E1915-E1916 (specifically discussing programs run by the National Football League, the National Basketball Association, Major League Baseball, and the National Hockey League).

Board (Access Board) with promulgating minimum guidelines for making "buildings, facilities, rail passenger cars, and vehicles" accessible "in terms of architecture and design, transportation, and communication." 42 U.S.C. 12204(b); see also 42 U.S.C. 12186(c).[5]

Pursuant to its statutory authority, the Department of Justice has promulgated standards governing the accessibility of stadiums. See Dep't of Justice, *Accessible Stadiums* (1996). That publication emphasizes that the Disabilities Act's accessibility requirements extend beyond the spectator areas. "An accessible route must 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." *Id.* at 2.[6] The purpose of such accessible routes is to "provide[] access for the public, employees, and athletes using the facility." *Id.* at 3.

The Justice Department's Standards for Accessible Design likewise direct that facilities used for public performances (such as assembly halls or theaters) must "provide an accessible route to a performing area," not just to spectator seats. 28 C.F.R. Pt. 36, App. A, at 534.[7] Indeed, Congress effectively required such coverage. The Disabilities Act

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[5] The Access Board is a federal agency created by the Rehabilitation Act of 1973, 29 U.S.C. 792(a) (1994 & Supp. IV 1998).

[6] See also *Accessible Stadiums*, *supra*, at 3 (stadiums must be designed so that an "accessible route * * * provide[s] access to all public and common use areas including the playing field, locker rooms, dugouts, stages, swimming pools, and warm-up areas"); *id.* at 4 (identifying "public and common use areas" subject to the Disabilities Act as including "locker rooms").

[7] See also 28 C.F.R. Pt. 36, App. A, at 583-585; *id.* at 585 ("An accessible route shall connect wheelchair seating locations with performing areas, including stages, arena floors, dressing rooms, locker rooms, and other spaces used by performers."); *id.* App. B, at 640 ("It would violate this section to establish exclusive or segregative eligibility criteria that would bar, for example, all persons who are deaf from playing on a golf course."); *Manual* 15 (basketball league may exclude wheelchair player only if it "can demonstrate that the exclusion is necessary for safe operation").

mandates that the Department's regulations be "consistent with the minimum guidelines and requirements" of the Access Board, 42 U.S.C. 12186(c), which in turn are required to "supplement the existing Minimum Guidelines and Requirements for Accessible Design," 42 U.S.C. 12204(a), promulgated under the Rehabilitation Act and in existence at the time the Disabilities Act was passed. Those pre-existing guidelines required the provision of accessible routes to "performing areas, including but not limited to stages, arena floors, dressing rooms, locker rooms, and other rooms and spaces required for use of the assembly area." 36 C.F.R. 1190.31(s)(3) (1989).[8]

The Access Board likewise includes the playing area of athletic facilities, and not just the stands, in proposed guidance that it has issued. See 64 Fed. Reg. 37,326, 37,336, 37,343, 37,350 (1999) (addressing accessibility in golf courses and sports facilities in the actual "area of sport activity," and accessible routes to player areas, as well as spectator areas).[9]

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[8] The Department of Justice also bears investigation and enforcement responsibilities under Title III. 42 U.S.C. 12188(b). Those enforcement efforts similarly reflect the Act's intended coverage of competitive athletics. See, *e.g.*, Three Settlement Agreements Between the United States and the Atlanta Committee for the Olympic Games, et al., Concerning the Olympic Stadium, the Olympic Aquatic Center, and the Olympic Tennis Center (1996) (providing accessibility for spectators, competitors, and support personnel), available at http://www.usdoj.gov/crt/ada/settlement.htm; Consent Decree between the United States and the NCAA, Civil No. 98-1290 (D.D.C. May 27, 1998) (addressing discrimination in initial eligibility requirements against students with learning disabilities); Settlement Agreement Between the United States and the Southeastern Conference (Dep't of Justice Complaint No. 202-35-103) (1999) (same); Letter from Deval Patrick, Asst. Attorney General, to Allan Selig, Acting Commissioner of Major League Baseball (Oct. 22, 1996), concerning the accessibility of new major and minor league sports facilities, including team locker rooms and similar areas, available at http://www.usdoj.gov/crt/foia/cltr196.txt.

