No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Americans with Disabilities Act bars disability discrimination by any covered "place of public accommodation." 42 U.S.C. § 12182(a). The Third Circuit and the Tenth Circuit have held that a plasma donation center is such a "place of public accommodation," and, therefore, may not discriminate on the basis of disability. The Fifth Circuit, however, has held that a plasma donation center is not a "place of public accommodation."

The question presented is:

Is a plasma donation center a "place of public accommodation" subject to the requirements of Title III of the Americans with Disabilities Act?

PARTIES TO THE PROCEEDING AND RELATED CASES

The parties to the proceedings below and in this Court are:

Mark Silguero, suing as plaintiff in the district court, appellant in the court of appeals, and petitioner in this Court;

Amy Wolfe, plaintiff-intervenor in the district court, appellant in the court of appeals, and petitioner in this Court; and

CSL Plasma, Inc., the defendant in the district court, appellee in the court of appeals, and respondent in this Court.

The following proceedings are directly related to this case:

- *Silguero v. CSL Plasma, Inc.*, No. 2:16-cv-361, United States District Court for the Southern District of Texas. Judgment entered Nov. 2, 2017.
- *Silguero v. CSL Plasma, Inc.*, No. 17-41206, United States Court of Appeals for the Fifth Circuit. Judgment entered Aug. 9, 2019.
- *Silguero v. CSL Plasma, Inc.*, No. 18-1022, Supreme Court of Texas. Judgment entered June 28, 2019.

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INTRODUCTION

This petition presents an important question that has generated a clear and acknowledged conflict among the federal courts of appeals: whether plasma donation centers are "public accommodations" within the meaning of Title III of the Americans with Disabilities Act (ADA).

Within the past three years, three courts of appeals have considered this question. First, the Tenth Circuit held that plasma centers *are* covered public accommodations. *See Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016). Then, in this case, the Fifth Circuit "reject[ed] the Tenth Circuit's conclusion" and held that plasma centers are *not*. Pet. App. 14a. Most recently, the Third Circuit examined this split of authority and held that "the Tenth Circuit got it right: the ADA applies to plasma donation centers." *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174 (3d Cir. 2019).

This question, already addressed by three appellate courts, will continue to arise frequently. More than 40 million times each year, at hundreds of collection centers around the United States, the multi-billion-dollar plasma industry extracts plasma from members of the public. Meanwhile, respondent CSL Plasma and other plasma companies have adopted company-wide policies that routinely exclude people with certain disabilities, without individualized assessment of whether each person excluded is fit to have plasma extracted and without considering whether individuals with disabilities can participate with reasonable accommodations.

For example, CSL excluded petitioner Amy Wolfe based on a company-wide policy of excluding anyone

who uses a service animal for anxiety, without assessing whether Ms. Wolfe could safely participate in plasma extraction. Similarly, CSL excluded petitioner Mark Silguero because of his mobility impairment, without trying to accommodate his needs.

Customers around the country have sued plasma centers over similar exclusions, and the resulting opinions of the courts of appeals are in irreconcilable conflict. The Fifth Circuit's opinion should be reviewed to ensure that the ADA's protections with respect to a major industry's customers are uniform nationwide. This case presents an ideal vehicle for resolving the conflict.

Letting the Fifth Circuit's decision stand not only would leave the conflict unaddressed, but would leave in place an erroneous decision. Title III defines "place of public accommodations" by reference to "12 extensive categories," which Congress intended to be "'construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676–77 (2001) (quoting S. Rep. No. 101-116, at 59 (1989), and H.R. Rep. No. 101-485, pt. 2, at 100 (1990)). Among those "extensive categories" is "service establishment," a broad term that is readily construed to cover entities that engage with the public as plasma donation centers do. The things a plasma center does to and for customers—taking medical histories, assessing vital signs, removing and then replacing blood with complex machinery—constitute the provision of services as that term is ordinarily used. Indeed, much of this activity overlaps with that of health care providers,

which Title III specifically lists as service establishments.

The Fifth Circuit held that plasma centers are not service establishments because they pay money to their customers instead of receiving payment for the service rendered. Such a direction-of-payment requirement does not appear in the text and is inconsistent with Congress's intent to ensure people with disabilities access to *all* the "wide variety of establishments available to the nondisabled." *PGA Tour*, 532 U.S. at 676–77. The Fifth Circuit inferred this requirement from the 14 examples of service establishments specified in the statute. Congress, however, expressly did *not* require establishments to be "similar" to the specified examples, making the court's application of the *ejusdem generis* doctrine improper. Moreover, service establishments specified in the ADA, such as banks and legal establishments, offer services using a variety of business models, some of which do *not* involve consumer payment.

