

# **Writing an *Amicus Curiae* Brief to the United States Supreme Court, *PGA Tour, Inc. v. Martin*: The Role of the Disability Sport Community in Interpreting the Americans with Disabilities Act**

ANITA M. MOORMAN  
*University of Louisville*

&

LISA PIKE MASTERALEXIS  
*University of Massachusetts, Amherst*

## **INTRODUCTION**

Casey Martin recently prevailed in his three and a half year battle with the PGA Tour, Inc. The battle concluded on May 29, 2001, when the United States Supreme Court issued its decision declaring that the PGA Tour is a public accommodation subject to the Americans with Disabilities Act (hereinafter ADA) and extending its protections to a professional golfer. The decision requires the PGA Tour to modify its rules of competition in order to permit Martin access to the service it provides - the opportunity to compete in a professional golf tour event.

Martin began his battle in the United States District Court of Oregon in 1997, and on January 26, 1998 he prevailed on a motion for summary judgment filed by the PGA Tour. Martin also prevailed at trial in the district court and on appeal to the Ninth Circuit Court of Appeals. The matter reached the United States Supreme Court on July 5, 2000 when the PGA Tour petitioned for a writ of certiorari. The U.S. Supreme Court granted the PGA Tour's petition on September 26, 2000 and set the case in motion.

Once the case reached the Supreme Court the petitioner PGA Tour and respondent Martin had little time to prepare and present their briefs and arguments for the Court.<sup>1</sup> In addition, parties supporting either

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1. Briefs for the PGA Tour and supporting parties were due on November 13, 2000 and those for Martin and supporting parties were due on December 13, 2000. The PGA Tour's reply brief was then due on December 29, 2000. Oral arguments were scheduled for January 17, 2001. The briefs are available at [http://supreme.lp.findlaw.com/supreme\\_court/briefs/00-24/00-24fo5.pdf](http://supreme.lp.findlaw.com/supreme_court/briefs/00-24/00-24fo5.pdf) and [http://supreme.lp.findlaw.com/supreme\\_court/docket/2000/jandocket.html](http://supreme.lp.findlaw.com/supreme_court/docket/2000/jandocket.html).

Martin or the PGA Tour had precious little time to indicate their support and contribute to the parties' causes. The primary way in which supporting parties could assist Martin or PGA Tour was to file supporting briefs in the U.S. Supreme Court known as *amicus curiae* briefs. The purpose of this article is to present the authors' experience preparing and filing an *amicus curiae* brief in the United States Supreme Court on behalf of the disability sport community and in support of Casey Martin. Since neither author had ever undertaken such a daunting but enriching task we felt others may find a description of the process as interesting and enriching.

"*Amicus curiae*" means, literally, "friend of the court."<sup>2</sup> An *amicus curiae* is a person with strong interest in or views on the subject matter of an action who may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views.<sup>3</sup> Such *amicus* briefs are commonly filed in appeals concerning matters of a broad public interest such as civil rights cases.<sup>4</sup> Most attorneys will stay blissfully ignorant of *amicus* briefs through much, if not all of their practice. In October 2000, the authors' bliss was replaced dramatically with an unexpected awakening and opportunity.

As with most sport law educators and sport lawyers, we were quite familiar with the on-going litigation between Casey Martin and the PGA Tour. That familiarity went no further than a recurring discussion of the issues presented in the case in our classrooms. A colleague involved in disability sport proposed that the disability sport community file an *amicus* brief in support of Casey Martin's appeal to the United States Supreme Court, and asked if we would be interested in working on that brief.<sup>5</sup> The immediate problem was that the brief had to be filed in about 60 days. Despite the onerous timeline, we both agreed to undertake the preparation of an *amicus curiae* brief on behalf of the disability sport community.<sup>6</sup>

While it would have been ideal to immediately begin framing and drafting the legal arguments, such was not the case. Several steps had to

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2. HENRY C. BLACK, BLACK'S LAW DICTIONARY (5th Ed. 1979).

3. *Id.*

4. *Id.*

5. Eli A. Wolff has published several articles on disability sport and regularly presents on disability sport topics both nationally and internationally. In addition, Eli is a former Paralympic athlete. Without Eli's vision, dedication, and support of this project, we would not have been able to contribute the *amicus* brief on behalf of the disability sport community.

6. Eli also almost single handedly contacted the various representatives of the disabled sport organizations coordinated their responses or questions, and secured their joinder among the amici.

be taken even before the drafting of the brief could begin. Many more steps would also be completed before the brief was finished and filed with the Supreme Court. In this paper we will (1) describe the process of preparing an *amicus curiae* brief for the U.S. Supreme Court, (2) summarize the arguments and positions asserted by the parties in their briefs, and (3) offer some insights into the effect of the Supreme Court decision on sport organizations and those who manage them. In classic sport analogy terms, the steps we experienced can be simply identified as follows:

Step One: Identify the Other Players.

Step Two: Educate the Other Players.

Step Three: Learn the Rules.

Step Four: Learn the Strategy and Prepare the Game Plan.

Step Five: Practice makes Perfect.

Step Six: Tee Off for Team Martin.

Step Seven: Final Fairway Walk.

Step Eight: A Major Victory!

### Step One: Identify the Other Players

Team Martin consisted of many players, all of whom brought unique interests and views to the case. Coordinating these many different players took place primarily through a series of lengthy conference calls and numerous email correspondences. The first such call involved more than 20 participants and lasted over two and a half hours. Each of the participants had an interest in Martin's appeal, and this interest had to be identified, discussed, and placed in a category that best described the interest area.

For example, several attorneys represented the interests of various disability rights groups. Rather than have each such group submit separate *amicus* briefs, an *amicus* brief voicing the views of the disability rights community as a whole would be filed. Similarly, a single brief representing the interests of the disability sport community was targeted. These conference calls produced the following *amicus* interest areas that would be briefed: Disability Rights Community, Klippel-Trenaunay-Weber Syndrome (hereinafter K-T Syndrome), the Solicitor General / Department of Justice, Congressional ADA sponsors, and Disability Sport. Once the interest areas were in place, the actual writers of the briefs had to be selected and a briefing timeline established.

An *amici* coordinator<sup>7</sup> was selected to monitor the status of the briefing process, provide editorial support, and coordinate the arguments being asserted by the various interested groups. Each of the interested groups had a particular view on disability rights, disability law, and disability discrimination. However, this view needed to be tempered and crafted in such a way to not only be consistent with the other *amici*, but especially to advance Martin's case on appeal. This need for consistency required that each of the interested groups educate the other on their perspectives and intentions. In consultation with our clients, we decided early on in the process that our main goal was a win for Casey Martin, even if it meant narrowing our arguments to apply only to elite level athletes in the disability sport community.

### Step Two: Educate the other Players.

If one approaches a Supreme Court review as a puzzle, the parties and each of the *amici* supply different pieces of the puzzle to convey a single, consistent image or idea to the Court. In the Martin case, some of these pieces were obvious, and others were not so obvious. For example, the K-T syndrome brief would represent the voices of people with K-T syndrome and educate the court as to the debilitating effects of this disease. Similarly, the Solicitor General's brief would represent the Department of Justice (DOJ) that is responsible for the enforcement of the ADA. Clearly the Court's interpretation of the scope and coverage of the ADA and its regulations promulgated by the DOJ would directly impact the Department's ability to enforce the law. Senators Harkin, Dole, and Kennedy were co-sponsors of the ADA enacted by Congress, thus, their voice as to the intent of Congress was also pertinent for the Court. Also, the National Association of Protection and Advocacy Systems, a disability rights organization represented the interests of many in the broader disability community ranging from support and advocacy groups to legal clinics that protect and preserve the rights of people with disabilities. This group's voice with regard to the legislative history of ADA and specialized disability law knowledge was critical to the briefing efforts.