[9] See also 65 Fed. Reg. 45,331 (2000); Recreation Access Advisory Comm., *Recommendations for Accessibility Guidelines: Recreational Facilities and Outdoor Developed Areas* 1, 2-7 (July 1994) (summary

Because the Justice Department's implementing regulations, technical assistance publications, and enforcement activities have consistently acknowledged and enforced the Disabilities Act's coverage of the playing areas for competitive athletics, "the Department's views are entitled to deference." *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998).[10]

D. Analogous Civil Rights Legislation Applies To Competitive Athletics

Congress's coverage of competitive athletics under analogous civil rights laws evidences Title III's similarly broad scope. Congress modeled Title III of the Disabilities Act on Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*.[11] Although the Civil Rights Act's definition of covered

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printed at 59 Fed. Reg. 48,542 (1994)) (recommending that "all new sports facilities can and should be designed to be usable by persons with disabilities," and detailing the provision of access to the "field-of-play" for golf and other sports, dugouts, locker rooms, and other "performing areas"). The Access Board expects to finalize the guidelines in 2001.

[10] A number of courts also have applied the Disabilities Act's provisions to competitive athletics. See, *e.g.*, *Washington* v. *Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.) (Title II applied to high school eligibility requirements), cert. denied, 120 S. Ct. 579 (1999); *McPherson* v. *Michigan High Sch. Athletic Ass'n*, 119 F.3d 453 (6th Cir. 1997) (en banc) (same for Title III); *Pottgen* v. *Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994) (same for Title II); *Bowers* v. *NCAA*, 118 F. Supp. 2d 494 (D.N.J. 2000) (Title III); *Tatum* v. *NCAA*, 992 F. Supp. 1114 (E.D. Mo. 1998) (Title III); *Shultz* v. *Hemet Youth Pony League*, 943 F. Supp. 1222 (C.D. Cal. 1996) (Title III); *Ganden* v. *NCAA*, No. 96-C-6953, 1996 WL 680000 (N.D. Ill. Nov. 21, 1996) (Title III); *Butler* v. *NCAA*, No. C96-1656L, 1996 WL 1058233 (W.D. Wash. Nov. 8, 1996) (Title III); *Anderson* v. *Little League Baseball*, 794 F. Supp. 342 (D. Ariz. 1992) (Title III protects coaches).

[11] That statute provides, in relevant part:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

42 U.S.C. 2000a(a).

public accommodations is narrower than the Disabilities Act's definition, see 42 U.S.C. 2000a(b), courts nevertheless have held that Title II of the Civil Rights Act encompasses the right to participate in, rather than just to observe, athletic events. In *Daniel* v. *Paul*, 395 U.S. 298 (1969), this Court found "no support in the legislative history" for the contention that Title II of the Civil Rights Act "refers only to establishments where patrons are entertained as spectators or listeners rather than those where entertainment takes the form of direct participation in some sport or activity." *Id.* at 306.

More particularly, courts have held that competitive athletic events conducted by sports associations (including golf associations) constitute places of public accommodation subject to Title II of the 1964 Civil Rights Act. See *United States* v. *Slidell Youth Football Ass'n*, 387 F. Supp. 474, 482-483 (E.D. La. 1974) (association of coaches and football players is a public accommodation in its operation of a youth football league); *Wesley* v. *City of Savannah*, 294 F. Supp. 698, 702-703 (S.D. Ga. 1969) (golf tournament is a place of public accommodation).[12] Because the Disabilities Act's coverage of public accommodations is more extensive than that of the 1964 Civil Rights Act, see S. Rep. No. 116, *supra*, at 11; H.R. Rep. No. 485, *supra*, Pt. 2, at 35, petitioner has no more license to exclude players on the basis of disability than to exclude Tiger Woods or Vijay Singh on the basis of race.

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[12] See *Welsh* v. *Boy Scouts of America*, 993 F.2d 1267, 1272 (7th Cir.) (a membership organization is a place of public accommodation when it "functions as a 'ticket' to admission to a facility or location," such as a sports field), cert. denied, 510 U.S. 1012 (1993); *Miller* v. *Amusement Enters., Inc.*, 394 F.2d 342, 350 (5th Cir. 1968) (en banc) (Title II covers "establishments which provide recreational or other activities for the amusement or enjoyment of its patrons"); *Evans* v. *Laurel Links, Inc.*, 261 F. Supp. 474, 475- 477 (E.D. Va. 1966) (Title II guarantees equal right to play golf on golf course).

Likewise, the Rehabilitation Act of 1973 applies to competitive athletic events operated by recipients of federal financial assistance. See 34 C.F.R. 104.47(a) ("In providing physical education courses and athletics and similar programs and activities to any of its students," postsecondary institutions "to which this subpart applies may not discriminate on the basis of handicap.").[13] Because the Disabilities Act "requires [this Court] to construe the [Act] to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act," *Bragdon*, 524 U.S. at 632, Title III likewise must regulate competitive athletic standards.