The Fifth Circuit improperly narrowed the ADA's reach to exclude customers of a large industry from the statute's protections. The resulting conflict among the courts of appeals requires resolution by this Court.

OPINIONS BELOW

The Fifth Circuit's opinion holding that plasma centers are not public accommodations for purposes of Title III and certifying state-law questions to the Texas Supreme Court is reported at 907 F.3d 323, and is reproduced in the appendix at 2a. The court of appeals' subsequent decision disposing of the appeal by reversing in part and remanding for further proceedings in light of the Texas Supreme Court's state-law rulings is reported at 774 Fed. App'x 886,

and is reproduced in the appendix at 19a. The district court's memorandum opinion and order is unreported and is reproduced in the appendix at 22a.

JURISDICTION

The court of appeals issued its final decision and judgment in light of the state-court opinion on certified questions on August 9, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title III of the ADA, 42 U.S.C. §§ 12181–89, provides in relevant part:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a).

Title III defines "public accommodations" at 42 U.S.C. § 12181(7) as follows:

> The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—
>
> (A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

STATEMENT OF THE CASE

1. Title III of the ADA—In 1990, Congress enacted the ADA "to remedy widespread discrimination against disabled individuals." *PGA Tour*, 532 U.S. at 674. Congress found that "physical or mental disabilities in no way diminish a person's right to fully participate in *all* aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination." 42 U.S.C. § 12101(a)(1) (emphasis added). Accordingly, it passed a bill with broad protections, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* § 12101(b)(1).

The ADA "effectuate[s] its sweeping purpose" by "forbid[ding] discrimination against disabled individuals in major areas of public life." *PGA Tour*, 532 U.S. at 675. Title I bars disability discrimination in employment. 42 U.S.C. §§ 12111–12117. Title II bars disability discrimination by public entities. 42 U.S.C. §§ 12131–12165. And Title III—which is at issue here—bars disability discrimination by places of public accommodation and in certain other settings, such as specified transportation services and licensing examinations. 42 U.S.C. §§ 12181–12189.

Title III sets out the "[g]eneral rule" that places of public accommodation may not discriminate "on the basis of disability in the full and equal enjoyment of the[ir] goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(a). It then provides more specific prohibitions, including on using "standards or criteria or methods of administration … that have the effect of discriminating on the basis of disability," 42 U.S.C.

§ 12182(b)(1)(D)(i); imposing "eligibility criteria that screen out or tend to screen out an individual with a disability," *id.* § 12182(b)(2)(A)(i); and "fail[ing] to make reasonable modifications in policies, practices, or procedures" that are "necessary to afford" service to individuals with disabilities, *id.* § 12182(b)(2)(A)(ii).

Congress intended these provisions, collectively, "to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities." S. Rep. No. 101-116, at 55. Title III's animating principle is that "covered entities are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do." *Id.*; *see, e.g.*, 28 C.F.R. § 36.301(b) (any safety requirements imposed "must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities"); *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998).

Title III provides a private right of action to enforce its protections. A private plaintiff can obtain injunctive relief requiring a defendant to make its services accessible, but not monetary relief. 42 U.S.C. § 12188(a). Additionally, the United States may investigate Title III violations and initiate its own lawsuits. 42 U.S.C. § 12188(b).[1]

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[1] Because the United States thus has its own interest in the scope of Title III, it submitted amicus briefs to the Fifth Circuit in this case and the Tenth Circuit in *Levorsen*. Both times, it agreed with Petitioners' position that plasma centers are covered public accommodations. *See* Brief for United States as *Amicus*

The term "place of public accommodation" is "defined in terms of 12 extensive categories"—such as "place[s] of public gathering," "sales or rental establishment[s]," and "place[s] of recreation"—each of which Congress intended to be "'construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled." *PGA Tour*, 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)). One of those categories provides that the following are covered places of public accommodation:

> a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, *or other service establishment*.

42 U.S.C. § 12181(7)(F) (emphasis added).

2. The Plasma Industry—This case involves Title III's application to plasma donation centers, which are establishments that extract blood plasma from members of the public in exchange for payment. The multi-billion-dollar plasma industry terms this process "donation."

