IN THE SUPREME COURT OF THE UNITED STATES

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PGA TOUR, INC., :

Petitioner, :

v. : No. 00-24

CASEY MARTIN. :

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Washington, D.C.

Wednesday, January 17, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

APPEARANCES:

MR. H. BARTOW FARR, III, ESQ., Washington, D.C.; on behalf of the Petitioner.

MR. ROY L. REARDON, ESQ., New York, New York; on behalf of the Respondent.

MS. BARBARA D. UNDERWOOD, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Respondent.

C O N T E N T S

P R O C E E D I N G S

[10:13 a.m.]

CHIEF JUSTICE REHNQUIST: We'll hear argument on Number 00-24, PGA Tour, Inc. vs. Casey Martin. Mr. Farr?

ORAL ARGUMENT OF H. BARTOW FARR, III

ON BEHALF OF THE PETITIONER

MR. FARR: Mr. Chief Justice and may it please the Court: The Ninth Circuit in our view made two critical mistakes in applying the Disabilities Act to this type of claim by a professional athlete. First it failed to recognize that Title 3 of the act, the public accommodations provision, apply only to claims by persons seeking to obtain inputs of a place of public accommodation, that is seeking to enjoy its goods or services, not to claims by persons seeking to supply inputs as employees or independent contractors.

Second, the Ninth Circuit never took account of just what a top-level professional sport really is, nothing more or less than a competition that tests excellence in performing what its rules require. Any attempt to adjust the rules to compensate for an individual player's physical condition fundamentally alters the nature of that competition.

Now in turning to the first issue, our position is simply this. That Title 3 of the act would not apply

if Respondent were playing in tour events as an employee of the Tour, and the results should be no different just because he is playing in the events --

QUESTION: Mr. Farr, the language of Part 3 of the act literally could cover the player. It says, it refers to any individual, and it refers to any kind of advantage or privilege on a golf course. So you have to construe it some way, it seems to me, to avoid that language.

MR. FARR: That's correct, Justice O'Connor. I mean, the argument --

QUESTION: To reach your conclusion.

MR. FARR: That's correct. The argument made by Respondent is essentially that Title 3 covers any person who is present at a place of public accommodation, whatever he or she is doing there, whether they are a customer, an employee or an independent contractor. I think that's wrong for several reasons.

First of all, just looking at the specific language that you point to, the notion of full and equal enjoyment of goods and services, it seems to me, is quite different from the notion of being allowed to provide the goods and services.

QUESTION: Well, Mr. Farr, you keep talking about goods and services, but the statute is not limited

to goods and services, as Justice O'Connor's question indicated. It covers the enjoyment of, among other things, privileges, and I, it seems to me the straightforward argument is that the person who is making a claim here is somebody who says, like any other member of the public, I paid my $3,000 and I got my two references and I want to enjoy the privilege of competing at this, at this place of public accommodation. Why doesn't it literally fall within that quite easily?

MR. FARR: Well, if I may separate this into two things, because the $3,000 applies only to a very small piece, which is the qualifying tournament. There is no requirement playing on the Tour itself or on the Nike Tour.

QUESTION: Right. But that's, that's where you start. That's where you start.

MR. FARR: But that's where one starts. But in terms of privilege, I'm using the term goods and services not to skip over the others, but simply as a shorthand reference to all of that.

QUESTION: Well, except that it makes a difference because I think in a common sense kind of way we can say well, he is not getting any goods and services, but he is trying to exercise a privilege of playing.

MR. FARR: Well, except for, it seems to me that

in fact the word privilege, if it means the privilege to work for a place of public accommodation, to provide the input of labor to a place of public accommodation, then naturally following that logic, Title 3 would apply to anybody, an employee, an independent contractor or anyone.

QUESTION: But once again, when you phrase it the way you do, it makes it easier for your case. You say a person supplying labor at a place of public accommodation. Another way of looking at it, and I frankly would have thought in this circumstance an easier way of looking at it would be not that he's supplying labor, but that he wants to play a game and if he plays the game well enough to win a prize. That's, that doesn't fall within the sort of aura of employment that Title 1 covers.

MR. FARR: Well, I think it does, to be honest with you, Justice Souter. For example, this happens to be a game of golf. But if one thinks of the game of football, for example, professional football is a game that is played by employees. They are, they are hired I think, basically by the teams. They compete against each other.

QUESTION: Yeah. And they get -- and each one of them gets paid by his employer win, lose or draw. In this case, maybe, maybe you'll have to help me out here.

I thought whether one got paid depended on whether one won the prize.

MR. FARR: Well, it depends on performance but in a very specific sense of course, the performance by any professional athlete determines ultimately what he or she gets paid. So if in fact one can say it is a privilege of a place of public accommodation to be able to compete in a professional sport, then it seems to me that would apply to any professional sport.

QUESTION: Well, except that the statement is too broad. The football industry, I suppose, does not say we will give anybody who wants to come in and compete for a place on our team a spot. They are not going to invite me to try out.

(Laughter).

But as I understand it, that, that is what is at stake here. Anybody who can start at the first qualifying level with his money and his references and keep on playing well enough is in a position the way the PGA is run to get to this top echelon of athletes and compete for a prize.

MR. FARR: I'm not sure what difference that makes, Justice Souter, because in a sense, anybody can compete to play on a professional football team. I mean, professional football teams are drawn from the public at

large --

QUESTION: Well, Mr. Farr --

MR. FARR: -- if they are good enough to qualify.

QUESTION: We don't have to decide the football case here, but I'm wondering if you take too narrow a view of what the PGA's business it is. You think of it as just two dimensional, the PGA wants spectators, both public and on the television, and that's the service involved. But the other thing, as Justice Souter's privilege question indicated, it also offers to a subset of the public, a very talented subset from all over the world, the opportunity to win a prize. And that's also part of its business. It is offering an opportunity to win a prize.