E. Petitioner's Objections To Coverage Are Unavailing

1. Petitioner contends (Br. 22-23; Pet. 10) that its tournaments cannot fall within Title III's coverage because the general public is not allowed to participate; only golfers who have survived a highly competitive selection process are entitled to play. But Title III does not condition coverage on indiscriminate public access. Quite the opposite, the statutory text envisions coverage for numerous entities whose admission policies may be restricted. See 28 C.F.R. Pt. 36, App. A, at 530 (Title III applies to areas of "common use," which include areas "made available for the use of a restricted group of people").

First, many entities that are expressly identified as public accommodations are highly selective in nature. For example, private schools are covered despite the generally competitive nature of admission to elite schools. Theaters, concert halls, and stadiums are covered despite the fact that

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[13] See also 34 C.F.R. 104.37(c) (same for preschool, elementary, and secondary institutions); 34 C.F.R. 104.47(a) (1989); *Kampmeier* v. *Nyquist*, 553 F.2d 296 (2d Cir. 1977) (junior high school athletics); *Cavallaro by Cavallaro* v. *Ambach*, 575 F. Supp. 171 (W.D.N.Y. 1983) (high school athletics); *Grube* v. *Bethlehem Area Sch. Dist.*, 550 F. Supp. 418 (E.D. Pa. 1982) (high school football); *Poole* v. *South Plainfield Bd. of Educ.*, 490 F. Supp. 948 (D.N.J. 1980) (high school wrestling).

they restrict access to ticket holders and, not infrequently, access to such tickets is highly competitive (*e.g.*, Redskins season tickets; popular rock concerts). Homeless shelters and food banks are covered despite the fact that they frequently restrict eligibility for their goods and services.[14]

Second, Title III's protection against discrimination in the allocation of "privileges" and "advantages" provided by places of public accommodation (42 U.S.C. 12182(a)) demonstrates that coverage is not limited to activities open to all, because "privileges" and "advantages," by definition, are enjoyed by one person or group to the exclusion of others. See, *e.g.*, *Webster's Third New Int'l Dictionary* 30, 1805 (1986); see also *Menkowitz* v. *Pottstown Memorial Med. Ctr.*, 154 F.3d 113, 122 (3d Cir. 1998) (Title III applies to hospital staff privileges).

Third, the limited statutory exemption for genuinely private clubs, 42 U.S.C. 12187, demonstrates that Title III is not confined to activities open to the general public. Congress's deliberately narrow exemption for private clubs would be superfluous if any entity could avoid Title III's mandate simply by limiting public access in some identifiable way.

Fourth, as the private school and concert hall examples demonstrate, a public accommodation must be open to the public, not in the sense of imposing no eligibility requirements, but rather in the sense of openly permitting members of the public to compete for admission. Thus, while those who actually are admitted to and attend the Nation's top

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[14] See also *Independent Living Res.* v. *Oregon Arena Corp.*, 982 F. Supp. 698, 759 (D. Or. 1997) (executive suites in a sports arena are places of public accommodation under Title III; "[A] facility that specializes in hosting wedding receptions and private parties may be open only to invitees of the bride and groom, yet it clearly qualifies as a public accommodation. Attendance at a political convention is strictly controlled, yet the convention center is still a place of public accommodation.") (citation omitted).

private universities may reflect a small cross-section of society, those universities generally allow any member of the public who submits an application, references, and the required fee to participate in the competition for admission. Further, their admission process is based largely on objective indicators of performance, rather than the types of insular and associational values that are the hallmark of private clubs. Competition for concert or stadium tickets is likewise generally open to the public and decided based upon objectively measurable criteria. Petitioner's tournaments are no different. While the tournaments themselves include only a narrow group of participants, petitioner permits any member of the public who submits the required fee and application papers to compete for the opportunity to play in its tournaments.[15]

2. Petitioner argues (Br. 16-19) that coverage of its tournaments would be inconsistent with Title I of the Disabilities Act's implied exclusion of independent contractors from its employment-discrimination provisions. That argument fails for three reasons.