Like other plasma companies, CSL screens each potential customer for fitness to donate. This screening includes completion of a questionnaire

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Curiae Supporting Neither Party, *Silguero*, 907 F.3d 323 (No. 17-41206) and Brief for the United States as *Amicus Curiae* Supporting Appellant and Urging Reversal, *Levorsen*, 828 F.3d 1227 (No. 14-4162).

about medical history, testing of vital signs, and examination for needle pricks. If the customer asks, CSL shares the results of the vital signs testing, such as protein or blood pressure levels, and will provide an information sheet with tips on how to increase protein levels or otherwise become eligible.[2] CSL also informs customers if blood pressure readings suggest the need for immediate medical assistance.[3]

Based on the screening, CSL decides unilaterally whether it will permit a person to have plasma extracted. CSL makes decisions to exclude potential customers (decisions CSL calls "deferrals") through employees whom CSL terms Medical Staff Associates (MSAs). MSAs are not doctors, and the exclusion decisions are not based on individualized assessment of a person's fitness. Rather, CSL generates company-wide eligibility guidelines (called the Medical Staff Reference) that call for across-the-board exclusion of people who fall into certain broad categories. MSAs determine what medical conditions, if any, potential customers present with, and then apply those eligibility guidelines. Pet. App. 23a-24a.

People who are approved proceed to a donation room. Pet. App. 2a-3a. They get into "donation beds," where technicians hook them to specialized machinery that performs a process called plasmapheresis, whereby blood is removed, plasma is separated from red blood cells, and red blood cells are returned to the bloodstream. Pet. App. 2a-3a, 22a-23a. At the end, plasma centers pay customers around $30–$40. The

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[2] 5th Cir. Record on Appeal (ROA) 17-41206.376-377.

[3] ROA 17-41206.378.

extracted plasma is used for medicinal products sold worldwide, for many times that amount.[4]

The U.S. plasma industry is enormous and growing rapidly. By 2016, according to the plasma industry's trade group, the industry was collecting plasma from customers 38 million times annually—triple the number of "donations" made just ten years earlier—and generating revenue of more than $20 billion.[5] Those figures understate present reality, as the industry's trade association reports further growth of 8 million plasma collections in 2018 alone.[6] More than 700 collection centers exist across the United States, which is by far the world's leading plasma exporter.[7]

CSL Plasma operates one of the largest and fastest-growing plasma collection networks. In 2018 alone, it opened 26 donation centers around the United States, and it now operates more than 200 centers in 41 states spanning all the regional

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[4] *See* Zoe Greenberg, *What is the Blood of a Poor Person Worth?*, N.Y. Times (Feb. 1, 2019), https://www.nytimes.com/2019/02/01/sunday-review/blood-plasma-industry.html.

[5] *See* H. Luke Shaefer and Analidis Ochoa, *How Blood-Plasma Companies Target the Poorest Americans*, The Atlantic (Mar. 15, 2018), https://www.theatlantic.com/business/archive/2018/03/plasma-donations/555599/ (citing to the Plasma Protein Therapeutics Association trade group).

[6] Amy Efantis, President & CEO of the Plasma Protein Therapeutics Industry, Outlook, The Source 4 (Fall 2019), https://vault.netvoyage.com/neWeb2/delView.aspx?env=%2FQ14%2Ft%2F3%2Fl%2Fq%2F~190925112919679.nev&dn=1&v=1&dl=1&p=0&e=&t=2py6L1KCUqjKYU%2BQNOsj7hsOufM%3D&cg=NG-N9RHSZR6&hd=1&nf=N&s=VAULT-PVPGFHJ2.

[7] *Id.*

appellate circuits except the D.C. Circuit.[8] Many of its users depend on the money they receive from regular plasma extraction to make ends meet, and their lives are severely disrupted if they are arbitrarily barred from continued participation.[9]

3. CSL's Refusal to Permit Petitioners to Participate—Petitioners are two people with disabilities who could safely have their plasma extracted. CSL excluded them both, explicitly citing their disabilities as the reason.[10] CSL relied on precisely the sort of "presumptions, patronizing attitudes, fears, and stereotypes" that Title III was intended to eradicate. S. Rep. No. 101-116, at 55. And it made no attempt to accommodate petitioners' disabilities.

Mark Silguero has suffered an injury to his left knee and has degenerative joint disease and arthritis in his right knee. As a result, he requires a cane to walk.[11] For years, Silguero supplemented his limited income by regularly selling his plasma.[12] One day, CSL decided that he no longer was fit to participate. As a matter of policy, CSL excludes anyone it believes

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[8] John Cropley, *Plasma collection center opens on State Street in Schenectady*, The Daily Gazette (May 6, 2019), https://dailygazette.com/article/2019/05/06/plasma-collection-center-opens-on-state-street. State-by-state listings of CSL's centers can be found at https://www.cslplasma.com/.

[9] *See* Greenberg, *supra* note 4.

