No. 19-603

IN THE

Supreme Court of the United States

MARK SILGUERO AND AMY WOLFE,
Petitioners,

v.

CSL PLASMA, INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Respondent CSL Plasma concedes, as it must, that the circuits are divided over whether plasma donation centers are places of public accommodation that must comply with Title III of the Americans with Disabilities Act (ADA). In the decision below, the Fifth Circuit expressly rejected a decision of the Tenth Circuit holding that they are, and the Third Circuit in turn rejected the Fifth Circuit's view and sided with the Tenth Circuit.

Faced with this undeniable conflict, CSL tries to minimize its significance, asserting that it is "of importance to a single business entity and others like it in [a] narrow industry." Opp. at 1. Just two months ago, however, CSL told this Court that the issue presented raised "important considerations concerning the safe operation of plasma collection centers and the safety and integrity of the plasma supply." Application for Extension of Time to File Pet. for Writ of Cert. at 3, *CSL Plasma, Inc. v. Matheis*, No. 19A576 (U.S. filed Nov. 21, 2019). While CSL's earlier statement to this Court erred in the particulars—the ADA does not require the plasma industry or any other to take actions that would endanger the public health—it was correct as to the importance of this case, which presents a recurring issue affecting a multi-billion-dollar industry that serves millions of people each year.

CSL spends the bulk of its brief in opposition defending the Fifth Circuit's decision on the merits. Opp. at 2–9. Those merits arguments, however, provide no reason to deny review of an issue on which the circuits have firmly staked out irreconcilable positions. Some 40 million people live in the Third and

Tenth Circuits, in which plasma centers must comply with Title III's anti-discrimination mandate; meanwhile, plasma centers in the Fifth Circuit, which covers a population of 33 million people, need not comply with that law. Ending that disparity is important regardless of which position is correct. And this Court's resolution of the issue would end the legal uncertainty that will prevail across the remaining circuits until, one by one, they choose sides in the already intractable conflict.

The time to resolve this issue is now, and this case is the ideal vehicle. CSL attempts to muddy the waters by pointing to factual and legal questions that would remain on remand as to CSL's ADA compliance. But it does not deny that the Fifth Circuit dismissed Petitioners' ADA claims based solely on the purely legal issue presented: whether plasma centers are places of public accommodation.

I. The Fifth Circuit's decision squarely conflicts with decisions of the Third and Tenth Circuits.

As CSL recently told the Third Circuit, the question whether Title III covers plasma centers "is one that is hotly contested currently in the federal courts and has divided the Courts of Appeals in recent years." Mot. to Stay Mandate at 2, *Matheis v. CSL Plasma, Inc.*, Nos. 18-3415 & 18-3501 (3d Cir., filed Sept. 20, 2019); *see also* Opp. at 1, 10 (conceding that the Fifth Circuit's decision squarely conflicts with decisions of the Third and Tenth Circuits). Likewise, both the Fifth Circuit and the Third Circuit have acknowledged the clear and growing split. *See* Pet. App. 14a; *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174 (3d Cir. 2019).

CSL now tries to downplay the significance of the circuit split. CSL observes that the split "is of recent vintage," with two of the cases involving CSL, and it argues that the issue therefore "should be allowed to develop further in the lower courts." Opp. at 1–2. CSL has it backwards. That this same question has reached three courts of appeals so quickly—because of the plasma industry's explosive growth and refusal to follow the ADA—demonstrates how urgently it requires resolution. The entire industry, not just CSL, claims exemption from the ADA, as evidenced by the amicus curiae briefs that the plasma trade association filed in the three courts of appeals; underscoring the importance of that claimed exemption to the entire industry, the trade association also participated in oral argument in *Matheis*. The question presented here has been comprehensively aired three times, with diverging results, and further litigation below would not aid this Court's resolution. Indeed, CSL's opposition, by primarily addressing the merits of the controversy, *see id.* at 2–9, only confirms that the issue is ripe for decision.