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[15] Cf. *Runyon* v. *McCrary*, 427 U.S. 160, 172 n.10 (1976) (private schools are considered open to the public because "[t]heir actual and potential constituency * * * is more public than private" in that "[t]hey appeal to the parents of all children in the area who can meet their academic and other admission requirements"). Petitioner's (Br. 18, 23, 32) and its amici's reliance (USGA Br. 13; ATP Br. 13) on regulatory provisions that identify hybrid private and public facilities is misplaced. For the most part, those regulations address the opposite situation—when select portions of facilities that are not otherwise covered by Title III may be open to the public for a limited purpose. For such private entities, Title III's coverage pertains only to those portions of their operations that constitute a public accommodation. See 28 C.F.R. Pt. 36, App. B, at 625 (where a commercial facility offers tours, only the tour route is a place of public accommodation); *id.* at 624 (for a "large hotel that has a separate residential apartment wing," the hotel would be covered while the residential wing would not). Petitioner's operation of a golf course for a tournament, where competition for entry or to observe play is open to the public, does not qualify as a commercial operation exempt from Title III, in whole or in part.

First, the very premise of petitioner's argument is mistaken. There is nothing inherently inconsistent about concluding that forms of discrimination excluded from coverage under one Title of the Disabilities Act are included in another. Rather, such coverage demonstrates the statute's breadth. See *Yeskey*, 524 U.S. at 212. Indeed, petitioner offers no basis for concluding that, in the course of crafting a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities" (42 U.S.C. 12101(b)(1)), Congress intended categorically to exclude such a large class of individuals from the Disabilities Act's aegis. The better reading of the Disabilities Act—and the only reading consistent with Congress's broad remedial purpose—is to conclude that the implicit exclusion of independent contractors from Title I reflects Congress's judgment that disputes over the independent provision of goods and services outside of an employee relationship are better dealt with through the provisions of Title II (for government contractors) and Title III (for private contractors).

Second, petitioner's argument lacks any basis in the Disabilities Act's text, legislative history, or administrative interpretation and implementation. Petitioner points to nothing in the language of any Title of the Disabilities Act that states that those engaged in contractual professional relationships are categorically excluded from protection under the Act's otherwise expansive coverage. Instead, petitioner asks this Court to hold that an *implicit* exclusion from one Title licenses disregard of claims that fall squarely within the text of another Title. But, as previously noted, the legislative history and administrative interpretation leave no doubt that Congress intended Title III's provisions to apply expansively to virtually everything that public accommodations offer to the public, including the opportunity to contract and including, in particular, the coverage of athletes and other performers.

Indeed, Title II—the public services counterpart to Title III—has long been understood to apply to those who enter into contracts with the government. See, *e.g.*, 28 C.F.R. 35.130(b)(5) ("A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability."); *Johnson* v. *City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998).[16] Likewise, in *Menkowitz*, *supra*, the Third Circuit held, consistent with administrative guidance (*Manual* 22), that Title III applies to a private hospital's extension of staff privileges to doctors. 154 F.3d at 122-123.

Petitioner offers no explanation why Congress would afford contractors protection against discrimination by governmental entities, but not against the identical discrimination when practiced by a private place of public accommodation. See H.R. Rep. No. 485, *supra*, Pt. 2, at 84 (expressing intent that "the forms of discrimination prohibited by [Title II] be identical to those set out in the applicable provisions of titles I and III"). Indeed, such a construction would be especially anomalous given that one of Congress's primary motivations for enacting the Disabilities Act was to extend to private entities the protections already available against public agencies. See *id.* at 99; S. Rep. No. 116, *supra*, at 58.[17]

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[16] See also Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual* § 3.7100, at 15 (Nov. 1993)) ("A public entity may not discriminate on the basis of disability in contracting for the purchase of goods and services.")

[17] See 135 Cong. Rec. 19,835-19,836 (1989) (Sen. Hatch) (Title III of the Disabilities Act applies to "all retail businesses, all service businesses, and more. From sole proprietorships all the way up, beyond 15-employee businesses. In contrast to the employment provisions, however, * * * [Title III] *contains no exemption whatsoever from its public accommodations provision.*") (emphasis added). Petitioner's concern that employers with less than 15 employees who are (unlike independent contractors) *expressly* excluded from coverage under Title I (see 42 U.S.C. 12111(5)(A)), will face claims of employment discrimination under Title III

Third, petitioner's effort to characterize respondent as an independent contractor is unpersuasive. A contractor, like an employee, is ordinarily paid for his work by the employer. Here, however, respondent initially paid petitioner $3000 for the privilege of participating in petitioner's tournaments. Moreover, respondent could play in petitioner's tournaments for an entire year without receiving any payment from petitioner. Tr. 815-816. And even when a player finally earns "prize money," more than half of his payment comes from someone other than petitioner, such as a corporate sponsor or tournament organizer. Tr. 819-820.