[10] CSL disputes some of these facts, though all are supported by record evidence. The Fifth Circuit properly did not rely on CSL's disputed version of events on summary judgment. Pet. App. 3a–4a.

[11] ROA 17-41206.8.

[12] ROA 17-41206.9, 17-41206.244.

has an "unsteady gait" or is unable "to safely transfer to and from" the donor bed "without assistance."[13] After Silguero complained about this exclusion, CSL permanently barred him. Pet. App. 24a. CSL put him on the industry "deferral list," excluding him not only from CSL, but from all other plasma facilities.[14]

CSL excluded Amy Wolfe the first time she tried to donate plasma. She has diagnosed mental health conditions, including post-traumatic stress disorder brought on by a sexual assault.[15] As a result, she suffers from anxiety, which is ameliorated by her service dog, Harley.[16]

Wolfe brought Harley with her to a CSL center, which sent her home based on the dog without further assessment of her fitness. Indeed, the CSL MSA who interacted with her remembered nothing about Wolfe other than her dog.[17] CSL then permanently excluded her until such a time as she does not use a service animal. As a matter of policy, CSL excludes anyone using a service animal to treat anxiety, no matter how calm and symptom-free their presentation at the center. Pet. App. 25a.

4. Litigation Below—Mr. Silguero brought this action against CSL in the Southern District of Texas. Ms. Wolfe later intervened as a plaintiff. They both alleged that CSL violated Title III and the Texas Human Resources Code. Pet. App. 25a.

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[13] ROA 17-41206.147, 17-41206.270.

[14] ROA 17-41206.10.

[15] ROA 17-41206.411.

[16] ROA 17-41206.415-417.

[17] ROA 17-41206.427.

The district court granted summary judgment to CSL, ruling that plasma centers are not public accommodations subject to Title III. Applying the interpretive maxim *ejusdem generis*, it reasoned that each of the "service establishments" specified in the statute is paid by members of the public for its services, whereas plasma centers pay members of the public for their transactions; this difference in direction of payment, it reasoned, "bars them from qualifying as service establishments." Pet. App. 31a. The district court also held that plasma centers were not covered by Texas state law barring disability discrimination. Pet. App. 33a-34a.

The court of appeals affirmed as to the Title III count. It held that CSL is an "establishment" but does not provide "service," and so is not a "service establishment." The court defined a "service establishment" as an establishment "that performs some act or work for an individual who benefits from the act or work." Pet. App. 8a. It concluded that CSL's customers "receive no obvious 'benefit' or 'help' which would make the plasma collection center's act a 'service,'" Pet. App. 9a-10a; rather, customers receive money, "which is wholly collateral to the act of plasma collection." Pet. App. 10a. The court stated that it was irrelevant that CSL "advertises plasma collection as a 'service' it gives for customers," because "[h]ow a party advertises the work it performs has no bearing on what Congress meant by the term 'service.'" Pet. App. 7a n.10.

Like the district court, the court of appeals asserted that each of the service establishments specified in the ADA "act[s] in some way that clearly benefits the individual … [b]ut plasma collection does not provide any detectable benefit for donors." Pet.

App. 11a. It found irrelevant that Congress specifically chose not to require covered entities to be "*similar* service establishments," inferring that Congress's concern was only to avoid limiting service establishments "to variants of the enumerated items." Pet. App. 11a n.14. Accordingly, the court used the specified examples to limit the term "service establishments" to those providing "certain types of services." *Id.*

Finally, the court of appeals said that an establishment that pays its customers effectively employs them and therefore cannot be considered to serve them. Pet. App. 12a-13a. Because the ADA regulates employment solely through Title I, the court stated, Title III coverage of employment-like relationships would disrupt Congress's calibration of Title I protections, such as the exclusion of work as an independent contractor or for small employers. Pet. App. 13a. Treating an entity that pays its customers as a service establishment, it said, "would turn virtually every employer and entrepreneur into a 'service establishment'" and would "make[] Title I largely redundant." Pet. App. 13a-14a.

The court recognized that it was creating a circuit split both as to the application of Title III to the plasma industry and in its broader reasoning as to the scope of the term "service establishment." It explicitly "reject[ed] the Tenth Circuit's conclusion that a service is provided 'regardless of whether [establishments] provide or accept compensation as part of that process.'" Pet. App. 14a (quoting *Levorsen*, 828 F.3d at 1233–34) (brackets in original).