MR. FARR: Well, the -- the thing that I think makes it more confusing, it seems, is that normally, our position would be that the opportunity to earn something, to start with, without using the words win a prize from it, but the opportunity to earn something would not be the kind of privilege or good or service that is being offered by a place of public accommodation. Indeed, people who want to provide the inputs would be the kinds of people who wanted to provide services and earn what they would get in return. I think what makes this case seem different is because what Respondent in fact does for a

living is something that other people do for recreational purposes or part of educational purposes.

But again, to take an example, if the Tour constructed its operation just slightly differently, instead of saying we will have everybody just compete for the prizes as independent contractors, if they said what we will do is we will hire a group of approximately 200 professional golfers, we'll make them employees, we'll pay them a modest salary, just enough to kind of cover their expenses as they play and then whatever they win over and above that, that will be their earnings.

Now, our argument would be that in that arrangement, the Tour would clearly not be subject to suits by those golfers under Title 3.

QUESTION: But they would be subject to suit --

MR. FARR: They might be subject to suit --

QUESTION: -- under Title 1.

MR. FARR: Because Title 1 is the title of this Act that deals with that kind of issue, the question of relationships between people who are providing labor and the people who are paying for it.

QUESTION: Well all that -- I mean, this -- that's true, that's it's a very, it's an unusual situation here, and we could go on forever about the pros and cons and who they are really like. But people go to race

courses for entertainment, but a few go to earn a living. They're touts. Some people go to casinos for fun and an occasional person goes there to earn a living. So, given the purpose of the statute, and the language of the statute, why does that make any difference?

MR. FARR: I think it makes a --

QUESTION: You're not going to say a person who goes to a race course, happens to make a living out of it, therefore, he couldn't sue if it's otherwise a public accommodation, and I think you'd say the same about all the unusual cases we can think of. Why should this make a difference?

MR. FARR: I think the difference between the examples you are using, Justice Breyer, and this example, is those, the people who go to the race tracks, some of whom may go to make a living, are essentially doing the same thing, receiving the same outputs, if you will, from the race track, as the people who are there simply for recreational purposes.

QUESTION: So are these people because after all, the golf course is leased by the PGA to use to play golf for that day.

MR. FARR: But, but I think the difference, Justice Breyer, is that at the time the tournament is going on, in fact, there are no people there playing for

recreational purposes. During the time of the tournament, which is the time when the PGA is operating the place of public accommodation, that's what's bringing the PGA within Title 3 with respect to the spectators, for example, is because it's operating a particular tournament at a place of public accommodation. It seems to me --

QUESTION: Mr. Farr, I understand you are behind the ropes, you say those are the spectators, it's a public accommodation with respect to them.

MR. FARR: That's correct.

QUESTION: But I'm, I'm sure that you must have an answer to, the public accommodations provision is not new with the American disabilities. It comes up in the Civil Rights Act of 1964 where the concern is race. Now, with respect to race, could the PGA say that we don't want any African-Americans to play in our game?

MR. FARR: Well, Title 2 does not apply, we believe, in the same circumstances as we don't think Title 3 of the ADA applies, to situations in which somebody is simply seeking to provide, seeking to obtain employment or trying to obtain work as an independent contractor, so Title 2 of the Civil Rights Act would not apply in that case.

QUESTION: So your answer is the same for both? That neither public accommodation --

MR. FARR: For both those situations. Now of course, the -- the disabilities act itself and of course the Civil Rights Acts that apply to race, and sex and age have provisions that deal specifically with the question of who is working at different places and claims about discrimination, saying the terms and conditions that you have set for a particular job are discriminating against me.

QUESTION: But you're saying they don't come under the employment provisions because they're not employees, not coming under the employment provisions, they are not covered at all?

MR. FARR: Under the disabilities act, and not under Title 2. Whether there are other provisions like Section 1981, for example, in the case of race, might extend protection in that situation.

QUESTION: Yes. But as far as the public accommodation is concerned, you are being consistent.

MR. FARR: The public accommodations provisions in our view are intended again to deal with essentially people who are consumers, clients and customers.

QUESTION: Mr. Farr, can I just identify your theory a little better? Are you contending that when the golf course is being used for a PGA tournament, it is not a place of public accommodation because of the limited

number of people that can play on that day or are you contending that even though it's a place of public accommodation, the contestants are not individuals within the meaning of the Act?

MR. FARR: It is a modified version of the second, Justice Stevens. It is that they are not individuals seeking full and equal enjoyment of goods, services, privilege and accommodations, as those terms are properly interpreted.

QUESTION: But you are assuming that the golf course, even though for a specific purpose, continues to be a place of public accommodation?

MR. FARR: That the area generally. There is a difficulty. I mean, one of the questions that one has is, is every piece of the property a place of public accommodation or is the -- are the ropes, for example, dividing a place of public accommodation from a place that isn't? That is one way to look at it.

In our view, the simpler way to look at it is the second way that you have which is to say, you have to be asking in this question, is the person an individual receiving the kind of goods, services and privileges that are covered?

QUESTION: I see. I think you conceivably could have taken the position that when it's rented out for a

particular purpose it loses its character as a place of public accommodation because only certain people can use it. You rent a hotel, say, to have a wedding. Is it then still a place of public accommodation? But you are not questioning that it is a place of public accommodation?

MR. FARR: But that's because, that's because they clearly are. The Tour doesn't deny. It's putting on an entertainment. It is putting on an entertainment to which spectators are allowed, so if one asks, is the golf course at this moment a place of exercise or recreation, as that's typically thought of under Title 3, our answer would be, I think the better view is no. And the Ninth Circuit actually interestingly didn't say that it was a place of exercise or recreation and noted that we made the argument it wasn't and basically said be that as it may, it is a place of entertainment, and we -- and what we are saying is yes, it is a place of entertainment and there are people present at the tournaments who in fact are enjoying goods and service and enjoying the entertainment that we are providing.