The final brief represented the disability sport interests. Disability sport refers to sport designed for or specifically practiced by athletes

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7. The role of the *amici* coordinator was quite unique. The *amici* coordinator, a disability law expert, volunteered to read all five *amicus* briefs, literally with only hours or days in which to read, edit, and revise.

with disabilities.<sup>8</sup> Strangely enough, not only the existence of disabled sport organizations, but also, their purposes were largely unknown among the other *amici* involved in the Martin appeal. In addition, knowledge concerning the field of sport management and the unique treatment of sport organizations in a myriad of legal settings was also absent from Team Martin. Thus, two goals emerged for the Disability Sport Organizations (hereinafter DSOs) brief. First, the DSO brief needed to educate the Court and the other *amici* as to the organization and purpose of disability sport organizations, and second, it needed to provide a view to the Court from the perspective of a sport organization, *albeit*, a disability sport organization perspective.

The following nine DSOs joined together as *amici* in the disability sport amicus brief: American Association of Adapted Sports Programs,<sup>9</sup> America's Athletes with Disabilities,<sup>10</sup> Dwarf Athletic Association of America,<sup>11</sup> National Wheelchair Basketball Association,<sup>12</sup> United States Cerebral Palsy Athletic Association,<sup>13</sup> United States Deaf Sports Federation,<sup>14</sup> Disabled Sports, USA,<sup>15</sup> Wheelchair Sports, USA,<sup>16</sup> and United

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8. KAREN DEPAUW & SUSAN GAVRON, *DISABILITY AND SPORT* (1995).

9. AAASP's mission is to enhance the health, independence and future economic self sufficiency of youth with physical disabilities by facilitating a national disability sports movement, assisting communities in creating the best member programs possible for physically disabled youth electing to compete in team and individual sports on a local, regional and national level. See website at: [www.aaasp.org](http://www.aaasp.org).

10. AAD's mission is to promote and sponsor sports, recreation, leisure, health and fitness activities for children and adults with physical disabilities. See website at: [www.americasathletes.org](http://www.americasathletes.org).

11. DAAA was formed in 1985 to develop, promote and provide quality amateur level athletic opportunities for Dwarf athletes in the United States. See website at: [www.daaa.org](http://www.daaa.org).

12. NWBA is comprised of 181 basketball teams within twenty-two conferences. The NWBA was founded in 1948, and today consists of men's, women's, intercollegiate, and youth teams throughout the United States of America and Canada. See website at: [www.nwba.org](http://www.nwba.org).

13. USCPAA provides assistance to member athletes with cerebral palsy, stroke, and traumatic brain injuries in coordinating their training and strives to enable its athletes to compete at their peak on local, regional, national, and international levels. See website at: [www.uscpaa.org](http://www.uscpaa.org).

14. USDSF provides year-round training and athletic competition in a variety of sports at the state, regional, national, and international level for developing and elite athletes. USDSF assists athletes in developing physical fitness, sportsmanship, and self-esteem. See website at: [www.usdsf.org](http://www.usdsf.org).

15. DSUSA's mission is to provide the opportunity for individuals with physical disabilities to gain confidence and dignity through participation in sports, recreation and related educational programs. Founded in 1967 Disabled Sports, USA is the nation's largest multi-sport, multi-disability organization. A national, non-profit, educational organization, DS/USA provides sports and recreation services to over 60,000 people annually, through a network of over 80 community-based chapters nationwide. See website at: [www.dusa.org](http://www.dusa.org).

States Association of Blind Athletes.<sup>17</sup> The USOC oversees the DSOs. The DSOs provide services and support to disabled athletes, including elite disabled athletes, throughout the United States and all DSOs are responsible for grassroots efforts to promote sport for people with disabilities. Six of the *amici* coordinate training, competitions, and player selection and eligibility for the Paralympic and World Deaf Games as disabled sport organizations under the Ted Stevens Olympic and Amateur Sports Act.<sup>18</sup> Essentially, the DSO's involved in this appeal are the sport organizations in the United States governing elite amateur sport for people with disabilities.

It is important to note that the DSOs are most often organized and named by *disability* (cerebral palsy, deaf, blind, dwarf, and wheelchair), whereas National Governing Bodies are named by *sport* (USA Baseball, USA Basketball, USA Triathlon).<sup>19</sup> This distinction takes on even more significance in the professional sport segment since professional disability sport organizations do not exist in the United States. Thus, any elite disabled athlete who competes professionally in the United States must compete with non-disabled athletes and is governed by that professional sport's governing body, i.e., the National Football League, Women's National Basketball Association, Major League Baseball, and in this instance, the Petitioner, PGA Tour, Inc.

### Step Three: Learn the Rules

As would be expected, Supreme Court rules and procedures for filing of *amicus* briefs are precise and detailed. At least five specific rules were particularly applicable for our *amicus* brief.<sup>20</sup> Rule Nine requires that

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16. WSUSA was founded in 1956 as the National Wheelchair Athletic Association, the name of the organization was changed in 1994 to Wheelchair Sports, USA, to better reflect the organization's mission and goals which includes providing sport opportunities for elite wheelchair athletes. See website at: [www.wsusa.org](http://www.wsusa.org).

17. USABA's mission is to change the attitudes about the abilities of the blind and visually impaired. Since its founding in 1976, the USABA has reached over 100,000 blind individuals. During that time, the organization has emerged as more than just a world-class trainer of blind athletes; it has become a vocal champion of the abilities of America's legally blind residents. See website at: [www.usaba.org](http://www.usaba.org).

18. 36 U.S.C. §§ 220501-220529 (2001). Dwarf Athletic Association of America, U.S. Cerebral Palsy Athletic Association, U.S. Deaf Sports Federation, Disabled Sports, USA, Wheelchair Sports, USA, and U.S. Association of Blind Athletes are the only disabled sport organizations that serve as governing authority for the training and selection of elite athletes for the Paralympics or World Deaf Games.

19. Eli A. Wolff, *Status of the Seven National Disabled Sports Organizations in the United States and Recommendations for the Future* (1998) (Unpublished paper, Brown University).

20. SUP. CT. R. 5, 9, 24, 25, 33 & 37 (1999).

any attorney seeking to file a document in the Supreme Court must first be admitted to practice before the Court.<sup>21</sup> Rule Five establishes the admissions criteria for attorneys who desire to practice before the Supreme Court.<sup>22</sup> In order to apply for admission, an attorney applicant must pay an admission fee and submit a Petition for Admission containing an oath and statement of sponsorship of two other attorneys already admitted to the Supreme Court.<sup>23</sup> The Petition must be accompanied by an Affidavit from the State Supreme Court from the State in which the attorney is licensed to practice verifying the attorneys licensure and certifying that no disciplinary proceedings have been filed or are pending against the attorney.<sup>24</sup> While this may seem like a simple enough process, since the sponsoring attorneys must personally know the applicant and already be admitted to the U.S. Supreme Court, the pool of sponsoring attorneys is fairly small.

To complicate the process a bit more, the Application for Admission must be signed by all the parties.<sup>25</sup> If, as in one case, your sponsoring attorneys are located in Massachusetts and Oklahoma, and you are located in Kentucky logistics does play a very important part especially when time is so limited. However, we also learned that a more efficient process was to utilize the law schools we attended and law school faculty where we teach to assist in our admission.<sup>26</sup>

One additional requirement of admission is that the admission must be approved prior to submitting a brief.<sup>27</sup> Since it takes about two weeks from the time the Clerk receives the application until the admission is

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21. *Id.* R. 9 also mandates that only one attorney may be considered counsel of record and if more than one attorney are involved in a case, the attorney of record must be clearly identified on the cover of the brief.