As to whether plasma centers are covered "public facilities" under state disability-rights law and, if so,

under what circumstances state law permits exclusion of people with disabilities, the Fifth Circuit certified those questions to the Texas Supreme Court. The Texas court unanimously held that plasma centers are covered because a plasma center is a "commercial establishment … to which the public is invited." Pet. App. 48a-50a (quoting Tex. Hum. Rts. Code § 121.002(5)). It declined to narrow this language to conform state-law protections to the Fifth Circuit's reading of the ADA. Pet. App. 53a-54a.

Following the Texas Supreme Court's decision on the certified question, the Fifth Circuit issued its final decision in Petitioners' appeal, reinstating their state-law claim but affirming dismissal of the Title III claim. Pet. App. 20a-21a. The Fifth Circuit remanded to the district court to determine whether to exercise supplemental jurisdiction over the state-law claim. *Id*. Petitioners sought and received a stay of the mandate pending this Court's review of the Title III determination. Pet. App. 77a.

REASONS FOR GRANTING THE WRIT

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

The Fifth Circuit held that plasma donation centers are not public accommodations and, therefore, are not subject to the non-discrimination requirements of Title III of the ADA. This holding squarely conflicts with decisions of the Third and Tenth Circuits on indistinguishable material facts.

A. In *Levorsen*, the Tenth Circuit held that plasma centers are service establishments covered by the ADA.

Levorsen surveyed dictionary definitions of "service," and then held that the broad, plain meaning of "service establishment" in the ADA includes any business "that, by its conduct or performance, assists or benefits someone" other than by providing that person with a "tangible good." 828 F.3d at 1231. Given Title III's broad purposes, it reasoned, "we won't bend over backwards to give the term 'service establishment' a definition that is more narrow than the plain meaning of its component parts." *Id.* The Tenth Circuit held that plasma centers fall within the coverage of Title III, because they "assist or benefit those who wish to provide plasma for medical use—whether for altruistic reasons or for pecuniary gain—by supplying the trained personnel and medical equipment necessary to accomplish that goal." *Id.* at 1234 (internal brackets and quotations omitted).

The Tenth Circuit rejected application of the *ejusdem generis* doctrine to narrow the definition of "service establishment" to otherwise covered establishments that receive payment from customers. Doing so, it stated, would leave gaps in Title III's coverage of commercial establishments open to the public, and would be inconsistent "with Title III's aim of affording individuals with disabilities access to the same establishments available to those without disabilities." *Id.* at 1232 (citing *PGA Tour*, 532 U.S. at 676–77). The court found relevant that, while considering the legislation that became the ADA, Congress specifically changed the operative language from "'other similar service establishments' to 'other service establishments,' presumably to make clear that a particular business need *not* be similar to the enumerated examples to constitute a service establishment." *Id.* at 1233.

The Fifth Circuit explicitly "reject[ed]" the Tenth Circuit's holding in affirming dismissal of Petitioners' claims. Pet. App. 14a.

B. After the Fifth Circuit issued its opinion setting forth its construction of the ADA, the Third Circuit considered the same issue. Observing that it was addressing an issue as to which two sister Circuits already disagreed, the court held "that the Tenth Circuit got it right: the ADA applies to plasma donation centers." *Matheis*, 936 F.3d at 174.

The Third Circuit reasoned that donors *do* benefit from their visits to plasma centers—they "receive money." *Id.* at 177. It found the Fifth Circuit's "emphasis on the direction of monetary compensation" was "unhelpful":

> Businesses that offer services to the public convey something of economic value in return for something else of economic value. The value received by the service provider and given by the customer is often money, but it need not be. Money is one proxy for economic value, and economic value is fungible.

Id. at 177–78.

For example, the Third Circuit observed that money goes both ways between banks and their customers—many of whom "receive money from banks for using the bank's service"—without changing the banks' service-establishment character. *Id.* at 178. Similarly, pawnshops and recycling centers pay many of their customers rather than having those customers pay them. *Id.* at 178. These examples, it reasoned, "underscore a simple fact: providing services means providing something of economic value to the public;

it does not matter whether it is paid for with money or something else of value." *Id.*

Applying those principles, the Third Circuit held that plasma centers are service establishments because they "offer[] a service to the public, the extracting of plasma for money, with the plasma then used by the center in its business of supplying a vital product to healthcare providers." 936 F.3d at 178. What matters, it reasoned, is that "both the center and members of the public derive value from the center's provision and public's use of a commercial service." *Id.* In that respect, the court held, a plasma center is no different from the statute's specifically named examples. *Id.*

Based on the direct conflict with the Fifth Circuit's decision here, CSL—the defendant in both cases—sought and received a stay of the Third Circuit's mandate so that it could file a petition for certiorari from that judgment. In its motion, CSL stated that "[t]he question of whether a plasma collection center is a place of public accommodation under ADA Title III is one that is hotly contested currently in the federal courts and has divided the Courts of Appeals in recent years." *See* Mot. to Stay Mandate at 2, *Matheis v. CSL Plasma*, Nos. 18-3415 & 18-3501 (3d Cir., filed Sept. 20, 2019) (CSL Mot.). As CSL explained to the Third Circuit, the conflict among the circuits merits resolution by this Court. *Id.* at 5.