Apparently to suggest that the Fifth and Third Circuits focused on different questions, CSL asserts that "[t]he Tenth Circuit's decision focused on the direction-of-payment issue because that was the basis for the decision below." Opp. at 10. Even if CSL's point had merit, it would not obscure the bottom line: The Third and Tenth Circuits hold as a matter of law that plasma centers are subject to Title III's requirements, while the Fifth Circuit holds as a matter of law that they are not. In any event, the Fifth Circuit, too, considered whether direction of payment was relevant to whether a business is a "service establishment" and, indeed, ultimately found dispositive that plasma

donors receive no benefit from the centers except payment. Pet. App. 10a. The court explicitly acknowledged it was splitting from the Tenth Circuit on the direction-of-payment issue, as well as the ultimate question of Title III coverage of plasma centers. Pet. App. 14a ("We thus reject [the] argument that the direction of payment for services is irrelevant. In doing so, we reject the Tenth Circuit's conclusion[.]"). The Third Circuit then considered those competing analyses and sided with the Tenth Circuit. *Matheis*, 936 F.3d at 177–78.

CSL observes that the Third Circuit, in addition to ruling on the question presented here, "reversed and remanded to the district court for further proceedings because summary judgment should not have been granted on the record before the court." Opp. at 10. That *Matheis* remanded for the resolution of fact issues as to ADA compliance is irrelevant to the existence of a conflict over a purely legal question that merits this Court's review. Once the Third Circuit determined that Title III applies to plasma centers, it followed that the courts in that circuit now need to make such inquiries. Courts in the Fifth Circuit, by contrast, no longer need to resolve such questions because the Fifth Circuit has held that the ADA does not apply. The remand in *Matheis* just confirms that the circuit split is consequential and requires resolution.

Finally, CSL speculates that "various state laws may impose obligations on plasma collection centers," such that this Court's decision "will not eliminate disparate results." *Id.* at 10. But CSL does not dispute that this Court's review, by settling whether Title III governs plasma centers' treatment of customers, will

eliminate disparate application of federal law, which is this Court's concern.

II. Whether a multi-billion-dollar industry is a covered public accommodation is an important question warranting review, and this case is an ideal vehicle for resolving that question.

CSL contends that the circuit conflict matters only to a "narrow industry" and does not have "national importance or wide application." Opp. at 1. This argument vastly understates the plasma industry's reach. As the petition explains, the plasma industry generates annual revenue exceeding $20 billion. More than 700 collection centers across the United States collect plasma more than 40 million times per year. CSL alone operates in 41 states. Pet. at 10–11. The application to this important, nationwide industry of a federal law enacted to protect people with disabilities thus has "national importance."

Notably, this Court's previous cases involving the coverage of the ADA and other civil rights laws often have involved the laws' application to particular industries or settings that are comparable to or smaller in impact than the plasma center industry. For example, the Court decided whether Title III's protections apply to the golfers in PGA Tour events, *see PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), and to the patrons of foreign-flag cruise ships, *see Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005). This Court similarly has granted certiorari to decide whether Title II of the ADA covers prisons, *see Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206 (1998), and whether snack bars in private recreation facilities are "public accommodations" covered by Title II of the

Civil Rights Act, *Daniel v. Paul*, 395 U.S. 298 (1969). It is irrelevant that this case, like those examples, "does not present a broad challenge to the fundamental purpose of the ADA," Opp. at 1, as this Court has never limited review to such cases. Rather, it has regularly granted certiorari to review precisely the sort of question about the coverage of the ADA and other civil rights laws that is presented here.

Moreover, the division among the courts of appeals implicates broader questions about the scope of the term "service establishment" and Title III's other catch-all provisions. In the Fifth Circuit, Title III does not cover establishments not specifically listed in the statute if a court believes they fit "oddly" with those listed, Pet. App. 10a–11a, whereas in the Tenth Circuit, all businesses that meet the plain meaning of the term "service establishment" and Title III's other catch-all provisions are covered, *see Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1231–33 (10th Cir. 2016). CSL's opposition only confirms the centrality to this specific controversy regarding plasma centers of the larger question about how to construe Title III. *See, e.g.*, Opp. at i (framing Question Presented as whether a plasma collection center is "akin" to the examples listed in the statute); *id.* at 3–4 (arguing that plasma center is "unlike the illustrative examples"). There can be no serious question that this controversy is important enough to merit this Court's review.