22. To qualify for admission to practice before the Supreme Court an attorney must (1) be admitted to practice in the highest court of a State, Commonwealth, Territory, or Possession, or the District of Columbia for the three years preceding the date of the application, (2) must not have been subject to any adverse disciplinary action either pronounced or in effect during the three year period, and (3) must appear to the Court to be of good moral and professional character.

23. The fee for admission and the certificate of admission is \$100.00. We would like to express our appreciation to our Supreme Court admission sponsors for their assistance in this effort:

24. SUP. CT. R. 5 (1999).

25. *Id.*

26. Many law schools assist their graduates in locating sponsoring attorneys to gain admission to the Supreme Court. Also, most law schools have at least one faculty member who is admitted to practice before the Supreme Court. Thus, lawyers teaching in other areas of the university could use law school faculty as a resource if such an opportunity were to present itself to them.

27. *Id.* R. 9.

approved, the window of opportunity to get the required sponsors, complete the paperwork, and actually become admitted was very narrow and rapidly closing. Fortunately, we were both admitted just a few days before the brief was due to be filed.

The Supreme Court rules also specify the format and content for the briefs. Rule 37 applies solely to *amicus* briefs and sets forth the length, style, and purpose of these briefs. Rule 37 states that the purpose of "an *amicus curiae* brief [is to] bring to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored."<sup>28</sup>

An *amicus curiae* brief relevant to the main case may be accepted for filing in one of two ways. First, such brief may be filed if accompanied by the written consent of all parties. This consent can come in the form of a simple consent letter from counsel for all parties.<sup>29</sup> The brief must include a statement affirming that consent has been granted and the letter of consent must also be filed with the brief.<sup>30</sup>

However, if one party withholds consent, than an *amicus curiae* can still file a motion with the Court requesting leave to file an *amicus curiae* brief.<sup>31</sup> The motion should be accompanied by the proposed *amicus curiae* brief.<sup>32</sup> Whether the brief is filed with consent or on motion, it must be filed by the deadline established for filing of the brief for the party supported.<sup>33</sup> The deadlines for the party briefs are set forth previously by order of the Court. An *amicus curiae* is subject to those same deadlines.<sup>34</sup> Every person who authors any portion of the brief or makes any monetary contribution to the preparation or submission of the brief must be disclosed to the Court.<sup>35</sup> This requirement was particularly interesting in the waning moments of the briefing sequence since only a few days before the briefs were due, representatives of a major athletic shoe company indicated an interest in financially supporting the briefing effort. While several of the *amici* could have used the financial support, none

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28. *Id.* R. 37.

29. *Id.* R. 37.3(a).

30. *Id.* R. 37.2(a). The DSO's used the written consent procedure for filing their brief.

31. *Id.* R. 37.2(b) & R. 33.1.

32. *Id.* R. 37.3(b).

33. *Id.* R. 37.3(a) & (b).

34. *Id.*

35. *Id.* R. 37.6.



were willing, at that late hour, to accept corporate support thereby being forced to disclose such corporate support to the Court.<sup>36</sup>

Before writing a single word or planning a single argument, many procedural requirements had to be met in order to be admitted to practice before the Supreme Court and to obtain the letters of consent from the parties permitting us to file an *amicus* brief for the disability sport community. These two examples demonstrate the procedural challenges faced by the attorneys for an *amicus curiae* especially so for attorneys who have not practiced before the Supreme Court. As the actual briefing begins many other Supreme Court rules will be used dictating format, length, order of arguments, number of copies to be filed, size of print and paper, proper binding, and cover color.<sup>37</sup>

#### Step Four: Set the Strategy and Prepare the Game Plan.

Having prepared many appellate briefs during our previous litigation practice, it seemed as though the actual planning of the arguments and preparing the appellate strategy would be similar to previous cases. This would prove to be an immensely incorrect perception.

First, developing a strategy involved much more than just understanding the relative strength and weaknesses of the legal arguments. The varied interests of Martin and the other *amici* also had to be considered. For example, what may be a beneficial argument for the disability sport community may or may not be a strategically wise argument for Martin, the K-T Support Group, or the broader disability rights community.

The most important strategy may be crafting arguments to be considered by the highest court in the land. The Supreme Court is only obliged

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36. The cost of printing the briefs alone was in the range of \$1500.00 to \$2000.00. We did our work *pro bono*, but if counsel were paid for their efforts on an hourly basis the brief writing process would involve a hefty sum.

37. For example, SUP. CT. R. 24.1(a)-(j) specifies the exact sections or order of sections, which shall be presented in the briefs. If the brief exceeds 5 pages it must have a table of contents. A summary of the argument must precede the actual arguments, and the conclusion must specify with particularity the relief sought. SUP. CT. R. 33 limits the length of an *amicus* brief to 30 pages. SUP. CT. R. 33 also requires briefs be bound in booklet format and be a specific designated size. This portion of the rule was probably the most burdensome for the disability sport community since it essentially required that a professional printer in Washington D.C. be engaged to print and bind the briefs. This expense was fairly significant and also further limited the time available to prepare the brief since the printer would need the text of the brief several days before the filing date. SUP. CT. R. 33 also requires briefs to have a particular color of cover depending on the role of the party filing the brief. *Amicus* briefs in support of the respondent bore a dark green cover.

to follow its own precedent. Thus, imagine preparing an argument where a decision by a United States Court of Appeals or a United States District Court has no precedential value. Since only a handful of Supreme Court cases have interpreted the Americans with Disabilities Act, and none involved the issues present in this case, the challenge to develop a strategy that may help to sway the Supreme Court to adopt our interpretation of Titles I and III was daunting to say the least. Thus, the majority of our arguments relied almost exclusively on statutory analysis of the ADA and an analysis and explanation of the rules and operations of sport organizations.

The case was essentially divided into two major issues. Each issue had two to three sub-issues. While it may have made sense to simply split the two issues between the two authors, instead we divided the sub-issues thus allowing both authors to work on the major issues. We felt this would not only help us to better understand all the arguments, but since neither of us is a disability law expert, we felt it necessary to acquaint ourselves with all the issues and corresponding legal background. In hindsight this strategy also proved a great benefit when responding to the local and national press inquiries that come with a case of this magnitude. To say that we had to quickly get up to speed on disability law is an understatement. We spent countless hours familiarizing ourselves with disability discrimination cases and ADA legislative background. However, what we both agreed on after our study and preparation, was that this case was more about sport and less about disability.<sup>38</sup> Thus, our game-plan was born.

#### Step Five: Practice Makes Perfect

Nowhere, except possibly in sport, is the old saying that "practice makes perfect" more appropriate than in preparing a brief for the Supreme Court. Perfection was desired on many levels from perfectly logical legal arguments, to perfectly written sentences and phrases, to perfectly organized and ordered briefs. Needless to say perfection was not attained; but it was not for lack of practice. The editing and review process was exacting. First, as either of us would draft each argument, we would first have the other read it for sense or logic, next each argument would be edited and revised (usually about 5-6 times) before it would be

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38. Focusing on sport and the role sport plays in the lives of elite athletes with disabilities as it does with non-disabled athletes was an essential component of our game plan. Elite athletes with disabilities are recognized and seek recognition for their excellence and accomplishments in sport, and as athletes, not for their disability.

incorporated into the bulk of the brief. Then the next argument would undergo a similar process. Once all the arguments were incorporated into the brief, the entire brief underwent another phase of editing (this time about 3-4 more edit and revision cycles). Finally, after we had completed our drafting and editing of the brief, it was sent to the *amici* coordinator and counsel for the respondent for any final edits. This phase was particularly important since it enabled Martin's attorneys and the *amici* coordinator to identify any inconsistent or questionable arguments.