II. Whether a multi-billion-dollar industry is a covered public accommodation is an important question warranting review.

As both the Third and Fifth Circuits acknowledged, and CSL agrees, the conflicting decisions of the courts of appeals leave the plasma

industry and its customers with disabilities with different rights and responsibilities depending on where they are located. In the Third and Tenth Circuits, plasma centers must respect the Title III rights of individuals with disabilities. Plasma centers must make reasonable modifications to their policies for such customers' needs and may exclude them altogether only on grounds recognized by the ADA. In the Fifth Circuit, on the other hand, the ADA does not bar plasma centers from being nakedly discriminatory. As far as the ADA is concerned, plasma centers may, for example, exclude blind customers or those with wheelchairs, for irrational reasons or no reason at all. And unlike virtually all other commercial establishments open to the public, they need not take affirmative steps to make their services accessible or accommodate customers' disabilities.

In the remaining circuits, the ADA's application to plasma centers is uncertain. Individuals with disabilities must litigate this threshold question to enforce any Title III rights they might have against plasma centers. That uncertainty unacceptably burdens their rights, and it mires courts and litigants in unnecessary controversy.[18]

That state-law disability protections apply to plasma centers in Texas does not solve the problem.

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[18] For example, an individual filed a *pro se* complaint against CSL in Georgia, alleging that the company unreasonably refused to serve him because of his mental illness diagnosis. CSL moved to dismiss on the grounds that Title III does not cover its conduct. The district court recently directed the plaintiff to inform the court whether he wanted appointed counsel to handle the briefing. *See Richards v. CSL Plasma Ctr.*, No. 1:17-cv-4277 (N.D. Ga. Docket entry #52, Aug. 14, 2019).

The Texas Supreme Court, which found the ADA to provide useful guidance in other respects, could not look to federal caselaw to inform the coverage of state law because there is no settled federal interpretation. Pet. App. 54a-55a n.8. Congress intended the ADA to "provide a clear and comprehensive *national* mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1) (emphasis added). Both the plasma industry and its customers will benefit from clarity about whether the industry is subject to that national mandate, and if it is, from the detailed guidance available from federal case law, regulations, and guidance addressing numerous granular questions about providing reasonable accommodations to individuals with disabilities.

Further, as CSL has stated, the applicability of the ADA to plasma centers "is an issue that affects the entire plasma collection industry and blood banks nationwide." CSL Mot. at 4. That industry has rapidly grown in recent years and has become an enormous part of the U.S. economy. *See supra* p. 10-11. With that growth has come increasing controversy over the industry's systematic non-compliance with Title III's requirements.

Reports have documented that most "donors" are relatively poor and rely heavily on the money they receive from plasma donation for basic necessities such as rent or groceries.[19] The plasma industry's target market overlaps with the population of persons with disabilities, who are disproportionately low-income. One recent official report found that

[19] *See* Greenberg, *supra* note 4.

"[p]overty among people with disabilities has reached epidemic proportions."[20] But the industry does not serve all those with disabilities whom it could reasonably serve.

Based on the erroneous premise that they need not comply with Title III's requirements, plasma centers have adopted policies *requiring* their employees to turn away customers *because of* those customers' disabilities, without any individualized assessment of their ability to safely donate plasma or of plasma centers' ability to reasonably accommodate their needs. For instance, plasma centers refuse to serve all people who, in their estimation, have "unsteady gait," *i.e.*, those who limp or use a cane; who use service animals for certain purposes; or who have certain diagnosed mental illnesses, *Levorsen*, 828 F.3d at 1229-30. That is, they engage in precisely the discrimination based on overbroad stereotypes and prejudice that led Congress to enact the ADA in the first place. And because they do not recognize that the ADA applies to their interactions with customers, companies such as CSL do not train plasma center employees on Title III requirements or otherwise adopt policies to ensure that their services are accessible to people with disabilities.[21]

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[20] National Council on Disability, *National Disability Policy: A Progress Report*, Letter of Transmittal to President Donald J. Trump (2017), https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf. People with disabilities make up about 12 percent of the country's working-age population, but account for more than half of those in long-term poverty. *Id.* at 21.