QUESTION: But it seems to me --

MR. FARR: But the golfers are part of the entertainment. Excuse me.

QUESTION: We are talking about not something that's just a place, we are talking about the Tour, the

circuit, the season, whatever it's called. That's what he wants to participate in.

MR. FARR: That's correct.

QUESTION: And that it seems to me is a public accommodation in that it's open to golfers from all over the world.

MR. FARR: Well, Justice Kennedy, I'm not sure I agree with that. I mean, if, if -- the thing that makes the Tour have the obligations to the spectators is the fact that they are operating a place of public accommodation during the tournaments. You have to be operating a place of public accommodation before you become subject to Title 3.

QUESTION: Well, I assume you could have a place of public accommodation on a cybernet or something that doesn't exist at any one place, and that's what, that's what this other dimension of this case is. They are offering to everyone the opportunity to compete in the abstraction we call a tour, a circuit.

MR. FARR: But Justice Kennedy, the Tour isn't an abstraction. The Tour literally is, are a series of events put on by a 501(c)(6) organization, a non-stock membership organization, and they are put on for the purposes of providing entertainment to the public. That entertainment, it seems to me, is a product that they

offer at a place of public accommodation.

QUESTION: Mr. Farr, there is another important question you haven't addressed. If we assume for purposes of resolving this case that it is a place of public accommodation, then there is a second question about what kind of accommodation is required. Are you going to talk about that before your time is up?

MR. FARR: Yes, Justice O'Connor. Let me talk about that now, if I may. The -- if one assumes for a moment, and for example, the Seventh Circuit in the Olinger case just assumed that Title 3 did apply to the type of claim that the professional golfer there made. If one assumes that, then the question is whether the modification that's requested here would fundamentally alter the nature of Tour events, and I think that where the Ninth Circuit went wrong on that particular question is that it never really came to grips with what professional athletics are.

The professional athletics are as I said in the beginning, simply tests of excellence. They are questions of who can perform the best a particular set of physical tasks, and those tasks are defined by the rules of the sport.

QUESTION: But, but the PGA has let down its requirements in a couple of cases. One golfer had been

injured and he was allowed to go in a cart, was he not?

MR. FARR: Not -- never in a high-level Tour event, Your Honor. There has never been a situation in the events we are talking about, which is the events on the highest level PGA tours where they have allowed different people --

QUESTION: Mr. Farr, that's not true as to qualifying schools.

MR. FARR: Oh, qualifying tours --

QUESTION: And the thing that puzzles me is how it can be a fundamental rule that applies that does not apply in the qualifying events.

MR. FARR: Well, because the, the principal events that they put on are, of course, the events of the Tour themselves, the two highest level events. Qualifying involves simply questions of logistics to be honest. There are, there are many more people who are playing.

QUESTION: No. If logistics are sufficient to justify use of a cart, why isn't this handicap sufficient?

MR. FARR: Well, first of all, let me make --

QUESTION: Because they are both trying to determine the quality of the golfer and it's not fundamental in qualifying schools but it is fundamental in the Tour event itself.

MR. FARR: Well, let me make one point. That

when carts are allowed, they are allowed for all players, and that is essentially because there are choices that the Tour has to make at any particular time about whether or not there are enough caddies available, whether there is enough time on the golf course to get however many people there are through the event in order to produce whatever result they are looking for.

With respect to the events we are talking about, the actual competitions on the PGA Tour, on the buy.com Tour, which is the second level tour, the Tour has always required that all competitors observe all the same rules, including the walking rule. There have been no exceptions to that whatsoever.

QUESTION: Mr. Farr --

QUESTION: Mr. Farr, is your position then, clear position that there is no accommodation required in a professional sport competition, that the rules are whatever they are, and there is no requirement to adjust to any disability?

MR. FARR: I want to make clear two points. First of all, that when I talk about rules, I am talking about what we have called in the case substantive rules. And that is rules that are intended to and do have the potential to affect performance and the outcome of the tournament. So first of all, when I'm using the term

rules, I am.

Secondly, though, the question is if, if you are saying do we mean that for any rule, or any accommodation, I think the correct answer is yes, although one sort of instinctively would think that there should be some process by which people can separate the performance affecting rules that really count from the performance affecting rules that don't really count. I actually don't think there is such a process.

QUESTION: Well, you're familiar with both the law in the area and the game in your preparation for this, for this argument, so you could not think of any concrete example of where there would be any requirement to accommodate to a disability, that the game is the game?

MR. FARR: In a professional sport, I think that's true, that the purpose of a professional sport is one thing and one thing only. It's to determine who is the best at doing a certain set of defined tasks. If you change what the tasks are, if you change the rules that people have to comply with so that you have different rules for different players, you are not going to get an answer to the question of who is the best at that particular thing.

QUESTION: Mr. Farr.

QUESTION: Your argument is --

QUESTION: Please, go ahead.

QUESTION: Am I correct that, assuming we have these two different grounds, if we go on your first ground, and agree with you on that, namely, that this is not an individual who is seeking to enjoy the place of public accommodation, the PGA Tour would nonetheless, if it wishes, be able to grant an exception in the future to Casey Martin. It could say well, we don't have to under Title 3, but we are going to do it voluntarily.

Whereas, if we go on your second ground, mainly that it is a fundamental part of a sport, the Tour wouldn't be able to make such an exception, would it? It would in effect be admitting that it is not a fundamental feature of the sport.

MR. FARR: I think our second argument is slightly different, Justice Scalia. I agree with the first part to start with. Yes. I think if the Court would agree on the first issue that the Tour could, and I think the Tour could under the second, simply by changing what the rules of the sport are. Our position is not that there is such a thing --

QUESTION: Well, no, make an exception just for one, for one member.

MR. FARR: But then you --

QUESTION: Of course you could change it for

everybody. Anybody that wants to ride can ride. But could you just say only Mr. Martin can ride? Could they do that if we, if we, if the basis for their exemption is the fact that walking is fundamental to the sport?