For example, the United States Golf Association's (USGA) *amicus* brief raised what we felt the Court would perceive as a very real concern in following the Ninth Circuit's decision for Martin. The USGA sanctions numerous qualifying events leading up to the U.S. Open. Citing the nearly 40,000 applicants for these events, the USGA argued that if the ADA applied to sport organizations it would "face an enormous administrative burden" in providing individual inquiries and assessments of a range of disabilities of participants who request rule modifications.<sup>39</sup> To solve the USGA's dilemma and squelch potential fears of the justices, in our original draft we suggested to the Court that the sport organizations could adopt an arbitration process to make such determinations. We discussed how professional<sup>40</sup> and elite level amateur sport<sup>41</sup> entities

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39. Brief of Amici Curiae for United States Golf Association at 4, PGA Tour, Inc. v. Martin (No. 00-24) (2001).

40. All professional sports leagues that have unionization and collective bargaining use arbitration to resolve a variety of disputes in an efficient manner. Collective bargaining agreements in the National Basketball Association (NBA), Women's National Basketball Association (WNBA), National Football Association (NFL), Major League Baseball (MLB), and National Hockey League (NHL) provide for a grievance arbitration procedure to resolve labor disputes and disputes over interpretation of other clauses in the collective bargaining agreement, such as the determination of salary caps. NATIONAL BASKETBALL ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT (NBACBA), Art. XXXI: *Grievance and Arbitration Procedure* & XXXII: *System Arbitration*, 213-223 (1999); WOMEN'S NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, Art. XVII: *Grievance and Arbitration Procedure* (2000); NATIONAL FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT (NFLCBA), Art. IX: *Non-Injury Grievance*, 18-22 (1993); MAJOR LEAGUE BASEBALL, BASIC AGREEMENT (MLBBA), Art. XI: *Grievance Procedure*, 28-36 (1997); & NATIONAL HOCKEY LEAGUE, COLLECTIVE BARGAINING AGREEMENT (NHLCBA), Art. 17: *Grievances, Arbitration and Impartial Arbitrator* (1995). In addition, the NFL and NBA collective bargaining agreements provide for injury grievance arbitration. NBACBA, Art. XXI: §7: *Injury Grievance*, at 218 & NFLCBA, Art. X: *Injury Grievance*, at 23-38. Furthermore, the NHL and MLB provide for arbitration to resolve salary disputes for eligible players. NHLCBA, Art. 12: *Salary Arbitration*, 43-53 & MLBBA, Art. VI: F: *Salary Arbitration*, at 13-17.

41. Nationally, arbitration has been mandated by Congress in the Amateur Sports Act as the means of resolving disputes over the eligibility of athletes to participate and disputes between entities seeking to be declared National Governing Bodies. 36 U.S.C. §§ 220509 &

effectively use arbitration to resolve disputes in a timely manner. The *amici* coordinator strongly suggested we eliminate that proposal from the brief. The administrative burden defense does not apply to Title III of the ADA governing public accommodations, but does apply to Title I involving employers. By responding to the USGA's argument we were focusing attention on it and risked the Court adopting arbitration as a mechanism to resolve such disputes. Arbitration is not mentioned in the ADA statute or rules, and if the Court were to adopt such an option it might all but eliminate the use of federal courts for disabled plaintiffs. In addition, the administrative burden of making public accommodations accessible is not an issue in the statute. The *amici* coordinator suggested that we eliminate such a proposal from the brief. An interpretation of Title III that forced the use of arbitration to resolve athletic eligibility disputes might harm not only disabled athletes by taking away their option of going to court, but the disability community as a whole by introducing arbitration as a means of resolving employment or other disputes. Thus, we eliminated the discussion in the brief concerning the viability of arbitration to handle rule modification requests.

Once revisions requested by either Martin's attorneys or the *amici* coordinator were made, the brief was sent to the printer. As with a journal article or book, the printer provided galleys upon which further revisions could be made prior to filing. In our case, the galley edits were a huge problem due to the page limit for an *amicus* brief. We had estimated a word count for a 30-page brief and used that word count to gauge our length. We sent what we thought was a 28 page brief to the printer. Unfortunately the printer used smaller margins than we used in our estimate,<sup>42</sup> resulting in lengthening our brief to 38 pages. Thus, eight pages had to be eliminated from the brief that same day. Several argu-

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220527. The USOC Constitution also requires the use of arbitration for disputes regarding participation eligibility. UNITED STATES OLYMPIC COMMITTEE, CONSTITUTION Art. IX (1990). On the international level, in 1983 the International Olympic Committee (IOC) established the Court for Arbitration (CAS) in Sport in Lausanne, Switzerland to resolve many disputes involving the Olympic Games, including athlete eligibility questions. Stephan Netze, *The Court for Arbitration for Sport: An Alternative Dispute Resolution in U.S. Sports*, 10 ENT. & SPORTS LAW. 1 (1992). Following concerns about the independence of an Olympic Sport arbitration system created by the IOC raised in a Swiss Federal Tribunal's review of a CAS decision, the IOC restructured the CAS to provide greater independence an appellate division. Jan Paulsson, *Arbitration of International Sports Disputes*, 12 ENT. & SPORTS LAW. 12, 16 (1994).

42. The printer also used smaller margins than mandated by the Supreme Court rules since in the printer's experience if the exact specifications of the Court were used the actual text area inevitably exceeded the text area acceptable to the Court, and would result in the Clerk's refusal to accept the *amicus* brief for filing.

ments were sacrificed which we felt had made our brief not only stronger, but also more specialized and unique to the impact the case would have upon sport managers. Also, had time permitted and had we not already been at the galley phase where editing is time consuming and costly, we probably could have preserved more of our original vision for the brief. While perfection was the goal, it was the practice that proved to be the most memorable and fulfilling.

### Step Six: Tee Off for Team Martin

Once we got through all of the logistical issues in drafting the brief and preparing our initial strategy, we sat down to draft the arguments for the DSO brief. Although email and fax transmissions have made collaboration on projects between colleagues miles away a reality, we still ran into our fair share of computer glitches and the like. As previously noted, coordinating our research and writing efforts took a great deal of editing and many phone conversations and emails.

Our first step in the writing process was to read and analyze the briefs submitted by the petitioner, PGA Tour, Inc. and the four *amici* supporting the PGA Tour, including the USGA, the ATP Tour and LPGA, the Equal Employment Advisory Council, and disabled amateur golfer Kenneth Green. Once we analyzed and outlined the issues and arguments raised in the briefs, we developed our responses and began our research. We also prioritized our arguments since not every argument raised by the PGA or the PGA's *amici* could be addressed in a 30-page brief. Some of our efforts sent us chasing red herrings. For instance, we spent hours analyzing the Title I arguments raised in the PGA and *amici* briefs only to decide that it was not our role to spend precious time and waste our limited space discrediting arguments that were not directly on point to Martin's. Once the arguments were prioritized and responses formulated, they were ultimately presented to the Supreme Court.

### *PGA Tour's Brief*

In its brief, the PGA Tour raised two questions: (1) Whether Title III of the ADA, 42 U.S.C. §12181 *et seq.* governs job-related standards for persons, such as professional golfers, working at places of public accommodation? and (2) If so, whether Title III requires sport organizations to

grant selective waivers of their substantive rules of athletic competition in order to accommodate disabled competitors.<sup>43</sup>

### *PGA's first issue*

Addressing the first question, the PGA argued that Title III of the ADA (governing places of public accommodation) provides no basis for claims of discrimination by persons, like Casey Martin, who are not clients or customers of a public accommodation. The PGA argued that the nature of Martin's claim brought it outside of the realm of Title III. Since Title I of the ADA is the exclusive remedy for litigating employment disputes, the PGA argued that Title III did not apply to someone like Martin, because he was earning money by participating in PGA events.<sup>44</sup> Title III, the PGA argued was intended to protect clients and customers.<sup>45</sup> However, the PGA further argued that Title I did not apply to Martin because he is not an employee, but is an independent contractor.<sup>46</sup> Finally, the PGA distinguished between competition areas and the rest of the golf course to argue that the ADA only applied to spectator areas.<sup>47</sup>

### *PGA's second issue*

Addressing the second question, the PGA argued that even if the ADA did apply, Martin could not seek protection for several reasons. First, the PGA and USGA suggested that unless their rule was shown to be a pretext for discrimination, there was no need to determine whether the rule, if waived, could fundamentally alter the Tour competition.<sup>48</sup> Essentially the PGA contended that unless their rules were intended to discriminate against people with disabilities, the court should not consider whether the rule could or could not be waived without fundamentally altering the competition.

