# SUPREME COURT OF THE UNITED STATES

No. 00–24

PGA TOUR, INC., PETITIONER *v.* CASEY MARTIN

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

[May 29, 2001]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

In my view today's opinion exercises a benevolent compassion that the law does not place it within our power to impose. The judgment distorts the text of Title III, the structure of the ADA, and common sense. I respectfully dissent.

I

The Court holds that a professional sport is a place of public accommodation and that respondent is a "custome[r]" of "competition" when he practices his profession. *Ante*, at 17. It finds, *ante*, at 18, that this strange conclusion is compelled by the "literal text" of Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U. S. C. §12101 *et seq.*, by the "expansive purpose" of the ADA, and by the fact that Title II of the Civil Rights Act of 1964, 42 U. S. C. §2000a(a), has been applied to an amusement park and public golf courses. I disagree.

The ADA has three separate titles: Title I covers employment discrimination, Title II covers discrimination by government entities, and Title III covers discrimination by places of public accommodation. Title II is irrelevant to this case. Title I protects only "employees" of employers who have 15 or more employees, §§12112(a), 12111(5)(A). It does not protect independent contractors. See, *e.g.*,

*Birchem* v. *Knights of Columbus*, 116 F. 3d 310, 312–313 (CA8 1997); cf. *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U. S. 318, 322–323 (1992). Respondent claimed employment discrimination under Title I, but the District Court found him to be an independent contractor rather than an employee.

Respondent also claimed protection under §12182 of Title III. That section applies only to particular places and persons. The place must be a "place of public accommodation," and the person must be an "individual" seeking "enjoyment of the goods, services, facilities, privileges, advantages, or accommodations" of the covered place. §12182(a). Of course a court indiscriminately invoking the "sweeping" and "expansive" purposes of the ADA, *ante*, at 13, 18, could argue that when a place of public accommodation denied *any* "individual," on the basis of his disability, *anything* that might be called a "privileg[e]," the individual has a valid Title III claim. Cf. *ante*, at 14. On such an interpretation, the employees and independent contractors of every place of public accommodation come within Title III: The employee enjoys the "privilege" of employment, the contractor the "privilege" of the contract.

For many reasons, Title III will not bear such an interpretation. The provision of Title III at issue here (§12182, its principal provision) is a public-accommodation law, and it is the traditional understanding of public-accommodation laws that they provide rights for *customers*. "At common law, innkeepers, smiths, and others who made profession of a public employment, were prohibited from refusing, without good reason, to serve a customer." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 571 (1995) (internal quotation marks omitted). See also *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964). This understanding is clearly reflected in the text of Title III itself. Section 12181(7) lists 12 specific types of entities

that qualify as "public accommodations," with a follow-on expansion that makes it clear what the "enjoyment of the goods, services, etc." of those entities consists of– and it plainly envisions that the person "enjoying" the "public accommodation" will be a *customer*. For example, Title III is said to cover an "auditorium" or "other place of public gathering," §12181(7)(D). Thus, "gathering" is the distinctive enjoyment derived from an auditorium; the persons "gathering" at an auditorium are presumably covered by Title III, but those contracting to clean the auditorium are not. Title III is said to cover a "zoo" or "other place of recreation," §12181(7)(I). The persons "recreat[ing]" at a "zoo" are presumably covered, but the animal handlers bringing in the latest panda are not. The one place where Title III specifically addresses discrimination by places of public accommodation through "contractual" arrangements, it makes clear that discrimination against the other party to the contract is not covered, but only discrimination against "clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement." §12182(b)(1)(A)(iv). And finally, the regulations promulgated by the Department of Justice reinforce the conclusion that Title III's protections extend only to customers. "The purpose of the ADA's public accommodations requirements," they say, "is to ensure accessibility to the goods offered by a public accommodation." 28 CFR, Ch. 1, pt. 36, App. B, p. 650 (2000). Surely this has nothing to do with employees and independent contractors.

If there were any doubt left that §12182 covers only clients and customers of places of public accommodation, it is eliminated by the fact that a contrary interpretation would make a muddle of the ADA as a whole. The words of Title III must be read "in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989).