MR. FARR: I think it's -- again, our argument, just to make sure I'm being clear, is not that we are contesting, contending that there is a difference, that there are fundamental rules and nonfundamental rules. We can tell which one is which, and walking is a fundamental rule. If there were such a way to tell, we think walking would be a fundamental rule. But our position in fact is that all the substantive rules are fundamental rules.

QUESTION: Rules are rules, and therefore --

MR. FARR: Rules are rules.

QUESTION: And therefore, you can't make an exception for one individual. Right?

MR. FARR: You cannot because you absolutely --

QUESTION: Right. And as soon as you do that, then --

MR. FARR: You have to have the uniformity in order to be able to measure what you do.

QUESTION: You're only saying walking is fundamental if there is a rule against riding?

MR. FARR: I'm sorry, Justice Stevens?

QUESTION: You're only saying walking is

fundamental if there is and always has been a rule against riding in a cart.

MR. FARR: That what is fundamental --

QUESTION: Am I right about that?

MR. FARR: I -- yes. Except, again, I want, I want to be clear that what in fact is fundamental to any particular game is the rules of the sport. That is what defines what the sport is. Therefore, if there is not a rule against it, by definition it's not something that potentially affects the outcome of the sport as played under its rules.

QUESTION: This would be true of --

QUESTION: Why would we say that --

MR. FARR: Pardon me?

QUESTION: This would be true of amateur sports, as well as the --

MR. FARR: I think the difference in amateur sports and the thing that makes, makes the, when you apply the fundamental alteration language is that the fundamental, when you talk about fundamentally altering the nature of a particular good or service, that requires looking at what the nature of the particular good or service is. The nature of a professional sport is very different, I think, from the nature of most amateur sports. Probably not all.

QUESTION: Because it's trying to winnow the wheat from the chaff in a way that amateur sports don't.

MR. FARR: Not only that. I mean, amateur sports do that to some extent as well, but amateur sports by definition, and particularly high school, college, grade school sports, things like that, have as part of their very nature, part of their very reason for being, an educational or recreational side. And therefore, when one comes to apply any fundamentally altered language to the nature of that, essentially amateur sports, most amateur sports have a dual nature. They have a nature that involves sort of sorting winners from losers, but they also have a nature that says we are trying to get as many kids in the high school or whatever to play. Professional sports are not --

QUESTION: Why couldn't we make that same argument. Why couldn't that same argument be made by anyone who provides an important public service? You know, we have a bunch of rules, characteristics, qualifications. We don't want courts in there weighing the importance of this good or service or privilege. Therefore, if it affects the nature of the good, service or privilege, it's fundamental, which is the argument you are making.

MR. FARR: Well, if it's actually changing what

the good or service is --

QUESTION: They always do, to some tiny degree.

MR. FARR: Well, if it changes the nature then though, I think one therefore, one has to look at the regulations for some guidance. And the regulations -- I'd like to take just a minute before I reserve my time, if I may, but the regulations are something that because the United States hasn't cited them, I think maybe get lost a little bit here. But under the regulations in Title 3, there is a specific provision that says a public accommodation does not have to change its inventory to accommodate disabled people. And the reason given for that in the preamble of the regulations is that Title 3 requirements are intended to assure access to the goods and services being provided, not to alter the mix in nature of the services typically provided.

Now, typically provided in this context we would say are the tournaments with uniform rules, including the walking rule, at the very highest level. That is one that has been typically provided.

And the reason I think for that, and I think this goes to your question, Justice Breyer, is that in a sense, any store or commercial entity is just whatever its goods are, a bookstore. An example is a bookstore does not have to stock braille, braille books. And there isn't

an inquiry every time as to how much trouble it would be to stock braille books, whether there's shelf space, whether they could get them or not. There's a categorical rule in the regulations that says that's not what we're talking about, that would be a fundamental alteration, and that's exactly the same point we are making here.

If I may, I'd like to reserve the balance of my time.

QUESTION: Thank you, Mr. Farr. We reserve your time. We'll hear from you now, Mr. Reardon.

ORAL ARGUMENT OF ROY L. REARDON

ON BEHALF OF THE RESPONDENT

MR. REARDON: Mr. Chief Justice, and may it please the Court: I would like to take the liberty of beginning with Petitioner's second point, because I think it's something we have recently heard discussed here, and it's I think quite important.

From 1965 until 1997, the PGA ran a Q School to determine --

QUESTION: A what school?

MR. REARDON: It's a Q, they call it the Q School. It's a qualifying school, Your Honor. And the purpose of that Q School is to determine, it's a test of excellence, as Petitioner said, to determine who is the best and who can go on the Tour the following year. It's

a very intense course. There are 14 sessions, 252 holes played on courses just like the PGA's regular courses that they play their tournaments on. The hard card, which is described in the briefs as the rules which impact tennis tournaments, golf tournaments under the PGA, the hard card applies to those events, but the walking provision of the hard card is eliminated for purposes of the Q School, and what happens is there is a winnowing down process.

In 1997, when Casey tried out, there was something like 1,200 people, golfers from the public, who wanted to play on the PGA Tour. And they came in, paid their money, had their references, and started to play, and they winnow it down to 168 players by the third stage. Every one of those 168 players is going to either go on the PGA Tour the next year or on the Nike Tour at the time, and none of those players need ever have walked a single hole, not only in the qualifying, but in their lives.

QUESTION: Mr. Reardon, all that proves, all that proves is that you could play golf under different rules, just as you can play baseball under different rules. Is the -- is the designated hitter rule, is it essential to the game of baseball that the pitcher bat?

MR. REARDON: There are two leagues. One league has it. One league doesn't.