[21] ROA 17-41206.175. In 2009, the Justice Department settled a Title III complaint lodged against the plasma company Bio-Medics for failing to serve a blind man. The company acknowledged that it had no procedures for accommodating the

This case presents an ideal vehicle for resolving this important question. The threshold question of whether plasma centers are public accommodations is squarely presented and was the only ground on which the Fifth Circuit affirmed the dismissal of plaintiffs' Title III claims. Because it resolved this case on threshold grounds, the Fifth Circuit did not reach fact-specific questions such as whether CSL's actions could be justified under the ADA, and this Court need not do so either.

III. The Fifth Circuit's decision is wrong.

The Third and Tenth Circuits got it right, and the Fifth Circuit got it wrong. The plain meaning of the term "service establishment" is broad by design, encompassing the wide variety of commercial establishments (and some non-commercial ones as well) that provide some benefit to the public, including where that benefit takes the form of money. The Fifth Circuit construed it otherwise only by narrowing the reach of this broad term in ways that are not reflected in the text and do not properly honor Congress's intent.

The activities that plasma centers do for customers—*e.g.*, medical screening, the extraction of blood, and the removal of plasma—are, by their nature, services. Indeed, much of that activity is also performed by medical establishments, which are specifically listed in the statutory definition. CSL offers these services to the general public. Moreover,

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needs of people with disabilities and only developed them once it became clear that it could face Title III liability otherwise. *See Settlement Agreement Between the United States of America and Bio-Medics*, DJ # No. 202-77-45 (2009), https://www.ada.gov/bio-medics.htm.

CSL itself regularly characterizes its activities as "services" in a variety of contexts—and terms its donors "customers" who benefit from those services—further reinforcing that the plain meaning of the broad term "service establishment" readily covers those activities. For example, CSL's website states: "CSL Plasma is committed to providing the best in customer service to our loyal plasma donors." *See Recent Donation Experience Questions*, CSL Plasma, https://www.cslplasma.com/contact-us (last visited Nov. 4, 2019).[22] Indeed, even the dissenting judge in the Tenth Circuit's *Levorsen* decision acknowledged that plasma centers' activities "seem to fit comfortably within the category of 'services' that, in my view, subsection (7)(F) contemplates." 828 F.3d at 1242 (Holmes, J., dissenting).

The Fifth Circuit reasoned that, because a plasma center extracts plasma for its use, not the customer's, and then pays the customer, "the individual performs a service for the establishment, not the other way around." Pet. App. 10a. In so holding, the court added a limitation to the plain meaning of "service establishment" that appears nowhere in the ADA. As the Third Circuit recognized, this logic also blinks economic reality. Whether a customer pays for plasma services or is paid for them, the parties have engaged in a mutually beneficial transaction involving the plasma center's services. *See Matheis*, 936 F.3d at 178. The Fifth Circuit's distinction between those two

[22] As the United States pointed out in its brief below, CSL's competitors also routinely describe themselves as providing "service," while many state laws specifically treat the procurement of blood plasma as a "service" for other purposes. *See* Brief for United States as *Amicus Curiae* Supporting Neither Party at 12-14.

scenarios creates a loophole for evading Title III's protections and amounts to "a harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 132 (2005).

The Fifth Circuit justified its reading in two ways. Both are wrong.

First, the court applied *ejusdem generis*—a maxim that general words that follow a list of specific words should be "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words," *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)—to narrow the broad term "service establishment" to those establishments that it perceived to be of a kind with the examples specified in the statute. Pet. App. 10a-12a. *Ejusdem generis*, however, is a tool for ascertaining the meaning of a statutory term where Congress has used clarifying examples to prevent an ambiguous term from having an unintended capacious reach. *See, e.g.*, *Yates v. United States*, 574 U.S. 528, 135 S. Ct. 1074, 1087 (2015). It "does not control … when the whole context dictates a different conclusion." *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991).

Here, Congress defined "public accommodation" by reference to "12 extensive categories" that would collectively cover "the wide variety of establishments available to the nondisabled." *PGA Tour*, 532 U.S. at 676–77. Congress did not include examples of each category to *narrow* those categories' plain scope, but to illustrate the categories' *breadth*. In the case of "service establishment," Congress provided fourteen

very different examples, from laundromat to bank to travel service to gas station to law office to health provider. The dissimilarity of these examples reflects that Congress did not include them to limit the plain meaning of "service establishment" by reference to some additional respect—beyond that they offer services—in which they are all "the same." *See CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 295 (2011) ("A canon meaning literally 'of the same kind' has no application to provisions directed toward dissimilar subject matter.").