Next, assuming that the court had to determine whether the rule would fundamentally alter the competition, the PGA argued that any waiver of substantive rules would fundamentally alter competition. The PGA argued that the walking rule was a substantive rule, and thus could not be waived.<sup>49</sup>

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43. Brief for Petitioner at (i), *PGA Tour, Inc. v. Martin*, 532 US 661 (2001) (No. 00-24).

44. *Id.* at 15-19.

45. *Id.* at 18-21.

46. *Id.* at 17, 24-25.

47. *Id.* at 22-23.

48. *Id.* at 35.

49. *Id.* at 36-41.

Next, the PGA contended that professional golfers must play by the same rules for competition to be uniform. Thus, any change in the rules would undermine such uniformity thereby fundamentally altering the competition.<sup>50</sup>

Lastly, the PGA argued that competitive elite level sports are contests designed and intended to reward and favor the most able bodied.<sup>51</sup> The ATP Tour and LPGA brief even went so far as to state that while it may undoubtedly seem unfair, many athletes prevail because they are born with natural athleticism or inherited characteristics such as strength and height while others prevail because of superior training opportunities.<sup>52</sup> In other words, athletes born with disabilities, such as Casey Martin, are simply out of luck when it comes to participating in elite level sports.

In our view, such sentiment is completely opposed to the goals and purposes of the ADA and the Amateur Sports Act.<sup>53</sup> The premier amateur sports competition organized solely for disabled athletes is the Paralympics, which takes place every four years immediately following the Olympics. Growth not only in the participation numbers of Paralympic athletes, but also the size and prestige of the Paralympic Games prompted Congress in 1998 to amend the Amateur Sports Act of 1978 to expand opportunities for sport for people with disabilities and to integrate disabled sport with able-bodied sport organizations. The amended law directs the USOC to act as the National Paralympic Committee to encourage and provide assistance to amateur athletic programs and competition for disabled individuals, including the expansion of opportunities for meaningful participation by disabled individuals in programs of athletic competition for non-disabled individuals.<sup>54</sup>

### *DSOs' Amicus Brief*

In our brief on behalf of the DSOs we countered with questions framed this way: (1) Whether the ADA prohibits discrimination against *any individual* who seeks access to a place of public accommodation regardless of whether that person may also enjoy some financial benefit from his/her access or participation? and (2) Whether the ADA requires a modification of a rule created by a professional sport organization in

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50. *Id.*

51. *Id.* at 33-34.

52. Brief for ATP Tour, Inc. & Ladies Professional Golf Association (LPGA) at 7, PGA Tour, Inc. v. Martin, 532 US 661 (2000) (No. 00-24).

53. 36 U.S.C. §§ 220501-220529.

54. *Id.* at § 220503(13).

order to provide a reasonable accommodation to a person with a disability under Title III?

### *DSOs' first issue*

To address the first question we focused on the statutory language and legislative history of the ADA. We argued that in accordance with Title III's language the PGA is a place of public accommodation and Casey Martin is *an individual* with a disability who is entitled to assert a discrimination claim. Section 12181 of the ADA sets forth categories and examples of places of public accommodation.<sup>55</sup> While the categories identified in Section 12181 are considered exhaustive, the legislative history states that the examples are not.<sup>56</sup> It is undisputed that the PGA is an entity, which leases golf courses for the purpose of operating its golf events. Golf courses are expressly identified among many examples of places of public accommodation contained in Title III.<sup>57</sup> However, the

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55. A public accommodation is defined as the following private entities if the operations of such entities affect commerce—

(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 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.

Americans with Disabilities Act, Title III, 42 U.S.C. § 12181(7) (1990).

56. H.R. Rep. No. 485, 101<sup>st</sup> Cong., 2d Sess., pt. 2, at 100 (1990) *reprinted in* 1990 U.S.C.C.A.N. 303, 308. Specifically the history states “[t]he Committee intended that the ‘other similar’ terminology should be construed liberally, consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities.” *Id.*

57. 42 U.S.C. § 12181(7)(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.



PGA contended that since the golf courses were not being used as places of exercise and recreation during the presentation of a PGA Tour event section 12181(7)(L) did not apply.

Assuming, for argument's sake, that the course was not being used for exercise and recreation, it most certainly was being used for purposes of exhibition and entertainment during the presentation of a professional golf event within the scope of section 12181(7)(C).<sup>58</sup> We presented our argument in such a way as to require the PGA to find an exemption in the ADA since we were confident that an exemption could not easily be read into the statute. We then argued that the competition areas of professional sport contests are not exempted from coverage, and focused on the fact that it was highly unlikely that Congress was unaware that professional sports contests took place in locations such as "stadiums," "auditoriums," "parks," "gymnasiums," "bowling alleys," and "golf courses," all of which are specifically named in the ADA. Asserting that Congress chose not to exclude professional sport contests from coverage of the ADA, we highlighted the 12 broad categories of places created by Congress at which any number of activities or uses may take place.<sup>59</sup>

Furthermore, Congress provided a non-exhaustive list of examples for the 12 categories. Nothing in the legislative history or the text of the ADA suggest Congress intended to exempt either the competition areas or spectator areas of a professional sport contest from complying with the ADA. Section 12181(7)(C) clearly applies to places used for "exhibition or entertainment" including but not limited to theaters, concert halls, stadiums, and in this instance, a golf course. The PGA's entertainment objective was obvious and was even admitted by the LPGA in its *amicus* brief where it stated ". . . professional sport depends on its entertainment value for its very existence."<sup>60</sup>

As for the PGA's Title I argument, employees of the PGA covered under Title I of the ADA would include tournament directors, staff members, sales and marketing staff, legal counsel, and the like.<sup>61</sup> Casey Martin is not an employee of the PGA; thus, his claim is neither governed by nor excluded from Title I.<sup>62</sup> Moreover, Section 12181 of Title III prohibits discrimination against *any individual with a disability*. This

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58. *Id.* at § 12181(7)(C), a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment.

59. ADA, Title III: Public Accommodations, 42 U.S.C. § 12181(7).

60. *Brief for ATP Tour, Inc. & LPGA* at 11.

61. *Brief for Petitioner* at 18-23.

62. 42 U.S.C. § 12111-12112.

section does not limit the protection afforded a disabled individual if that individual also has a financial interest or motive in seeking access to the place of public accommodation.

Section 12182(a) provides a general prohibition against discriminating against an individual with a disability in the full and equal enjoyment of goods, services, facilities, privileges of any place of public accommodation. The PGA also attempted to restrict the broad, general protections established in section 12182(a) to only the "clients or customers" of the PGA. No such restrictive reading of the term individual is contained in the test of the statute.<sup>63</sup> The scope of the terms client or customer, however, are expressly limited to sub-section 12182(b)(1)(A)(i-iii).<sup>64</sup> Moreover, even if Casey Martin were required to be a client or customer of the PGA, he would clearly fall within the normal and ordinary definition and meaning of the terms "client or customer" as a participant competing on the PGA Tour. Martin, like any member of the public, must pay a \$3,000.00 entry fee and obtain two letters of recommendation from a PGA professional to compete in Qualifying School for a spot on the PGA Tour. Martin was consuming the services offered by the PGA Tour to professional golfers.