QUESTION: They play under different rules. But every team in each league has to play under, under the same rule. Now, could a pitcher in, in the, in the National League, which follows the traditional rule, could he say I have some blood deficiency that means I get tired sooner than other pitchers, and therefore I shouldn't have to go up to bat. I'd like to, I'd like to sit in the dugout, because after all, the, the rule that the pitcher has to bat is not fundamental to baseball. The American League doesn't have that rule.

MR. REARDON: Well, for the National League, it is fundamental. And it would not be permissible because you would be changing --

QUESTION: Why. Simply because that --

MR. REARDON: You're changing --

QUESTION: Simply because that's what they do. That's the rule of the game.

MR. REARDON: But Your Honor, but Your Honor -- I cite, I cite what happens in the Q School to demonstrate the fact that walking is not indeed fundamental because they don't require it.

QUESTION: All that it demonstrates -- all that it demonstrates is that you can play the game under a different rule. I mean, what -- I don't understand the whole meaning of fundamentalness with regard to a sport.

Is it fundamental to baseball that, that the strike zone be from the chest to the knees? It could be from the eyes to the hips, couldn't it?

MR. REARDON: It could.

QUESTION: Would that make any difference?

MR. REARDON: Rules could be changed.

QUESTION: And could a player who has a disability, which means he has, which causes him to have an excessively long torso, could he demand that the umpire call strikes on him from, you know, from his eyes to his hips?

MR. REARDON: No, he could not, Your Honor. Because a fundamental --

QUESTION: Of course he couldn't .

MR. REARDON: It's fundamental.

QUESTION: It's a silly rule.

MR. REARDON: It's fundamental to the game.

QUESTION: All sports rules are silly rules, aren't they?

MR. REARDON: I don't think it's a silly rule. I think it gauges how well the pitcher can control the ball and get it within the strike zone. Here we are dealing with something that isn't fundamental. Not only in the Q School. Any Monday, a golfer with a two handicap and two letters of reference can go out to a PGA

tournament that's about to be run that week and they show up and they present their handicap and their letters of reference.

QUESTION: Mr. Reardon, the Seventh Circuit Court of Appeals in a strikingly similar case to this one determined at the end of the day that the walking rule was fundamental because it put additional physical stress on each competitor after a tournament lasting several days and perhaps in hotter inclement weather, and on hilly conditions, it could impose quite an additional stress on the players in the final rounds.

MR. REARDON: That's correct, Your Honor.

QUESTION: And therefore, that it was an aspect of the physical challenge involved.

MR. REARDON: That case is in this Court. That case was decided on a different record from this record. That case I don't think went into a very material aspect of the proof in our case, which was the nature of the disability, this tragic disability that he has, and what it did in terms of whether or not a, a rule which would require him to walk should be altered.

QUESTION: Should the nature of the disability make a difference?

MR. REARDON: Basically because if it doesn't, then you are not really gauging the second part, which is

to consider whether or not an alteration is going to do something fundamentally. If it's a superficial disability, giving a player an advantage may indeed result in an alteration in that circumstance.

QUESTION: Well, what would be your example of a superficial disability?

MR. REARDON: Ingrown toenail, Your Honor.

QUESTION: Well, I think if you have an ingrown toenail, it doesn't seem superficial.

(Laughter).

MR. REARDON: I agree with that, but, but the Act, the Act --

QUESTION: I think it's quite internal, actually.

(Laughter).

MR. REARDON: The Act does not accommodate that kind of a disability. Casey Martin's disability is indeed accommodated.

QUESTION: Mr. Owens, are -- Mr. Reardon, you said Mr. Olinger's case was different because it was on a different record, and that's somewhat worrisome because let's say you're right, that they do have to make accommodations. Who is the judge of whether a person is sufficiently disabled to get a dispensation from the nonfundamental walking requirement? Is it up to the

lawyers and the quality of the record they make?

MR. REARDON: I think it's initially up to the public accommodation, in this case the PGA, to look at it and decide.

QUESTION: But you said the difference between this case and the Olinger case is the record, and that's made in court by advocates for a side.

MR. REARDON: Yes, it is. But I'm talking about in advance of it getting to the courthouse. If the PGA had done what I respectfully suggest the law demands of it, which was to take a look at the nature of the disability, the individual disability of Casey Martin, rather than returning his medical records without looking at them, and returning the tape demonstrating the gravity of his problem, they would have seen the disability and in those circumstances --

QUESTION: But did they do it on a case-by-case basis or did they say we're troubled by this notion because we think there are a lot of people who will say it's a lot harder for us to walk, and we don't -- we won't know where to draw the line?

MR. REARDON: Respectfully, Justice Ginsburg, I don't believe there will be a lot of cases, a lot of people. Because just taking our 1997 case, the PGA has not had another lawsuit by a disabled person. The USGA,

which is here, has had two lawsuits, basically similar facts. Now, there has not been a huge wave of litigation and the reason is, a person like Casey Martin is very unique. He never asked for any modification of any rule affecting where he hits the ball, how big the hole is or anything else. He plays every single rule of the game. The only thing is his disability and the whole purpose of the Act is to get people like Casey Martin a chance to get to the game.

QUESTION: What, what is the rule? Didn't organized baseball waive a rule in the case of Jim Abbott, who had, I think, a hand -- what was the rule they waived? Do you remember?

MR. REARDON: As I understand the rule, Your Honor, basically in baseball the pitcher is not supposed to move the ball in his hand prior to delivery.

QUESTION: And they waived that rule. Right?

MR. REARDON: Regular pitchers take the ball, as you see, they take it into their chest, hold the ball behind the glove and then make the delivery.

QUESTION: Now, how are we supposed to find out whether this rule is more like that rule of looking at the ball in baseball, or whether it's more like the rule that Justice Scalia mentioned, namely the rule of having a designated hitter? How is the -- how are we supposed to

decide whether the rule is the one or the other?

MR. REARDON: Okay. I think what's very important is to understand what the game is, what is the competition? Now, when you look at the rules of golf, promulgated by the U.S. Golf Association and St. Andrews, this is the bible of golf. If you want to play golf virtually in the world, you play by these rules. What do these rules say?