In addition, a contractor, like an employee, is ordinarily selected by the employer. But petitioner has no right to select or reject golfers because membership in the PGA or Nike Tour is open to anyone who finishes above a certain position in a qualifying tournament that is broadly opened to public participation. See Pet. App. 42a. Petitioner cannot pick and choose members from among the finalists. See *id.* at 49a; Tr. 473 ("[t]he competition picks" the players); Tr. 847 (petitioner does not "select" its members; admission rests entirely on performance).[18] Finally, an independent contractor, like an employee, commits to perform some work

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is misplaced. The legislative history makes clear that private employer/employee disputes can only be addressed under Title I and not under Title III. See H.R. Rep. No. 485, *supra*, Pt. 2, at 99 ("employment practices are governed by title I of this legislation," and not Title III); S. Rep. No. 116, *supra*, at 58 (same). In any event, because money damages are available under Title I but not under Title III, it is difficult to understand petitioner's argument (Pet. 19) that persons suing under Title III would somehow occupy a "*preferred* position."

[18] Cf. *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 751 (1989) ("hiring" is essential to establish agency relationship for both employees and independent contractors); *O'Connor* v. *Davis*, 126 F.3d 112, 115 (2d Cir. 1997) (under the common law, "a prerequisite to considering whether an individual is" an employee or an independent contractor "is that the individual have been hired in the first instance"), cert. denied, 522 U.S. 1114 (1998).

pursuant to a contract.[19] Respondent, however, has no contract to provide any work or service for petitioner, and petitioner has absolutely no authority to require respondent to participate in any of its tournaments. Tr. 812. Tour members' participation is entirely within their discretion.

In short, there is no basis for concluding that the association between petitioner and respondent is the type of employment relationship that Congress intended to regulate either under Title I or not at all. To the contrary, the better understanding of their mutually beneficial professional relationship is that petitioner offers a service or privilege—the opportunity to compete for prizes—which respondent, like thousands of other members of the golfing public, wishes to enjoy.[20]

3. Petitioner seizes (Br. 19-23) upon the reference, in one subsection of Title III, to covered individuals as "clients or customers" of the public accommodation and, from that, concludes that Title III prohibits discrimination only in the "marketplace" (Br. 18). That cramped vision of Title III is without basis and, in any event, does not exclude respondent.

First, as a textual matter, the phrase petitioner invokes has no application to respondent's claim. Petitioner relies on the definition of covered individuals as "clients or cus-

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[19] See *Black's Law Dictionary* 693 (5th ed. 1979) (employer retains control over independent contractor "only as to end product or final result of his work"; independent contractor "contracts with another to do something for him").

[20] See Tr. 435, 473 (1100 golfers started in petitioner's qualifying school tournament); cf. *NCAA* v. *Board of Regents*, 468 U.S. 85, 102 (1984) (NCAA's role in organizing and marketing college football enhances opportunities for athletes, as well as fans). Petitioner is thus similar to those public accommodations that sell lottery tickets, host beauty pageants, game competitions, or science fairs, or invite comedians and other performing artists to compete for the opportunity to perform in their clubs.

tomers" in 42 U.S.C. 12182(b)(1)(A)(iv), which provides:

> For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

The reference in subsection (iv) to subsections (b)(1)(A)(i) through (iii) addresses the particular problem of preventing public accommodations from escaping their obligations under Title III by indirectly discriminating "through contractual, licensing, or other arrangements." 42 U.S.C. 12182 (b)(1)(A)(i)-(iii). The purpose of subsection (iv) was simply to clarify that, while public accommodations could not avoid Title III's mandates through contracts, neither would the existence of such a contractual relationship expand their responsibility to include any discrimination independently perpetrated by the other contracting party separate and apart from the underlying contract.[21] The "clients or customers" language thus was intended to elucidate the scope of contractual liability faced by places of public accommodation, not to transform Congress's broad mandate of public access into a narrow "marketplace" regulation. And the "clients or customers" limitation on contracts is not even implicated in this case, because the district court and court of appeals did not grant respondent relief under the provisions of 42 U.S.C. 12182(b)(1)(A) that prohibit a public accommodation from contracting away its obligations under Title III. Thus, "[t]he short answer" to petitioner's contention that a

[21] See H. R. Rep. No. 485, *supra*, Pt. 2, at 101 (subsection (iv) makes "clear" that "a public accommodation is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers"); H.R. Conf. Rep. No. 596, *supra*, at 76 ("covered entities are only liable in contractual arrangements for discrimination against the entity's own customers and clients and not the contractor's customers and clients"); 28 C.F.R. Pt. 36, App. B, at 631.

definition deliberately confined to a single subsection should be expanded to govern an entire Title of the Disabilities Act "is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979).