Congress expressly excluded employers of fewer than 15 employees from Title I. The mom-and-pop grocery store or laundromat need not worry about altering the nonpublic areas of its place of business to accommodate handicapped employees— or about the litigation that failure to do so will invite. Similarly, since independent contractors are not covered by Title I, the small business (or the large one, for that matter) need not worry about making special accommodations for the painters, electricians, and other independent workers whose services are contracted for from time to time. It is an entirely unreasonable interpretation of the statute to say that these exemptions so carefully crafted in Title I are entirely eliminated by Title III (for the many businesses that are places of public accommodation) because employees and independent contractors "enjoy" the employment and contracting that such places provide. The only *distinctive* feature of places of public accommodation is that they accommodate the *public*, and Congress could have no conceivable reason for according the employees and independent contractors of such businesses protections that employees and independent contractors of other businesses do not enjoy.

The United States apparently agrees that employee claims are not cognizable under Title III, see Brief for United States as *Amicus Curiae* 18–19, n. 17, but despite the implications of its own regulations, see 28 CFR, Ch. 1, pt. 36, App. B, p. 650 (2000), appears to believe (though it does not explicitly state) that claims of independent contractors are cognizable. In a discussion littered with entirely vague statements from the legislative history, cf. *ante*, at 12, the United States argues that Congress presumably wanted independent contractors with private entities covered under Title III because independent contractors with governmental entities are covered by Title II, see Brief for United States as *Amicus Curiae* 18, and n. 17— a line of reasoning that does not commend itself to

the untutored intellect. But since the United States does not provide (and I cannot conceive of) any possible construction of the *terms* of Title III that will exclude employees while simultaneously covering independent contractors, its concession regarding employees effectively concedes independent contractors as well. Title III applies only to customers.

The Court, for its part, assumes that conclusion for the sake of argument, *ante*, at 17, but pronounces respondent to be a "customer" of the PGA TOUR or of the golf courses on which it is played. That seems to me quite incredible. The PGA TOUR is a professional sporting event, staged for the entertainment of a live and TV audience, the receipts from whom (the TV audience's admission price is paid by advertisers) pay the expenses of the tour, including the cash prizes for the winning golfers. The professional golfers on the tour are no more "enjoying" (the statutory term) the entertainment that the tour provides, or the facilities of the golf courses on which it is held, than professional baseball players "enjoy" the baseball games in which they play or the facilities of Yankee Stadium. To be sure, professional ballplayers *participate* in the games, and *use* the ballfields, but no one in his right mind would think that they are *customers* of the American League or of Yankee Stadium. They are themselves the entertainment that the customers pay to watch. And professional golfers are no different. It makes not a bit of difference, insofar as their "customer" status is concerned, that the remuneration for their performance (unlike most of the remuneration for ballplayers) is not fixed but contingent— viz., the purses for the winners in the various events, and the compensation from product endorsements that consistent winners are assured. The compensation of *many* independent contractors is contingent upon their success— real estate brokers, for example, or insurance salesmen.

As the Court points out, the ADA specifically identifies golf courses as one of the covered places of public accommodation. See §12181(7)(L) ("a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation"); and the distinctive "goo[d], servic[e], facilit[y], privileg[e], advantag[e], or accommodatio[n]" identified by that provision as distinctive to that category of place of public accommodation is "exercise or recreation." Respondent did not seek to "exercise" or "recreate" at the PGA TOUR events; he sought to make money (which is why he is called a *professional* golfer). He was not a customer *buying* recreation or entertainment; he was a professional athlete *selling* it. That is the reason (among others) the Court's reliance upon Civil Rights Act cases like *Daniel* v. *Paul*, 395 U. S. 298 (1969), see *ante*, at 18-19, is misplaced. A professional golfer's practicing his profession is not comparable to John Q. Public's frequenting "a 232-acre amusement area with swimming, boating, sun bathing, picnicking, miniature golf, dancing facilities, and a snack bar." *Daniel*, *supra*, at 301.

The Court relies heavily upon the Q-School. It says that petitioner offers the golfing public the "privilege" of "competing in the Q-School and playing in the tours; indeed, the former is a privilege for which thousands of individuals from the general public pay, and the latter is one for which they vie." *Ante*, at 14–15. But the Q-School is no more a "privilege" offered for the general public's "enjoyment" than is the California Bar Exam.[1] It is a competi-

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[1]The California Bar Exam is covered by the ADA, by the way, because a separate provision of Title III applies to "examinations . . . related to applications, licensing, certification, or credentialing for secondary or post-secondary education, professional, or trade purposes." 42 U. S. C. §12189. If open tryouts were "privileges" under §12182, and participants in the tryouts "customers," §12189 would have been unnecessary.