Rule one of the game of golf, hitting the ball from the teeing ground into the hole by a stroke or successive strokes. That's the game. There is no rule in the rules of golf --

QUESTION: I know. But you realize I'm not the one who will know that. I'm not very good at golf.

(Laughter.)

The -- the -- the real question is some rules are like the designated hitter and they are part of the game. Other rules are like whether you look at the baseball before you throw it or hold it to your chest, which isn't part of the game, at least not an essential part. Now, how did we find out which is which because the question was raised and I want to be clear what the answer to that is, and how do we find out? Not we, me personally. What's the system for finding out?

MR. REARDON: I would respectfully suggest the

system is to look at the nature of the rule.

QUESTION: Who?

MR. REARDON: Initially it would be the public accommodation. If they don't agree that there should be a waiver of the rule, then it has to go on up the line, including to courts, if that's required.

QUESTION: So courts look at that like they look at any other rule of any other employer, public accommodation, et cetera?

MR. REARDON: Yes. I don't see anything quite frankly respectfully, extraordinary about that.

QUESTION: Well, we get into a lot of unexpected areas around here. But, Mr. Reardon, at the least, don't we have to give substantial deference to the sporting authority?

MR. REARDON: Actually, Justice Kennedy, if you wind up giving substantial deference, in other words, if you roll over and let them make a rule and say it's substantive, and that's the end of the game, then you are basically giving them a free pass out of the Americans with Disabilities Act, which would be improper.

QUESTION: Well, what -- we give deference to agencies all the time. It's not rolling over. It's just an acknowledgment of who has the best expertise, who knows the most about it, who is best equipped to make the

decision. That's all it is.

MR. REARDON: But it's, it's not just a decision by the sport. There is an implication, and a very significant implication in the statute, which requires the analysis. This is not something where Congress said sports can have --

QUESTION: Mr. Reardon, can I ask you a question to be sure I understand your theory about fundamentally alter the nature of the game. Are you contending that the walking rule is never a fundamental -- abandoning the walking rule, it would never be a fundamental rule, or are you contending that with respect to Casey Martin, it's not fundamental because his disability has the same impact on his ability to play as walking has on other people? Which is your theory?

MR. REARDON: I would -- I'm trying to live with both theories, if Your Honor please. But I do believe --

QUESTION: Quite different.

MR. REARDON: -- that looking at, at his disability is very important. Because it enables the one making the judgment to determine whether or not this modification, taking into account his circumstances, is really significant.

QUESTION: 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 --

QUESTION: Wait a minute.

QUESTION: 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 that the rules of baseball did not prohibit what he was doing. The only thing that was prohibiting was deceiving the base runner, and spinning the ball; so long as it didn't deceive the base runner, it was okay. We don't have to resolve that here.

QUESTION: I saw his --

QUESTION: But I just want to be on the record that we're aware of that problem.

(Laughter).

MR. REARDON: I don't know if I've answered your question, Justice Stevens, but I think it largely turns initially at least on the condition of the disabled person, and you look at that.

QUESTION: Well then you're not contending that the, if it, if it weren't for the particular nature of his disability, that it would fundamentally alter the game?

MR. REARDON: No. Your Honor, I think if you examine the way the PGA has handled the whole walking

rule, it's replete with exceptions, that you can't have all of those exceptions and then argue it's essential because that's what the -- you get to the definition --

QUESTION: Well, it seems to me you can have a different rule for qualifying and then have, than you have for the final events. And if the final events are all run consistently with the general rule, I'm not sure the, the fact that it isn't fundamental in the sense you don't really have to have it makes the difference.

MR. REARDON: But if you're testing the same skills, that's very important to my argument, that what are you testing. And when you look at the way they handled the exceptions throughout, this is the over 50s, just last week in Hawaii, and this is not in the brief, but examples like this are in the brief. There are a couple of holes out in Hawaii on the Mercedes championship that were difficult for the players to negotiate because they were hilly. They took them by cars.

QUESTION: Yeah, but they took them by cars, I take it, for everybody.

MR. REARDON: Everybody.

QUESTION: And -- and therefore, the fact that they took them by cars does not affect the assessment of the relative abilities of the players, because they all got the same dispensation. Your brother's argument is

that a professional sport is entitled to define anything as fundamental which could affect the relative, the measurement or the indication of the relative ability of the players. And he says walking or not walking does make that kind of a difference. What is wrong -- and we've got to come on with some kind of a standard if, no matter how we decide this case, why isn't that a reasonable standard that should be respected under the Act?

MR. REARDON: Because walking is not the game. The game is hitting the ball and --

QUESTION: No, but -- the game can -- we're not talking about the game in the abstract. We're talking about the PGA Tour, and if the people who make the rules for the PGA Tour say we want to make this particular game tougher than regular golf games, we are going to separate another subset of people by making them walk, or at least making them walk on most holes. Everybody has to play by this rule. Why, if that could be outcome determinative, is that not a, number one, a reasonable way for them to draw the line, and why shouldn't we respect it?

MR. REARDON: I think it -- you still have to look at the rule to see whether that rule as imposed, or as modified, giving an exception, would fundamentally alter that game.

QUESTION: I know it. But their argument is,

that's -- but you're avoiding my question.

MR. REARDON: I'm sorry.

QUESTION: I think. Their argument is that if it can affect the results, then we are entitled to define it as fundamental in this kind of a game. You may argue that it doesn't affect the results and therefore even on their own theory, it shouldn't apply, and you have so argued, and I understand that. But if you're not right about that, is there something wrong with the legal criterion that they are arguing for?

MR. REARDON: Your Honor, what I think is wrong with it is that you would basically be giving the PGA and organized sports a free pass out from under the --

QUESTION: I understand your argument, but their response to that I think would be no, it's not a free pass because if you can in fact show that this doesn't affect the relative measurement of the players, that this is just kind of a sham, then we couldn't enforce it. It wouldn't be fundamental within the meaning.