Second, even if this case involved liability under subsection (b)(1)(A), it would be a mistake to give "clients or customers" the narrow meaning ascribed to it by petitioner. In the course of defining liability for contractors, Congress simply adopted "clients or customers" as a shorthand phrase for those who partake of the "goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation," 42 U.S.C. 12182(a). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000) (internal quotation marks and citation omitted). Rather than permit one narrowly crafted subsection to drive an unnatural reading of the remaining statutory provisions, courts must "fit, if possible, all parts into a harmonious whole." *Ibid.* (citation omitted). Indeed, in *Daniel*, *supra*, this Court refused to adopt a similarly narrow reading of Title III's predecessor, the public accommodations provision of the 1964 Civil Rights Act, that was "restricted to the primary objects of Congress' concern" because "a natural reading of its language would call for broader coverage." 395 U.S. at 307. In light of Congress's underlying purposes, a natural reading of Title III as a whole should also be adopted here.

Third, subsection (iv) cannot be read as a broad limitation on Title III's coverage. The legislative history stressed that, "to the extent there is any apparent conflict" between subsection (b)(1) (which includes (iv)) and the specific provisions of subsection (b)(2) (which include respondent's reasonable modification claim), the latter prevails. S. Rep. No. 116, *supra*, at 61; see also H.R. Rep. No. 485, *supra*, Pt. 2, at 104 (same). That is consistent with the legislative history

emphasizing that the "clients or customers" language was intended only to clarify the scope of contractual liability, rather than to limit the overall operation of Title III. See H. R. Rep. No. 485, *supra*, Pt. 2, at 101.

Fourth, petitioner's proposed construction is irreconcilable with Congress's definition of covered public accommodations, in 42 U.S.C. 12181(7). If the "marketplace" approach extended coverage only to paying clients or customers, it would render Title III inapplicable, despite the explicit inclusion of concert halls, auditoriums, lecture halls, and other places of public gathering and exhibition (42 U.S.C. 12181(7)(C) and (D)), to any concerts, lectures, or performances offered to the public free of charge, and to any amateur exhibitions or meetings of political or social groups that are open to the public. And even if petitioner's construction included nonpaying "customers," it would seem to exclude all who perform services rather than receive them. Thus, while a "homeless shelter" or a "food bank" is covered by Title III (42 U.S.C. 12181(7)(K)), volunteers in such establishments would lack any protections. While hospitals (42 U.S.C. 12181(7)(F)) and transportation facilities (42 U.S.C. 12187(G)) are public accommodations, the coverage would extend only to patients, and not their visitors, and only to travelers and not persons picking them up or dropping them off. Colleges (42 U.S.C. 12181(7)(J)) would be covered for students, but not for employers who wish to recruit at a job fair. Companies sponsoring spelling bees would be covered with respect to the audience, but could exclude disabled children from participating. In short, where Congress provided for blanket coverage of social and economic activity in places of public accommodation, petitioner offers a reading of Title III that is as gap-ridden as Swiss cheese.

Finally, even if adopted, petitioner's "marketplace" rendition of Title III would not support its claim. Because respondent paid petitioner to participate in its golf tourna-

ments and because petitioner exists entirely "to promote and operate tournaments for the economic benefit of its members," Pet. App. 46a, respondent could easily be considered a paying "client" of petitioner.

II. THERE IS NO REASON TO DISTURB THE LOWER COURTS' FACTUAL DETERMINATION THAT PERMITTING RESPONDENT TO USE A GOLF CART WILL NOT FUNDAMENTALLY ALTER PETITIONER'S COMPETITIONS

A. Petitioner argues that the fundamental alteration analysis should begin and end with an inquiry into whether the rule of competition implicated by the individual's disability is a "substantive" rule of competition with a "possible (non-trivial) effect on the outcome" (Br. 35). Respondent and the court of appeals, by contrast, place heavy reliance on the question whether modification of the rule would afford an individual a competitive advantage. See Pet. App. 10a-11a. In our opinion, while both considerations are important in the fundamental alteration analysis, neither one should be dispositive. Rather, the application of Title III to competitive sports, like its application to educational, trade, and professional examinations (42 U.S.C. 12189), requires a judicial determination of what skills and abilities the competition is intended to test and whether the proposed modification would substantially alter the measurement of those skills and abilities. Cf. 28 C.F.R. 36.309(b)(3); 28 C.F.R. Pt. 36, App. B, at 653. In applying that test, a variety of factors should be considered, focusing ultimately on whether modifying a rule for a particular plaintiff would fundamentally alter the competition at issue. See *Washington* v. *Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), cert. denied, 120 S. Ct. 579 (1999).[22]