tion for entry into the PGA TOUR— an open tryout, no different in principle from open casting for a movie or stage production, or walk-on tryouts for other professional sports, such as baseball. See, *e.g.*, Amateurs Join Pros for New Season of HBO's "Sopranos," Detroit News, Dec. 22, 2000, p. 2 (20,000 attend open casting for "The Sopranos"); Bill Zack, Atlanta Braves, Sporting News, Feb. 6, 1995 (1,300 would-be players attended an open tryout for the Atlanta Braves). It may well be that some amateur golfers enjoy trying to make the grade, just as some amateur actors may enjoy auditions, and amateur baseball players may enjoy open tryouts (I hesitate to say that amateur lawyers may enjoy taking the California Bar Exam). But the purpose of holding those tryouts is not to provide entertainment; it is to hire. At bottom, open tryouts for performances to be held at a place of public accommodation are no different from open bidding on contracts to cut the grass at a place of public accommodation, or open applications for any job at a place of public accommodation. Those bidding, those applying— and those trying out— are not converted into customers. By the Court's reasoning, a business exists not only to sell goods and services to the public, but to provide the "privilege" of employment to the public; wherefore it follows, like night the day, that everyone who seeks a job is a customer.[2]

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[2] The Court suggests that respondent is not an independent contractor because he "play[s] at [his] own pleasure," and is not subject to PGA TOUR control "over [his] manner of performance," *ante*, at 18 n. 33. But many independent contractors— composers of movie music, portrait artists, script writers, and even (some would say) plumbers— retain at least as much control over when and how they work as does respondent, who agrees to play in a minimum of 15 of the designated PGA TOUR events, and to play by the rules that the PGA TOUR specifies. Cf. *Community for Creative Non-Violence* v. *Reid*, 490 U. S. 730, 751-753 (1989) (discussing independent contractor status of a sculptor). Moreover, although, as the Court suggests in the same footnote, in rare

II

Having erroneously held that Title III applies to the "customers" of professional golf who consist of its practitioners, the Court then erroneously answers— or to be accurate simply ignores— a second question. The ADA requires covered businesses to make such reasonable modifications of "policies, practices, or procedures" as are necessary to "afford" goods, services, and privileges to individuals with disabilities; but it explicitly does not require "modifications [that] would fundamentally alter the nature" of the goods, services, and privileges. §12182(b)(2)(A)(ii). In other words, disabled individuals must be given *access* to the same goods, services, and privileges that others enjoy. The regulations state that Title III "does not require a public accommodation to alter its inventory to include accessible or special goods with accessibility features that are designed for, or facilitate use by, individuals with disabilities." 28 CFR §36.307 (2000); see also 28 CFR, ch. 1, pt. 36, App. B, p. 650 (2000). As one Court of Appeals has explained:

> "The common sense of the statute is that the content of the goods or services offered by a place of public accommodation is not regulated. A camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons. Had Congress purposed to impose so enormous a burden on the retail sector of the economy and so vast a supervisory responsibility on the federal courts, we think it would have made its

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cases a PGA TOUR winner will choose to forgo the prize money (in order, for example, to preserve amateur status necessary for continuing participation in college play) he is contractually *entitled* to the prize money if he demands it, which is all that a contractual relationship requires.

> intention clearer and would at least have imposed some standards. It is hardly a feasible judicial function to decide whether shoestores should sell single shoes to one-legged persons and if so at what price, or how many Braille books the Borders or Barnes and Noble bookstore chains should stock in each of their stores." *Doe* v. *Mutual of Omaha Ins. Co.*, 179 F. 3d 557, 560 (CA7 1999).

Since this is so, even if respondent here is a consumer of the "privilege" of the PGA TOUR competition, see *ante*, at 14, I see no basis for considering whether the rules of that competition must be altered. It is as irrelevant to the PGA TOUR's compliance with the statute whether walking is essential to the game of golf as it is to the shoe store's compliance whether "pairness" is essential to the nature of shoes. If a shoe store wishes to sell shoes only in pairs it may; and if a golf tour (or a golf course) wishes to provide only walk-around golf, it may. The PGA TOUR cannot deny respondent *access* to that game because of his disability, but it need not provide him a game different (whether in its essentials or in its details) from that offered to everyone else.