MR. REARDON: And we haven't proposed the rule as a sham, but we have, and rely upon the record, which reflects the trial judge's conclusion after a six-day trial, that walking was not a significant matter.

QUESTION: Under normal circumstances.

MR. REARDON: Under normal circumstances.

QUESTION: And that's an ambiguity in the lower court's finding. What is -- isn't a tournament at the height of the competition abnormal circumstance with the description of the, of the, what would it be, the extra hole and the humidity and the rough terrain. That doesn't sound to me like normal circumstances. What, what was, what was the lower court intending to cover with that qualifying language?

MR. REARDON: I, I can only suggest, and there was testimony with respect to the U.S. Open, which was held here in Washington in 1964, testimony by the player who won it, Mr. Venturi. And his testimony was that he literally did get exhausted. There was counter-testimony that said the exhaustion came from dehydration, not from walking, and there was spectators at that event who were passing out. They weren't doing any walking.

QUESTION: What are abnormal -- what is a normal circumstance and what is an abnormal circumstance?

MR. REARDON: I, I think the abnormal circumstance would probably be a circumstance that may, may have some relationship to performance, but may not.

QUESTION: Thank you, Mr. Reardon. Ms. Underwood, we'll hear from you.

ORAL ARGUMENT OF BARBARA D. UNDERWOOD

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

MS. UNDERWOOD: Thank you, Mr. Chief Justice, and may it please the Court: This case presents an important question of the coverage of the Disabilities Act, as well as an issue of its application. When an organization arranges a golf tournament and invites the public to compete for the opportunity to participate, it provides golfers with services, privileges, and advantages of the golf course.

QUESTION: Miss Underwood, may I just ask a question right there? Putting the qualifying schools to one side for a moment, at the time they have entries to the golf tournament itself, the public can't just -- anybody just can't come in and say I want to play, only those people who have graduated from the qualifying school.

MS. UNDERWOOD: Well, that's rather like the fact that a university that, that offers, to which the public can apply doesn't then admit the whole public. It has a selection process, and so what only, only the admitted people can attend, but the university is a public accommodation.

QUESTION: The students are not performing. The professors are performing and the students, the students are enjoying the performance of the professors.

(Laughter).

MS. UNDERWOOD: Yes. That's a different point. All I meant was that the fact that there is a selection process does not deprive an entity of its status as a public accommodation. If it's open to the public to compete, to attend, then that whole process is, is something that's open, to which the public is invited.

On the separate point, what are the circumstances --

QUESTION: Why is that any different with respect to employees? Couldn't you say that awful your employees are enjoying the opportunity to work for you in the place of public accommodation in which you employ them? That seems to me perfectly parallel to saying that these professional golfers who are making money by, by putting on this entertainment are enjoying the opportunity to do that.

MS. UNDERWOOD: You might be able to say that. There are two -- the words would allow you to say that. There are two reasons why you wouldn't. One is that Congress made very clear that it was covering employees in Title 1 and that it didn't intend to provide redundant coverage in Title 3 so whatever one might say ab initio, that possibility is excluded.

QUESTION: Independent contractors would be

covered then. The independent contractors who, who provide services to the owner of the public accommodation are enjoying the opportunity to provide him services.

MS. UNDERWOOD: Well, I'd like to take, to answer that in two steps because I take issue with the proposition that these are employee-like independent contractors. I do say that even if they were, they would be covered, but this is a much stronger case because in fact, there is no independent contracting relationship here. The golfer does not, does not undertake any obligation to perform, even in the way that an independent contractor does. He is simply --

QUESTION: Doesn't he -- doesn't he have to appear in a certain number of tournaments per year? I thought that was part of the commitment.

MS. UNDERWOOD: He doesn't make a commitment to -- it's my understanding of the record that he doesn't make a commitment. It is true that if he doesn't appear, he won't be in the Tour anymore, but he, by qualifying and being eligible to be in the Tour does not make a commitment to participate.

QUESTION: Well, that's just like saying an independent contractor doesn't have to comply with his contract there. The only thing is if he doesn't, he gets fired. I mean, it's the same thing.

MS. UNDERWOOD: It's not quite the same thing because there is no contract, there is no contractual commitment here at all.

QUESTION: But you're saying, I take it you're saying that they can't sue, the Tour can't sue the guy that doesn't play enough games, they just drop him. Whereas, they can sue the plumber who doesn't come if you have to hire a more expensive plumber.

MS. UNDERWOOD: That's correct. In fact, PGA Tour explained in the district court when they were attempting to defeat the claim that this was an employee, that it doesn't hire golfers, that it's a membership organization, a professional association that arranges playing opportunities for its members and promotes their interests. It compared itself to the ABA in that regard. It provides opportunity for them. It provides services for them.

QUESTION: May I -- may I ask you, Ms. Underwood, if whether to decide in your favor, we have to determine the general applicability of Title 3 of the ADA to independent contractors?

MS. UNDERWOOD: No, you do not. In the -- that is, the, the particular sort of entity or status of Respondent here is, as I said, a much clearer case that he is a consumer of the services or the privileges or

advantages of a public accommodation.

QUESTION: Wait. It was determined in this case, as I understood it, that he was an independent contractor; at least the district court thought so.

MS. UNDERWOOD: Well, the district court said so in the context of deciding that he wasn't an employee, as if the only two options were that he was an employee or an independent contractor. That is, in deciding that he couldn't take advantage of Title 1 for employees, the court said he is not an employee, and looked to the body of law that said people who aren't employees are independent contractors. But I don't think that resolves the question whether he maybe was something else entirely, a member or a potential member who was neither an employee nor an independent contractor as that term is commonly used in the working context. He simply wasn't a worker here at all.