Finally, we argued that competition areas of the Tour are not exempt from the ADA. The *amici*, USGA, ATP/LPGA, and Equal Employment Advisory Council argued that even if they were considered places of public accommodation within the meaning of the ADA, the competition areas of the golf course were not subject to the ADA under a theory that the events are mixed-use.<sup>65</sup> In other words, the *amici* might accept that the ADA applied to spectator areas, but not competition areas of the tournament. (Thereby exempting them from having to make any reasonable accommodations to the playing areas of the tournament.) The *amici* relied on a line of cases that allowed public accommodations to keep employee-only enclaves inaccessible under a mixed use theory.<sup>66</sup> In those cases, the mixed use areas were defined as employee-only enclaves that the public on a cruise ship or film studio production lot could

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63. ADA, Title III: Public Accommodations, 42 U.S.C. 12182(b)(1)(A)(i-iii).

64. *Id.* § 12182(b)(1)(A)(iv).

65. Brief of the United States Golf Association (USGA), at 16-18, *PGA Tour, Inc. v. Martin*, 532 US 6 (2000) (NO. 00-24); Brief for ATP Tour, Inc. & LPGA, at 15-16; Brief Amicus Curiae of the Equal Employment Advisory Council, at 8-9, *PGA Tour, Inc. v. Martin*, 532 US 6 (2000) (NO. 00-24).

66. *Stevens v. Premier Cruises, Inc.*, 215 F. 3d 1237 (11<sup>th</sup> Cir. 2000) (employee-only sections of cruise ships need not be accessible to public) & *Jankey v. Twentieth Century Fox Film Corp.*, 212 F. 3d 1159 (9<sup>th</sup> Cir. 2000) (employee ATM machine need not be accessible to public on movie lot tours).

not access. We argued that argument was flawed and incidental because every place of public accommodation has mixed uses. As a place of public accommodation the PGA has many different uses for a myriad of individuals involved in participating a PGA Tour event, many of who will meet the statutory definition of individuals covered under Title III. Competitors, spectators, tournament volunteers, and members of the media are some of the myriad of individuals seeking the benefits and privileges of the PGA Tour event. Casey Martin is not seeking accessibility to an employee-only area, as the plaintiffs were in the cited cases. Nor would we expect that Title III would allow a member of the public accessibility to those areas of the tournament reserved for work by the employees of the PGA.<sup>67</sup>

In the alternative, the manner in which a PGA event is operated does not lend itself to the geographic lines of separation proffered by the *amici*. Participants in the benefits and services provided by the PGA are on all areas of the golf course. Members of the public, such as event volunteers, photographers, writers, VIPs, sponsors, and some spectators are often within the competition areas and the golfers may find themselves in the spectator areas when chasing down an errant shot. Thus, the competition area is not as easy to define geographically because the lines between competition and spectator areas are blurred.<sup>68</sup>

### *DSO's second issue*

To address our second question we argued that the standard of review adopted by the district court, and its finding permitting a modification of a rule of golf to allow Casey Martin to use a cart during competition, did not constitute a fundamental alteration of the PGA event.<sup>69</sup> Such a finding was well supported by the evidence presented to the district court and we argued, should not be disturbed on appeal.

Section 12182(b)(2)(A)(ii) identifies the elements and evidentiary burdens for a Title III discrimination claim. Casey Martin was required to an offered competent evidence that he was an individual with a disability, that a modification was requested, and that the modification requested was reasonable. The burden then shifted to the PGA to demonstrate that the requested modification would fundamentally alter the nature of the PGA event. While the PGA proffered evidence that

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67. Brief for American Association of Adapted Sports Programs, et al., at 13-14, PGA Tour, Inc. v. Martin, 532 US 661 (2001) (No. 00-24).

68. *Id.*

69. *Id.* at 17-21.

the purpose of its rule requiring competitors to walk at all times during the competition was to inject the element of fatigue into the competition, the district court found that such purpose was not being fundamentally altered by permitting Martin to participate with the aid of a cart. The ruling in favor of Martin included the following findings of fact:

- (1) nothing in the rules of golf requires or defines walking as a part of the game;
- (2) the game of golf generally consists of playing a ball from the teeing ground into the hole by a stroke or successive strokes in accordance with the rules;
- (3) Martin attempted to use various other artificial aids to walking, such as in-shoe orthosis and ankle-foot orthosis;
- (4) while injecting the element of fatigue may be cognizable purpose to the walking rule, the fatigue factor cannot be deemed significant under normal circumstances;
- (5) approximately only 500 calories would be expected by walking a golf course in a five hour time period;
- (6) PGA golfers have numerous intervals of rest and opportunities for refreshment or calorie replacement;
- (7) fatigue due to low intensity exercise is primarily a psychological phenomenon, and;
- (8) Martin's disabling condition causes him more fatigue, even when provided with the use of a cart, than the average PGA Tour golfer endured.<sup>70</sup>

We also argued that the district court properly conducted an individual, fact specific inquiry relative to the stated purpose of the PGA rule, and Martin's individual disability and circumstances. The PGA's contention that only the nature of the public accommodation should be examined to determine whether a modification of a rule or policy would result in a fundamental alteration would be contrary to the broad goals and scope of the ADA. An individualized inquiry must be conducted to comply with the spirit and letter of the ADA mandate.<sup>71</sup>

The PGA also presumed that substantive rules of competition can not be waived without fundamentally altering the nature of the competition.<sup>72</sup> No such presumption is identified in Title III. Section 12182 unambiguously provides that "reasonable modifications in policies, practices, or procedures" must be made. The statute does not say that only

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70. *Martin v. PGA Tour, Inc.*, 994 F.Supp. 1249, 52 (D. Or. 1999).

71. *Johnson v. Gambrinus Company/Spoetzel Brewery*, 116 F.2d 1052 (5<sup>th</sup> Cir. 1997).

72. *Brief for Petitioner* at 30-33.

“non-substantive policies, practices, or procedures” are subject to modification.

Any entity, sport organization or not, bears the burden under the ADA to demonstrate that the requested modification will result in a fundamental alteration to its goods or services.<sup>73</sup> It would be contrary to the clear language of the statute to create a presumption favoring a sport organization, or to impose an improper burden of proof to the disabled individual requesting the modification. The PGA failed to sustain what was clearly its burden of proof and we argued, the findings of the district court should not be disturbed.

We argued that providing Casey Martin with a cart was a reasonable modification of the type allowed by the statute.<sup>74</sup> With this argument we focused on various evidence to support the fact that this was not a fundamental alteration of the sport and that there really was no such thing as uniform rules and conditions in any competition. First, no codified walking rule exists in the extensive rules of golf as published by the U.S.G.A.<sup>75</sup> and the Royal and Ancient Golf Club of St. Andrews, Scotland.<sup>76</sup> Further, if walking injects the fatigue element to elite level golf competition and riding in a cart provides an outcome affecting competitive advantage, then why do so many Senior PGA Tour and Senior Men’s and Women’s Open competitors choose to walk the course? Second, uniform conditions do not exist for golfers. For example, very few events rely on a blind draw for tee times, and weather and course conditions often vary depending on one’s tee time.<sup>77</sup>

The PGA’s proposed analysis would have effectively rendered Title III applicable only to instances of intentional discrimination and eliminated the burden of proof imposed on one seeking to avoid compliance with the ADA. Title III outlaws not just intentional discrimination, but also practices that have an unequal impact upon persons with disabilities even in the absence of any conscious intent to discriminate.<sup>78</sup>

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73. *Johnson*, 116 F.2d at 1059.

74. *Brief for American Association of Adapted Sports Programs, et al.* at 25-27.

75. The USGA’s rules of golf number 34 with well over 125 subsections. They are available at [www.usga.org/rules/](http://www.usga.org/rules/).