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[22] There is no basis for crafting a special exemption for professional-level sports competitions (see USGA Br. 8, 21). The private club and religious organization exemption (42 U.S.C. 12187) leaves little doubt that

First, a court must determine whether a rule or condition of competition is substantive in the sense that it regulates those aspects of play that the competition is designed to measure. A rule's label as "substantive," however, cannot be dispositive, lest public accommodations be permitted to define their competitions out of Title III. Rather, the court should inquire into written or otherwise documented understandings of the essential elements of a particular competition and what it is designed to measure. The court should also consider evidence of the particular rule's (1) status in the written rules and regulations of a competition, (2) foundation in historic practice and/or established record as an unwritten rule or standard, (3) consistency in application, and (4) adoption of or adherence to by other entities that host the same or closely similar competitions.

The court's determination that a rule is non-pretextual and genuinely substantive in the sense that it regulates those aspects of play that the competition is designed to measure will carry substantial weight in the fundamental alteration analysis. We disagree, however, with petitioner's contention that such a conclusion necessarily ends the inquiry. Sometimes a modification that is sufficiently minor or tailored can be made without affecting the integrity of the competition or altering the contest's ability to measure fairly the relevant capabilities. For example, Major League and Minor League Baseball permitted Jim Abbott, a pitcher who was born without a right hand, to deviate from the rule that "a pitcher must remain completely still before his delivery" and allowed him to "spin the ball" slightly in his hand before pitching to accommodate his disability. Jim Abbott, "It's

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Congress knew how to write such exemptions when it wanted them, and it did not write one for professional sports. The legislative history, moreover, expressly anticipated the Act's application to a variety of professional sports. See, *e.g.*, H.R. Conf. Rep. No. 596, *supra*, at 66. Thus, like other civil rights legislation, the Disabilities Act tolerates no glass ceiling for qualified athletes with disabilities.

Easy to Accommodate," *Golf World* 92 (Feb. 20, 1998). Furthermore, Congress could fairly be concerned that the technical wording of admittedly substantive rules could reflect the prior invisibility of athletes with disabilities, such that reformulating the rule in light of an individual athlete's disability could be accomplished without discernibly affecting the competition. For example, the United States Golf Association's (USGA) *Rules of Golf* (1997) generally require golfers to play a ball where it lies. *Id.* Rule 13-1. In those situations where a player is permitted to alter a ball's lie by lifting and dropping it, the rules require the golfer to "stand erect, hold the ball at shoulder height and arm's length and drop it." *Id.* Rule 20-2. Dropping the ball "in any other manner" results in a penalty. *Ibid.* That rule could reasonably be modified to permit wheelchair golfers to sit erect rather than "stand" without fundamentally altering the competition. See USGA, "A Modification of the Rules of Golf for Golfers with Disabilities," Rule 20-2 (1997).

A court also could reasonably require substantive rules to be read with a practical sensitivity to the unique situation of competitors with disabilities. For example, the substantive rule of golf that prohibits players from "us[ing] any artificial device or unusual equipment * * * [w]hich might assist him in making a stroke or in his play" could be construed not to encompass artificial limbs or leg braces (at least absent any peculiar, play-affecting modification). *Rules of Golf*, *supra*, Rule 14-3. Likewise, application of the substantive rule against taking an "unnecessarily abnormal stance, [or] swing" in the rules governing temporary immovable obstructions (see *id.* App. 1; J.A. 119, 128) could reasonably be required to take account of an individual's disability in determining whether the stance is "unnecessary."

Second, a court may consider the extent to which a proposed modification would afford a player a competitive advantage. Any modification that poses a realistic risk of giving one player a competitive advantage would skew and

thus fundamentally alter the competition's measurement of ability. That does not mean, however, that the absence of a competitive advantage is always dispositive. In some circumstances, there is more to a competition than the final score or who finishes first. Thus, even if a competitor's disability would offset any abstract advantage enjoyed by the modification, a modification still would not be reasonable if it interfered with the competition's ability to measure a physical or mental capability that it is designed to evaluate. In addition, courts should consider the extent to which a modification could substantially alter the pace or flow of a game and thus interfere with other players.