Petitioner argues that players can't be consumers of services because they are providers of entertainment to the spectators, but that is simply a false dichotomy. PGA offers services to these two different groups. It arranges playing opportunities for golfers and viewing opportunities for the spectators. As a result, players both consume and provide services at the same time, just like the little league players who have

uniformly been treated by the lower courts as protected users of a public accommodation.

QUESTION: Well, I suppose any business which is a successful business in the community holds out the privilege of independent contracting as repairmen come in and so forth, they are all independent contractors, and I'm not quite sure how you distinguish that from, from the golfers here.

MS. UNDERWOOD: Well the difference is, as I said, I think there is an argument that even those independent contractors could be covered, that the Disability Act meant to open economic and social life to people with disabilities and that --

QUESTION: Let's -- let's assume I disagree with that.

MS. UNDERWOOD: Yes. I think the simple answer here is that the privilege of working for, for money in an employee-like role is simply quite different from what is happening when somebody participates in a competition. The public accommodations laws, as we said earlier, protect gamblers at a casino, or exhibitors at a craft fair, or participants in a dance contest, whether there are money prizes or not, whether the people who are engaging in those competitions. I mean, I think the -- are doing it to make their living or are doing it as an

avocation. It wouldn't work to distinguish the motivations of the different users of the services of that accommodation. They wouldn't be protected if they were employees.

It's perfectly true that if golf arranged itself differently, and had employees here, they wouldn't be protected under Title 3.

QUESTION: But the independent contractor repairman has to do it for a living, and let's, let's assume that we think that that's what these golfers are doing. What's the difference?

MS. UNDERWOOD: The difference is that the participation in a contest is a different sort of, that is open to the public, is a different sort of thing from the cut from the arrangement by contract, by employment contract or by some other contract to provide services.

And I'd like to point out, of course, that covering people like independent contractors or like contest participants, which is what we have here under Title 3 is not as has been suggested some sort of end run around the limitations of Title 1.

QUESTION: Are you then distinguishing the stage -- one analogy that was made is the spectators are in the theater, but what's going on in the stage, those people are not relating to the space as a public accommodation.

MS. UNDERWOOD: Well, you're making a comparison to the theater, you mean?

QUESTION: Yes.

MS. UNDERWOOD: Well, in a theater, of course, ordinarily there are employees so this issue, they ordinarily are employees so this issue doesn't come up. I would suppose though, that if, if a, if a performer sought to rent a performance space, he would be a consumer of the, of that facility and could claim that he was being discriminated against as a consumer of that facility. That's not usually the way performers relate to performance space.

QUESTION: In your opinion, does it make a difference if, if there is no easy classification, that is, if a professional golfer is somehow unique, not this, not some other thing, not an employee, not a contractor, not a client, not exactly a customer, not a this, not a that. Does it matter?

MS. UNDERWOOD: Well, I think that the purpose of the Disabilities Act was to, was to be inclusive. I think that's clear both from the statute and from the legislative history so that I would suggest that if there's, that doubts should be resolved here in favor of coverage. But I don't think it's unclear. I think that, that the, that the public accommodations title was meant

to cover golf courses and participation in events at golf courses so long as they are open to the public. And it seems to me this is right in the heart of what the statute was meant to reach.

QUESTION: Thank you, Ms. Underwood. Mr. Farr, have you three minutes remaining.

REBUTTAL ARGUMENT OF H. BARTOW FARR, III

ON BEHALF OF PETITIONER

MR. FARR: Thank you, Mr. Chief Justice. Excuse me. Just a few brief points.

Responding in reverse order to the United States' argument, first of all, they say that the reason that employers, employees are not covered by Title 3 is because that covers Title 1, but Title 1 doesn't cover all employees. It only covers employees of a covered employer. You have to have at least 15 employees to be covered and if you are not an employee of a covered employer, you are not covered either. Yet, the United States' position is that no employees are covered by Title 3, but really independent contractors or people similar to that are in the same position essentially with respect to Title 3 as noncovered employees under Title 1.

Secondly, the district court specifically said that Respondent was an independent contractor, not just in talking about Title 1, but on page 53 of the joint

appendix, it says, the district court says, I focus only on the issue of whether he is entitled to his requested accommodation, the use of a golf cart, as an independent contractor playing in defendant's tournaments which are held at places of public accommodation.

Now -- but I should point out, I mean, while he is an independent contractor as defined by the district court, our point is not exactly it turns on whether he is an employee or an independent contractor. Our point is he is not a consumer of goods and services, and there are a number of people who are not consumers. Employees are in the group. Independent contractors are in the group. Partners in a law firm, which is a type of public accommodation, are not in the group. Insurance agents are not in the group. The issue is what they are not. They are not people obtaining, seeking to obtain or gain access to goods and services. They are all in the category of people who are providing goods and services to the public accommodation so it in turn can provide its goods and services to other people.

Secondly, just to make the contrast between the people who are also playing golf and who are covered, Title 3, we concede, it covers commercial opportunities, recreational opportunities, educational opportunities. Those are all things specifically mentioned in Title 3 in

terms of defining who's a public accommodation. What it doesn't cover is professional opportunities, the people who are trying to get, to make their living essentially working for the place, the operator, the public accommodation. So they are not like the tout at the race track who is there in common with the other people enjoying it for recreation. They are people actually working like somebody who is behind the betting counter at the race track who is working for the operator.

Now, just quickly on the points that Respondent raises, Rule 1.1 doesn't say golf is a sport of hitting the ball from the tee to the putting hole. It says it's a game of hitting it from the tee to the putting hole in accordance with the rules. That is Rule 1.1.

And the rules for this particular competition include, as there are permitted to be, optional rules, and that in turn includes the requirement that competitors walk the course. So if you, if you are saying that you cannot, that you have to make waivers in that situation for someone who can't comply, then you are changing the game.

QUESTION: Thank you, Mr. Farr. The case is submitted.

(Whereupon, at 11:13 a.m., the case in the above-entitled matter was submitted.)