76. THE ROYAL AND ANCIENT RULES OF GOLF (29<sup>th</sup> Ed. as approved by the Royal and Ancient Golf Club of St. Andrews Scotland and the USGA) (Jan. 1, 2000). These rules also contain five sections, 34 rules, and three appendices and are effective throughout the world except for the United States and Canada. They are available on the internet at [www.randa.org/rules\\_of\\_golf/default.sps](http://www.randa.org/rules_of_golf/default.sps).

77. *Id.*

78. *Crowder v. Kitagawa*, 81 F.3d 1480, 1483-1484 (9th Cir. 1995).

When it enacted the ADA Congress specifically found that "individuals with disabilities continually encounter various forms of discrimination, including *outright intentional exclusion*, the *discriminatory effects* of . . . overprotective rules and policies, *failure to make modifications* to existing . . . practices, exclusionary qualification standards and criteria, segregation, and *relegation to lesser services, programs, activities, benefits, jobs, or other opportunities*" (emphasis added).<sup>79</sup> The ADA was enacted "to provide a clear and comprehensive national mandate for the *elimination* of discrimination against individuals with disabilities."<sup>80</sup> Congress clearly intended to protect disabled persons not just from intentional discrimination, but also from thoughtlessness, indifference, and benign neglect.<sup>81</sup>

Finally we addressed the arguments asserted by the PGA and USGA that sport organizations should be provided with deference to their rules.<sup>82</sup> These organizations suggested that they were "the keepers of the game," and as such courts should defer to them and let them decide whether their rules do or do not discriminate against people with disabilities. First, no such deference is provided to any organization or entity including sport organizations. Second, the ADA does not exempt sport organizations.<sup>83</sup> Had Congress desired to exempt sport organizations it could have, and yet nothing in the ADA, its history, or the *amicus* brief of ADA sponsors Senators Harkin, Dole, and Kennedy, supports the existence of an exemption. Exemptions are not foreign to Congress, as it exempted all professional sports leagues and the business of professional baseball from the antitrust laws.<sup>84</sup>

In addition, the USGA argued that "courts have generally permitted sport governing bodies to create and define the competition provided they promulgate rules that are rational and not a pretext for unlawful activity."<sup>85</sup> While courts have adhered to a theory of limited judicial review, there are exceptions and they are not limited to antitrust theory, as the USGA tended to argue. In general, precedent shows courts will intervene where a sport entity exceeds the scope of its authority, acts in an

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79. 42 USCS § 12101(a)(5).

80. *Id.* at § 12101(b)(1).

81. *Crowder*, 81 F.3d 1480.

82. *Brief for Petitioner* at 30-33; *Brief of the USGA* at 21.

83. 42 U.S.C. § 12182(b)(2)(A)(ii).

84. Sports Broadcasting Act of 1960, 15 U.S.C. §§ 1291-1294 (1990) & Curt Flood Act of 1998, 15 U.S.C. § 27, et. seq. (1998).

85. *Brief of the USGA* at 21, citing *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984); *Brookins v. International Motor Contest Ass'n*, 219 F.3d 849,853 (8<sup>th</sup> Cir. 2000); *Gunter Hars Sports, Inc. v. United States Tennis Ass'n*, 665 F.2d 222,223 (8<sup>th</sup> Cir. 1981).

arbitrary or capricious manner, breaks its own rule, violates public policy, or violates constitutional rights or federal or state statutes.<sup>86</sup> The theory of limited judicial review does not give total deference to the unfettered judgments of sport organizations. We argued once again that adopting such a standard is contrary to the broad and comprehensive protections mandated by Congress.

### Step Seven: The Final Fairway Walk

The last briefs for all the parties were filed and submitted to the Court on December 29, 2001. Oral arguments took place on January 17, 2001. While Supreme Court rules allow *amici* to present oral arguments, it is at the consent of the parties and time is taken from that allocated to the parties. Therefore, most *amici* decided not to participate in the oral argument, turning all of us into “armchair quarterbacks.” The Solicitor General did petition the Supreme Court to be heard, and was granted five minutes to argue in support of Casey Martin and the Ninth Circuit’s decision.

As members of the Supreme Court bar, we were given seats in the front row at the oral argument. It is hard to capture in words the excitement and awe one feels seeing the DSOs brief in the hands of a justice or hearing one of the attorneys in the case cite language from our brief. Knowing that our work may have an influence on this decision made the late night writing and editing worthwhile.

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86. *Atlanta Nat’l League Baseball Club v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977) (Major League Baseball commissioner exceeded scope of authority in penalty levied on Atlanta Braves); *Lindland v. USA Wrestling Ass’n*, 2000 U.S. App. LEXIS 21754 (7th Cir. 2000) (USA Wrestling and USOC declined to follow their own rule on qualification for US Olympic Greco Roman wrestling competitors); *California State Univ. Hayward v. NCAA*, 47 Cal. App. Ed 533 (Cal. Ct. App. 1975) (athletic association violated its own rule when applying rule retroactively); *Christ the King Regional High Sch. v. Catholic High Sch’s Athletic Ass’n*, 624 N.Y.S.2d 755 (1995) (athletic association violated own rule and acted in arbitrary and capricious manner in applying rule limiting out of state play); *Louisiana High Sch. Athletic Ass’n v. St. Augustine High Sch.*, 396 F.2d 234 (5th Cir. 1968) (black high school singled out and subjected to different league entrance criteria in athletic association made up of white schools); *Ludtke v. Kuhn*, 461 F. Supp. 86 (S.D.N.Y. 1978) (Major League Baseball’s rule barring female reporters from locker room violates equal protection clause); *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (college football broadcasting limitations violates antitrust law); *Philadelphia World Hockey, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (1972) (NHL reserve clause and other rules restricting free agency subject to antitrust law when challenged by third party competitor); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1977) (NFL free agent compensation rule violates antitrust law); *Law v. NCAA*, 134 F.3d 1010 (10th Cir.1998) (rule limiting assistant coaches income violates antitrust law).

The petitioner, the PGA, presented its case first. Its argument focused on two errors it argued were made by the Ninth Circuit. First, the PGA argued that it failed to recognize that Title III of the ADA only applies to those seeking to enjoy goods and services of a public accommodation, not to those as it characterized Martin, who were supplying the goods and services as employees or independent contractors. Second, it argued that the Ninth Circuit never took into account that an elite level professional sport is nothing more than a competition that tests excellence in performing what its rules require.<sup>87</sup> Thus, any alteration of those rules to adjust for an individual's physical condition would fundamentally alter the nature of competition.

As respondent, Casey Martin's attorney's argument focused on rebutting the argument that walking was fundamental to the game of golf and that allowing Martin the use of a cart was a reasonable accommodation that would not create a flood of ADA litigation for sport organizations. The justices asked many questions, among them, why is Casey Martin not considered a member of the public?<sup>88</sup> Is Casey Martin an independent contractor?<sup>89</sup> Should the nature of the disability make a difference?<sup>90</sup> Aren't all sports rules silly?<sup>91</sup> How do we distinguish between fundamental, substantive rules of the game and those that are not?<sup>92</sup> How is the game of golf played?<sup>93</sup> What role does walking play in the sport of golf?<sup>94</sup> Must we give substantial deference to the sports governing body that makes the rules?<sup>95</sup>

The oral argument was reminiscent of sitting in a law class, but with nine of the most challenging professors all asking questions. The questions were thorough and well-researched. In our brief writing research we discovered that three of the justices were avid golfers, and two of the three, Justices O'Connor and Stevens had hit holes in one. However, it was clear during the questioning that some of the justices were not golfers or preferred the sport of baseball to golf. For instance, in response to an explanation by Casey Martin's attorney Roy Reardon, that walking is

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87. Oral argument of H. Bartow Farr, III, Proceedings at 3, *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (No. 00-24).