Since it has held (or assumed) professional golfers to be customers "enjoying" the "privilege" that consists of PGA TOUR golf; and since it inexplicably regards the rules of PGA TOUR golf as merely "policies, practices, or procedures" by which access to PGA TOUR golf is provided, the Court must then confront the question whether respondent's requested modification of the supposed policy, practice, or procedure of walking would "fundamentally alter the nature" of the PGA TOUR game, §12182(b)(2)(A)(ii). The Court attacks this "fundamental alteration" analysis by asking two questions: first, whether the "essence" or an "essential aspect" of the sport of golf has been altered; and second, whether the change,

even if not essential to the game, would give the disabled player an advantage over others and thereby "fundamentally alter the character of the competition." *Ante*, at 20-21. It answers no to both.

Before considering the Court's answer to the first question, it is worth pointing out that the assumption which underlies that question is false. Nowhere is it writ that PGA TOUR golf must be classic "essential" golf. Why cannot the PGA TOUR, if it wishes, promote a new game, with distinctive rules (much as the American League promotes a game of baseball in which the pitcher's turn at the plate can be taken by a "designated hitter")? If members of the public do not like the new rules— if they feel that these rules do not truly test the individual's skill at "real golf" (or the team's skill at "real baseball") they can withdraw their patronage. But the rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone— not even the Supreme Court of the United States— can pronounce one or another of them to be "nonessential" if the rulemaker (here the PGA TOUR) deems it to be essential.

If one assumes, however, that the PGA TOUR has some legal obligation to play classic, Platonic golf— and if one assumes the correctness of all the other wrong turns the Court has made to get to this point— then we Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government's power "[t]o regulate Commerce with foreign Nations, and among the several States," U. S. Const., Art. I, §8, cl. 3, to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once

again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot *really* a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a "fundamental" aspect of golf.

Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question. To say that something is "essential" is ordinarily to say that it is necessary to the achievement of a certain object. But since it is the very nature of a game to have no object except amusement (that is what distinguishes games from productive activity), it is quite impossible to say that any of a game's arbitrary rules is "essential." Eighteen-hole golf courses, 10-foot-high basketball hoops, 90-foot baselines, 100-yard football fields— all are arbitrary and none is essential. The only support for any of them is tradition and (in more modern times) insistence by what has come to be regarded as the ruling body of the sport— both of which factors support the PGA TOUR's position in the present case. (Many, indeed, consider walking to be *the central feature* of the game of golf— hence Mark Twain's classic criticism of the sport: "a good walk spoiled.") I suppose there is some point at which the rules of a well-known game are changed to such a degree that no reasonable person would call it the same game. If the PGA TOUR competitors were required to dribble a large, inflated ball and put it through a round hoop, the game could no longer reasonably be called golf. But this criterion— destroying recognizability as the same generic game— is surely not the test of "essentialness" or "fundamentalness" that the Court applies, since it apparently thinks that merely changing the diameter of the *cup* might "fundamentally alter" the game of

golf, *ante*, at 20.

Having concluded that dispensing with the walking rule would not violate federal-Platonic "golf" (and, implicitly, that it is federal-Platonic golf, and no other, that the PGA TOUR can insist upon) the Court moves on to the second part of its test: the competitive effects of waiving this nonessential rule. In this part of its analysis, the Court first finds that the effects of the change are "mitigated" by the fact that in the game of golf weather, a "lucky bounce," and "pure chance" provide different conditions for each competitor and individual ability may not "be the sole determinant of the outcome." *Ante*, at 25. I guess that is why those who follow professional golfing consider Jack Nicklaus the *luckiest* golfer of all time, only to be challenged of late by the phenomenal *luck* of Tiger Woods. The Court's empiricism is unpersuasive. "Pure chance" is randomly distributed among the players, but allowing respondent to use a cart gives him a "lucky" break every time he plays. Pure chance also only matters at the margin— a stroke here or there; the cart substantially improves this respondent's competitive prospects beyond a couple of strokes. But even granting that there are significant nonhuman variables affecting competition, that fact does not justify adding another variable that always favors one player.

In an apparent effort to make its opinion as narrow as possible, the Court relies upon the District Court's finding that even with a cart, respondent will be at least as fatigued as everyone else. *Ante*, at 28. This, the Court says, *proves* that competition will not be affected. Far from thinking that reliance on this finding cabins the effect of today's opinion, I think it will prove to be its most expansive and destructive feature. Because step one of the Court's two-part inquiry into whether a requested change in a sport will "fundamentally alter [its] nature," §12182(b)(2)(A)(ii), consists of an utterly unprincipled