CSL also asserts that this case is "not the ideal vehicle for review of this question" because, if this Court reverses on the question presented, the district court will have to determine on remand whether CSL complied with the ADA in its treatment of the Petitioners. Opp. at 9–10. Once again, CSL gets it

backwards. This case provides a ready-made vehicle to consider the purely legal question presented—whether plasma centers are places of public accommodation covered by Title III—precisely because this Court can decide that question without consideration of such fact-specific issues. The factual issues CSL raises in its opposition, if properly preserved, would be questions for trial; they would not complicate this Court's consideration of the legal question presented.[1]

III. The Fifth Circuit's decision is wrong.

CSL argues at length that the Fifth Circuit was correct. Opp. at 2–9. CSL's merits arguments provide no basis for declining to resolve a circuit conflict and are largely addressed in the petition. We respond here briefly to make a few additional points.

First, CSL errs in suggesting that Title III's separate "commercial facilities" provision—which imposes architectural accessibility requirements on commercial buildings constructed or renovated since shortly after the ADA's passage, regardless of whether they are places of public accommodation—means that plasma centers are "commercial facilities" rather than

[1] As the Fifth Circuit correctly found, and CSL does not dispute, CSL's contested assertion that it deferred petitioner Mark Silguero because of his conduct rather than because of his disability cannot be resolved on summary judgment on this record. Pet. App. 4a–5a & n.4. CSL did not contest below that petitioner Amy Wolfe uses a service animal within the meaning of ADA regulations; the Fifth Circuit introduced that question *sua sponte*, which is why the record put forward on summary judgment did not address it. Pet. App. 4a & n.5. To the extent that CSL wishes to press this argument for the first time on remand, it would be a question of fact, irrelevant to this Court's disposition of the purely legal question presented here.

"places of public accommodation." Opp. at 2. The two terms are not mutually exclusive. Title III's broad definition of "commercial facility"—any facility that "is intended for commercial use," 42 U.S.C. § 12181(2)—addresses an entirely different matter than does the definition of "place of public accommodation." The former regulates the building and renovation of physical structures, while the latter regulates the ongoing operation of businesses. Whether CSL's various locales are subject to the "commercial facilities" requirements (depending on when and for what purpose they were built) has nothing to do with the issue presented here.

Second, CSL's characterization of the "public accommodation" analysis—which it contends is "multifaceted and complex and requires a fact-intensive examination of the nature of the facility," Opp. at 2—is irreconcilable with this Court's holding that the twelve categories of "public accommodation" must be "'construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled." *PGA Tour, Inc.*, 532 U.S. at 676–77 (quoting S. Rep. No. 101-116, at 59 (1989), and H.R. Rep. No. 101-485, pt. 2, at 100 (1990)). CSL's and the Fifth Circuit's reasoning complicates what this Court and the circuit courts have understood to be the easy-to-apply proposition that Title III covers any commercial facility that is "open to the public." *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999). CSL would force courts to determine whether any given establishment "is unlike the illustrative examples . . . as to form, function, purpose, or operation." Opp. at 3–4. This sprawling and ill-defined inquiry creates unnecessary uncertainty and

guarantees additional litigation as various industries strive to generate coverage loopholes in a law that Congress intended to "cover all aspects of civic life." *See* Br. for Members of Congress at 2.[2]

Third, CSL's statutory analysis relies heavily on the notion that "[a]n unlisted 'other service establishment' should be similar to the listed service establishments." Opp. at 8. The problem, as the petition explains and CSL does not address, is that CSL's interpretation reads the statute as though it contains a word—"similar"—that Congress made the considered choice to exclude. Pet. at 25. CSL also ignores that Congress chose the specific examples it included largely by amalgamating various state laws, historical examples of disability discrimination, and Congressional testimony. *See* Br. for Members of Congress at 5–6 & n.4; *id.* at 9–11 (explaining that Congress largely included "service establishment" examples that previously appeared in state public accommodations laws). This derivation makes it particularly unlikely that Congress intended courts to closely analyze commonalities and differences among the listed establishments to find implicit limitations in otherwise broad catch-all categories. Indeed, in scouring state public accommodations laws for these examples, Congress chose *not* to include explicit limitations that appeared in some states' laws, including a requirement that establishments charge the public a fee for service. *Id.* at 10–11.

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[2] The indeterminacy of CSL's test is illustrated by the fact that a plasma donation center could be a service establishment even under CSL's formulation. As the petition explains, CSL can characterize itself as fundamentally dissimilar only by giving undue weight to details such as direction of payment.

The flaws in CSL's merits arguments only underscore that this petition cleanly presents an important and ripe controversy among the circuits over a purely legal question of statutory interpretation. This Court should grant the petition and resolve the circuit split regarding this question.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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