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IN THE SUPREME COURT OF THE UNITED STATES

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PGA TOUR, INC., :  
Petitioner, :  
v. : No. 00-24  
CASEY MARTIN. :

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.

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1 P R O C E E D I N G S

2 [10:13 a.m.]

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

5 ORAL ARGUMENT OF H. BARTOW FARR, III

6 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

12 QUESTION: To reach your conclusion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 (Laughter).

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

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

1 large --

2 QUESTION: Well, Mr. Farr --

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

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

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



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

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

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

15 QUESTION: But they would be subject to suit --

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

17 QUESTION: -- under Title 1.

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

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

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

6 MR. FARR: I think it makes a --

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

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

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

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

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

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

10 MR. FARR: That's correct.

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

17 MR. FARR: Well, Title 2 does not apply, we  
18 believe, in the same circumstances as we don't think Title  
19 3 of the ADA applies, to situations in which somebody is  
20 simply seeking to provide, seeking to obtain employment or  
21 trying to obtain work as an independent contractor, so  
22 Title 2 of the Civil Rights Act would not apply in that  
23 case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 QUESTION: But it seems to me --

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

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

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

3 MR. FARR: That's correct.

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

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

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

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

1 offer at a place of public accommodation.

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

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

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

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



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

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

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

9 MR. FARR: Oh, qualifying tours --

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

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

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

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

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

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

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

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

14 QUESTION: Mr. Farr --

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

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

1 rules, I am.

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

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

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

24 QUESTION: Mr. Farr.

25 QUESTION: Your argument is --

1 QUESTION: Please, go ahead.

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

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

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

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

24 MR. FARR: But then you --

25 QUESTION: Of course you could change it for

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

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

13 QUESTION: Rules are rules, and therefore --

14 MR. FARR: Rules are rules.

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

17 MR. FARR: You cannot because you absolutely --

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

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

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

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

25 QUESTION: You're only saying walking is

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

3 MR. FARR: That what is fundamental --

4 QUESTION: Am I right about that?

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

12 QUESTION: This would be true of --

13 QUESTION: Why would we say that --

14 MR. FARR: Pardon me?

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

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

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

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

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

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

1 the good or service is --

2 QUESTION: They always do, to some tiny degree.

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

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

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



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

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

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

11 ORAL ARGUMENT OF ROY L. REARDON

12 ON BEHALF OF THE RESPONDENT

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

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

20 QUESTION: A what school?

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

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

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

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

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

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

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

14           QUESTION: Why. Simply because that --

15           MR. REARDON: You're changing --

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

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

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

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

4 MR. REARDON: It could.

5 QUESTION: Would that make any difference?

6 MR. REARDON: Rules could be changed.

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

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

14 QUESTION: Of course he couldn't .

15 MR. REARDON: It's fundamental.

16 QUESTION: It's a silly rule.

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

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

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

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

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

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

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

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

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

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

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

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

7 MR. REARDON: Ingrown toenail, Your Honor.

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

10 (Laughter).

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

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

15 (Laughter).

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

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

1 lawyers and the quality of the record they make?

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

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

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

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

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

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

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

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

17                 QUESTION: And they waived that rule. Right?

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

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



1       decide whether the rule is the one or the other?

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

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

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

15              (Laughter.)

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

25              MR. REARDON:  I would respectfully suggest the

1 system is to look at the nature of the rule.

2 QUESTION: Who?

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

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

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

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

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

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

1 decision. That's all it is.

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

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

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

18 QUESTION: Quite different.

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

24 QUESTION: Mr. Reardon, lest we seem as ignorant  
25 of the rules of baseball as we may well be of the rules of

1 golf, and the former would be a much greater sin, I --

2 (Laughter).

3 I want to point --

4 QUESTION: Wait a minute.

5 QUESTION: In dissent again. I want to point  
6 out that your, your colleague does not agree that a  
7 special exception was made for Jim Abbott, that they  
8 believe that the rules of baseball did not prohibit what  
9 he was doing. The only thing that was prohibiting was  
10 deceiving the base runner, and spinning the ball; so long  
11 as it didn't deceive the base runner, it was okay. We  
12 don't have to resolve that here.

13 QUESTION: I saw his --

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

16 (Laughter).

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

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

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

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

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

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

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

21 MR. REARDON: Everybody.

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

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

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

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

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

25 QUESTION: I know it. But their argument is,

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

2 MR. REARDON: I'm sorry.

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

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

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

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

24 QUESTION: Under normal circumstances.

25 MR. REARDON: Under normal circumstances.

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

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

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

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

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

24                   ORAL ARGUMENT OF BARBARA D. UNDERWOOD

25                   ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE



1 SUPPORTING THE RESPONDENT

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

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

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

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

1 (Laughter).

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

8 On the separate point, what are the  
9 circumstances --

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

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

25 QUESTION: Independent contractors would be

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

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

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

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

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

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

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

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

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

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

1 advantages of a public accommodation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 QUESTION: Yes.

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

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

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



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

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

7 REBUTTAL ARGUMENT OF H. BARTOW FARR, III  
8 ON BEHALF OF PETITIONER

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

11 Responding in reverse order to the United  
12 States' argument, first of all, they say that the reason  
13 that employers, employees are not covered by Title 3 is  
14 because that covers Title 1, but Title 1 doesn't cover all  
15 employees. It only covers employees of a covered  
16 employer. You have to have at least 15 employees to be  
17 covered and if you are not an employee of a covered  
18 employer, you are not covered either. Yet, the United  
19 States' position is that no employees are covered by Title  
20 3, but really independent contractors or people similar to  
21 that are in the same position essentially with respect to  
22 Title 3 as noncovered employees under Title 1.

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

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

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

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

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

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

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

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

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