ontology of sports (pursuant to which the Court is not even sure whether golf's "essence" requires a 3-inch hole), there is every reason to think that in future cases involving requests for special treatment by would-be athletes the second step of the analysis will be determinative. In resolving that second step— determining whether waiver of the "nonessential" rule will have an impermissible "competitive effect"— by measuring the athletic capacity of the requesting individual, and asking whether the special dispensation would do no more than place him on a par (so to speak) with other competitors, the Court guarantees that future cases of this sort will have to be decided on the basis of individualized factual findings. Which means that future cases of this sort will be numerous, and a rich source of lucrative litigation. One can envision the parents of a Little League player with attention deficit disorder trying to convince a judge that their son's disability makes it at least 25% more difficult to hit a pitched ball. (If they are successful, the only thing that could prevent a court order giving the kid four strikes would be a judicial determination that, in baseball, three strikes are metaphysically necessary, which is quite absurd.)

The statute, of course, provides no basis for this individualized analysis that is the Court's last step on a long and misguided journey. The statute seeks to assure that a disabled person's disability will not deny him *equal access* to (among other things) competitive sporting events— not that his disability will not deny him an *equal chance to win* competitive sporting events. The latter is quite impossible, since the very *nature* of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence. This unequal distribution is precisely what determines the winners and losers— and artificially to "even out" that distribution, by giving one or another player exemption from a rule that emphasizes his particular weakness, is to destroy the game. That is why the

"handicaps" that are customary in social games of golf— which, by adding strokes to the scores of the good players and subtracting them from scores of the bad ones, "even out" the varying abilities— are *not* used in professional golf. In the Court's world, there is one set of rules that is "fair with respect to the able-bodied" but "individualized" rules, mandated by the ADA, for "talented but disabled athletes." *Ante*, at 29. The ADA mandates no such ridiculous thing. Agility, strength, speed, balance, quickness of mind, steadiness of nerves, intensity of concentration— these talents are not evenly distributed. No wild-eyed dreamer has ever suggested that the managing bodies of the competitive sports that test precisely these qualities should try to take account of the uneven distribution of God-given gifts when writing and enforcing the rules of competition. And I have no doubt Congress did not authorize misty-eyed judicial supervision of such a revolution.

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My belief that today's judgment is clearly in error should not be mistaken for a belief that the PGA TOUR clearly *ought not* allow respondent to use a golf cart. *That* is a close question, on which even those who compete in the PGA TOUR are apparently divided; but it is a *different* question from the one before the Court. Just as it is a different question whether the Little League *ought* to give disabled youngsters a fourth strike, or some other waiver from the rules that makes up for their disabilities. In both cases, whether they *ought* to do so depends upon (1) how central to the game that they have organized (and over whose rules they are the master) they deem the waived provision to be, and (2) how competitive— how strict a test of raw athletic ability in all aspects of the competition— they want their game to be. But whether Congress has said they *must* do so depends upon the answers to the legal questions I have discussed above— not upon what

questions I have discussed above– not upon what this Court sententiously decrees to be "decent, tolerant, [and] progressive," *ante*, at 13 (quoting *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 375 (2001) (KENNEDY, J., concurring)).

And it should not be assumed that today's decent, tolerant, and progressive judgment will, in the long run, accrue to the benefit of sports competitors with disabilities. Now that it is clear courts will review the rules of sports for "fundamentalness," organizations that value their autonomy have every incentive to defend vigorously the necessity of every regulation. They may still be second-guessed in the end as to the Platonic requirements of the sport, but they will *assuredly* lose if they have at all wavered in their enforcement. The lesson the PGA TOUR and other sports organizations should take from this case is to make sure that the same written rules are set forth for all levels of play, and never voluntarily to grant any modifications. The second lesson is to end open tryouts. I doubt that, in the long run, even disabled athletes will be well served by these incentives that the Court has created.

Complaints about this case are not "properly directed to Congress," *ante*, at 27-28, n. 51. They are properly directed to this Court's Kafkaesque determination that professional sports organizations, and the fields they rent for their exhibitions, are "places of public accommodation" to the competing athletes, and the athletes themselves "customers" of the organization that pays them; its Alice in Wonderland determination that there are such things as judicially determinable "essential" and "nonessential" rules of a made-up game; and its Animal Farm determination that fairness and the ADA mean that everyone gets to play by individualized rules which will assure that no one's lack of ability (or at least no one's lack of ability so pronounced that it amounts to a disability) will be a handicap. The year was 2001, and "everybody was finally

equal." K. Vonnegut, Harrison Bergeron, in Animal Farm and Related Readings 129 (1997).