Third, a court should consider the circumstances in which exceptions are authorized or have been made to the rule. The frequency and character of exceptions or modifications both outside and within the disability context will be acutely relevant in evaluating both what a particular competition measures and whether a proposed modification would fundamentally interfere with the competition's ability to evaluate the relevant capabilities. An established practice of modifying a rule for individualized circumstances (such as temporary illness or injury, economic considerations, convenience, or efficiency) will often support an equivalent modification for a disability. On the other hand, a rule that is virtually never modified in its operation absent imperative safety concerns or other extraordinary and rarely arising circumstances will make modification harder to justify.[23]

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[23] Petitioner (Br. 33, 36-41) suggests that, because athletics "are contests of *physical* performance" (*id.* at 33), the Disabilities Act cannot functionally police the rules and conditions of athletic contests. That argument overlooks, however, that many (if not most) disabilities affect only part rather than all of an individual's physical and mental capabilities. Likewise, not all sports comprehensively test an individual's physical and mental abilities from head to toe. The Disabilities Act thus properly polices stereotypes and overgeneralizations about the impact of particular disabilities on an individual's ability to engage in "contests of physical

B. In the vast majority of athletic competitions at the highest level, a request to waive a rule of competition will effect a fundamental alteration in the sport. According to the facts as found below, this case qualifies as an exception to that general rule. The lower courts found that the walking rule can be modified because the rule does not regulate those aspects of play that golf competitions are designed to measure and its waiver will not give respondent a competitive edge. The district court examined whether walking was one of the capabilities intended to be measured by the game of golf and noted that the *Rules of Golf* neither require walking nor define it as part of the sport. Pet. App. 30a. Rather, the rules make clear that the "Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes." *Rules of Golf* 1-1. In addition, the court examined the walking rule's status, noting that the United States Golf Association permits competitors to ride a cart unless it is prohibited by the rules of a particular event. Petitioner also permits competitors to use carts in some of its tournaments, including the Senior Tour and the early rounds of the qualifying tournament. Pet. App. 28a n.9 & 30a.[24] And even in the regular PGA and Nike Tour events where walking is generally required, petitioner allows the Tours' respective Rules Committees to authorize the use of carts to speed play when balls are lost or long distances separate holes. *Id.* at 9a, 30a-31a. Further, when carts are permitted, petitioner imposes no stroke penalty on those who use them to offset the supposedly lessened fatigue. Finally, the court noted that, although collegiate golf prohibits carts, respondent was permitted to use a cart in his college tournaments. See *id.* at 28a.

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performance" by requiring careful analysis of the nature of the disability and the athletic competition at issue.

[24] Indeed, until the year respondent first competed in the qualifying tournament, petitioner allowed golf cart usage in all three rounds of that tournament. J.A. 267.

The district court further found that permitting respondent to use a cart will not give him an unfair competitive advantage. Accepting that the purpose of the walking rule was to inject a fatigue factor into shot-making, the court found that the fatigue involved in the "lower intensity exercise" of walking the golf course during a competition "is primarily a psychological phenomenon," and that "[s]tress and motivation" are key to the level of fatigue. Pet. App. 34a. The court of appeals found ample evidence to support those conclusions. *Id.* at 10a.[25]

The district court also found, based upon medical and other evidence, that "[t]he fatigue [respondent] endures just from coping with his disability is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot." Pet. App. 35a. The district court explained that respondent

> is in significant pain when he walks, and even when he is getting in and out of the cart. * * * The other golfers have to endure the psychological stress of competition as part of their fatigue; Martin has the same stress plus the added stress of pain and risk of serious injury. As he put it, he would gladly trade the cart for a good leg.

Id. at 36a.[26]

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[25] The district court explained that the fatigue caused by walking "cannot be deemed significant under normal circumstances." Pet. App. 33a. The court noted that the PGA does not require golfers to walk rapidly between shots, and that walking at a slow pace is a natural act for the able-bodied. *Id.* at 35a & n.14. The court also noted that "most PGA Tour golfers appear to prefer walking as a way of dealing with the psychological factors of fatigue," asking rhetorically that "[i]f the majority of able-bodied [golfers] elect to walk in 'carts optional' tournaments, how can anyone perceive that [Martin] has a competitive advantage by using a cart given his condition?" *Id.* at 34a-35a.

[26] The court of appeals also noted that respondent must walk approximately 25% of the course in any event because the cart frequently cannot be brought near to the ball. Pet. App. 36a; see also *ibid.* (district

The court of appeals affirmed the district court's finding that "permitting [respondent] to use a golf [cart] in PGA and Nike Tour competitions would not fundamentally alter the nature of those competitions." Pet. App. 10a. The court emphasized that "[t]he central competition in shot-making would be unaffected by [respondent's] accommodation," *id.* at 10a-11a, because "[a]ll that the cart does is permit [respondent] access to a type of competition in which he otherwise could not engage because of his disability." *Id.* at 11a. Those concurrent findings by the two lower courts should not be disturbed. See generally *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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court finds that, even with a cart on a course "roughly five miles in length, [respondent] will walk $1^{1/4}$ miles").