As a House Committee report explained:

> A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition. Rather, the person must show that the entity falls within the overall category. For example, it is not necessary to show that a jewelry store is like a clothing store.

H.R. Rep. No 101-485 (III), 101st Cong., 2d Sess., at 54 (1990). Accordingly, the Conference Committee, in reconciling the Senate and House versions of the ADA, chose the House version of the relevant language, which unlike the Senate version did *not* require an "other service establishment" (or any of the other categories of public accommodation) to be "similar" to those listed in the text. *See* H.R. Rep. 101-596, 101st Cong., 2d Sess., at 76 (1990) (Conf. Rep.). The Fifth Circuit's invocation of *ejusdem generis* thus made the mistake of "adding implicit limitations to statutes that the statutes' drafters did not see fit to add." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2160-61 (2016).

In any event, the necessary premise of *ejusdem generis*—that a common theme of the specific examples can inform the meaning of the general term—is absent here, because customer payment to the establishment (or existence of payment at all) is *not* a necessary feature of the examples listed in the statute. A legal establishment can accept payment for service from its clients; can be paid by others (as are legal-aid lawyers); can be not paid at all (as in pro bono work); or can be paid on contingency, with the rest of the proceeds paid out to its client. A bank can accept payment for its services; can offer banking for no charge (because it profits in other ways from the money invested); or can pay its customers for depositing their money. Those differences in payment arrangements do not affect the character of the service offered.

Similarly, the Fifth Circuit's finding that each of the "service establishments" listed in the ADA performs a service that *directly* benefits a consumer, whereas a plasma center's activities benefit a consumer only through the payment of money, Pet. App. 11a, does not distinguish the listed establishments from plasma centers. For example, when "lawyers file clients' pleadings," the clients receive no "detectable benefit" from the pleadings themselves. Pet. App. 11a. Few clients seek the drafting and filing of pleadings so they can read and enjoy the completed work as a good in itself. Rather, the goal of such activity more frequently is to *increase* the client's chance of *receiving money* (if plaintiff) or *decrease* the client's chance of *paying money* (if defendant).

As the Third Circuit correctly put it, the constant that unifies service establishments is not direction or

type of payment, nor the receipt of a non-monetary ultimate benefit, but that service establishments "convey something of economic value in return for something else of economic value." *Matheis*, 936 F.3d at 177–78. Plasma centers readily qualify under that test; they perform their activities as part of transactions that leave both the plasma industry and its customers better off.

Second, the Fifth Circuit held that money *cannot* be the ultimate benefit that members of the public receive from service establishments, because then Title III might cover independent contractors and other non-employee work relationships. That result, the court said, would undermine Congress's decision not to extend Title I's protections so far. Pet. App. 12a-14a. This concern is unwarranted.

To begin with, there is no factual basis for the Fifth Circuit's slippery-slope concern. A restaurant's employee can be readily distinguished from a restaurant's customers—just as a plasma center's employees can be distinguished from its customers—without regard to payment. No one entering a plasma collection center would have difficulty telling the customers from the employees.

Furthermore, Title III protects not simply "clients" or "customers," but *all* people in their equal enjoyment of a public accommodation's "goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(a). The proper inquiry thus is not whether a plaintiff seeks access in order to obtain money (as opposed to some other benefit), but whether the discrimination complained about concerns protected "goods, services, facilities, privileges, advantages, or accommodations." The relevant "privilege" may relate

to employment opportunity or the opportunity to otherwise obtain money. For example, Title III bars a hospital from discriminating based on disability in granting physicians admitting privileges. *See* DOJ, *Title III Technical Assistance Manual*, 4.1100 General, Illustration 4, https://www.ada.gov/taman3.html. Accordingly, in *PGA Tour*, this Court rejected the argument that Title III did not protect a professional golfer's right to participate in a tournament because he was more like an employee than a client or customer. 532 U.S. at 678.

The bottom line is that Congress intended Title III to guarantee people with disabilities equal enjoyment of *all* the "wide variety of establishments available to the nondisabled," *PGA Tour*, 532 U.S. at 676–77. And it enacted language broad enough to cover plasma centers, making it immaterial that it did not specify that particular establishment for coverage. *Cf. Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (finding that sweeping language of Title II of the ADA covers prisons). Courts should not "bend over backwards" to find reasons not to call an establishment that serves the public a "service establishment." *Levorsen*, 828 F.3d at 1232. By doing so, the Fifth Circuit created precisely the sort of gap in Title III's coverage that the ADA's drafters sought to avoid.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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