88. Transcript at 3-11, *PGA Tour, Inc. v. Martin*, 532 US 661 (2001) (No. 00-24).

89. *Id.* at 6.

90. *Id.* at 29.

91. *Id.* at 28.

92. *Id.* at 27-28 & 33.

93. *Id.* at 33-34.

94. *Id.* at 35-38.

95. *Id.* at 33-34.



not in the rules of golf, Justice Kennedy said, “But you realize I’m not one who will know that. I’m not very good at golf.”<sup>96</sup>

At another point in the arguments, Justice Stevens asked Attorney Reardon to lay out his theory on when rules are fundamental to the game. This led to the following banter between Justices O’Connor, and Scalia. Justice Scalia said, “Mr. Reardon, lest we seem as ignorant of the rules of baseball as we may well be of the rules of golf, and the former would be a much greater sin, I - - (Laughter). I want to point” – Then Justice O’Connor made a face and added, “Wait a minute.” Justice Scalia went on, “In dissent again. I want to point out that your, your colleague does not agree that a special exception was made for Jim Abbott, that they believe the rules of baseball did not prohibit what he was doing. . .” As Justice Stevens attempted to get the line of questioning back to the fundamental alteration theory, Justice Scalia interrupted to say, “I just want to be on the record that we’re aware of the problem [the conflict].” This led to more laughter in the Court.<sup>97</sup>

Attending the oral argument was an exciting, yet exhausting experience that left all of us involved filled with self-doubt as we walked down the steps of the Supreme Court Building. Our prediction was that Justices Scalia, Thomas, and Rehnquist favored the PGA Tour and Justices O’Connor, Souter, and Ginsburg favored Casey Martin. Despite his liberalism and his avid golf play, Justice Stevens’ tough questions made him suspect to us. We were also concerned about Justices Breyer and Kennedy who appeared to struggle with the rules of the sport and the issue of whether they needed to defer to a professional sport organization to make their own rules. Thus, we left hoping, but not feeling confident in our chances for a win. In fact, a thank you letter we received from Casey Martin’s lawyers soon after the arguments basically stated that “we gave it our best shot, but . . .” In the days that followed the oral arguments, many would predict a loss for Martin, or that a win would be another narrow 5-4 decision from a decidedly divided Court. Fortunately, these predictions would not become reality.

### Step Eight: A Major Victory!

On May 29, 2001, the Supreme Court held that the PGA Tour is a place of public accommodation under Title III of the ADA since the PGA leases and controls golf courses for the purpose of operating its

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96. Oral argument of Roy L. Reardon, Proceedings at 33, *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (No. 00-24).

97. *Id.* at 35-36.

golf events.<sup>98</sup> The Court also held that providing Martin with a cart was a reasonable modification necessary for Martin to play on the Tour.<sup>99</sup> When the case was decided we realized the impact of our work. Shortly after the decision came down, calls and emails flowed in from reporters, colleagues, and students and alumni of the universities where we teach. People we had never met were offering congratulations and their thoughts on why the decision was correct because they were behind Casey all the way.

## CONCLUSION

We believe *PGA Tour, Inc. v. Martin* will impact the professional sport industry in a limited manner. First, this decision provides disabled elite level individual athletes the protection under the ADA that has already been afforded professional athletes in team sports. Title I of the ADA requires that organizations employing over 15 individuals comply with the ADA. Thus, the ADA has applied to professional leagues from its enactment and disabled professional athletes such as Tom Dempsey (NFL), Jim Abbott (MLB), and Magic Johnson (NBA) have all played in the major leagues without having sought protection provided them under the ADA.<sup>100</sup>

Second, the decision will have a limited impact on rule changes in elite level professional and amateur sport. The standard established in *Martin* requires that to accommodate an individual athlete with a disability, the requested modification must *not* fundamentally alter the sport or give the disabled athlete a competitive advantage. Few rule modifications would satisfy this two-part inquiry. An example of a rule modification that would satisfy the two-part inquiry is using a blinking light instead of the starting gun to signal the start of a race for a hearing impaired swimmer. Presumably the essential nature of the competition has not been altered, nor has the hearing impaired athlete been given a competitive advantage.

Third, this decision should not create an administrative burden on sport governing bodies. As an elite level golfer Martin only requested a modification that was absolutely necessary to afford him the opportunity to participate. In the three years since Martin received his injunction, the

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

99. *Id.*

100. Laura F. Rothstein, *Don't Role in My Parade: The Impact of Sports and Entertainment Cases on Public Awareness and Understanding of the Americans with Disabilities Act*, 19 THE REV. OF LITIG. 400-432 (Summer 2000).

PGA Tour has not seen a rise in the number of disabled competitors requesting modifications under the ADA.

While the impact of *PGA v. Martin* should be minimal in the actual number of requests for modifications by disabled athletes, the case has raised awareness and stimulated discussion concerning sport opportunities for people with disabilities. It is the solemn duty of sport organizations, and if necessary, courts, including the Supreme Court, to fulfill Congress' mandate to remove barriers and to integrate sport for people with disabilities.

The ADA was enacted to integrate individuals with disabilities into mainstream society. Sport is uniquely situated to lead this movement. Sport provides a vehicle for integration at all levels from grassroots to elite professional competitions. Congressional amendments to the Amateur Sports Act direct the USOC to expand participation opportunities for people with disabilities and to integrate disabled and non-disabled sport. The steps taken by the Paralympic movement coupled with this Congressional mandate and the *Martin* decision must awaken sport organizations to not only fulfill their legal responsibilities toward disabled athletes but also their social, ethical, and moral obligation to integrate their sports and adopt inclusive policies toward people with disabilities. Writing an *amicus* brief on behalf of the DSOs for the *Martin* case gave us insight and a sense of fulfillment that we too have played a role in this movement.

### ABOUT THE AUTHORS

ANITA M. MOORMAN is an Assistant Professor in Sport Administration and has served on the faculty at the University of Louisville since 1996. Professor Moorman earned her law degree from Southern Methodist University and has practiced law in the areas of commercial and securities litigation. Professor Moorman also holds an M.S. in Sport Management from the University of Oklahoma, and a B.S. in Political Science from Oklahoma State University. Professor Moorman teaches in the areas of sport law and facility and event management. She is also the faculty coordinator of the Sport Administration Internship Program. Professor Moorman serves on the Editorial Boards of the *Journal of Sport Management* and the *Journal of Legal Aspects of Sport*. In addition, she is on the Executive Council for the Society for the Study of Legal Aspects of Sport and Physical Activity and also actively participates in the North American Society for Sport Management, the Sport Lawyers Association, and the Academy of Legal Studies in Business. Professor Moorman's research interests include commercial and intellec-

tual law issues in the sport industry; and legal and ethical issues related to sport marketing and sponsorship practices. She has published a number of articles including recent publications in the *Journal of Legal Aspects of Sport*, *Sport Management Review*, *International Sports Journal*, and *Sport Marketing Quarterly*. Professor Moorman also serves as co-editor on a regular column on "Sport Marketing and the Law" published in the *Sport Marketing Quarterly*.

LISA PIKE MASTERALEXIS is Department Head and Associate Professor in the Sport Management Program at the University of Massachusetts-Amherst. She is also an Adjunct Faculty member in the Labor Relations Program. Professor Masteralexis teaches courses in Professional and Amateur Sport Law, Labor Relations in Professional Sport, and Sports Agency. Her primary research interests are in legal issues and labor relations in the sport industry. She holds a J.D. from Suffolk University School of Law and a B.S. in Sport Management from the University of Massachusetts-Amherst. She is a member of the Massachusetts and U.S. Supreme Court Bars. She is an Advisory Board member of the Women's Sports Foundation and the National Sports Law Institute of Marquette University Law School. Professor Masteralexis is a certified player agent with the Major League Baseball Players Association and a principal in DiaMMond Management Group, a professional athlete management firm.

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