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.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

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.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed October 23, 2018]

No. 17-41206

MARK SILGUERO,
Plaintiff-Appellant,

AMY WOLFE,
Intervenor-Appellant,

v.

CSL PLASMA, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before KING, ELROD, and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

CSL Plasma, Inc. is a plasma collection center that will pay anyone who passes its screening test to donate plasma. Mark Silguero and Amy Wolfe are both individuals with disabilities who attempted to donate plasma but whom CSL Plasma deferred for reasons they allege related to their disabilities. Silguero used a cane and had a limp; Wolfe had anxiety and required the use of a service animal. Silguero and Wolfe sued under the Americans with Disabilities Act ("ADA") and Chap-

ter 121 of the Texas Human Resources Code ("THRC"). The district court granted summary judgment in CSL Plasma's favor. It concluded that those laws did not apply because CSL Plasma was neither a "public accommodation" under the ADA nor a "public facility" under the THRC.

We affirm the district court's decision regarding the scope of the ADA. The core dispute is whether CSL Plasma is a "service establishment" within the definition of "public accommodation." We conclude it is not. CSL Plasma does not provide any "service" to customers. Instead, it pays them for the inconvenience of donating plasma so that it can collect a commercially valuable asset. We certify the THRC questions to the Supreme Court of Texas.

I. Background

CSL Plasma operates a network of plasma collection centers. It offers to pay members of the public to donate[1] plasma. Individuals who wish to donate must pass a screening evaluation that confirms that the individual donating and the plasma extracted meet Food and Drug Administration (FDA) regulations. Those who do not pass the screening, for whatever reason, are deferred—told they will not be permitted to donate and will not be paid.

Those who pass the screening are taken to a room where they are connected to specialized machinery

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[1] The district court refused to use the word "donate" because "individuals are compensated for supplying their plasma" and it was therefore "inaccurate to refer to them as 'donors' or to the process as 'donation.'" We use the term donate and its variants because that term is used in federal regulations covering the process. *See, e.g.*, 21 C.F.R. § 606.100. But, for clarity, CSL Plasma pays any individual who donates plasma.

that removes their blood, separates the plasma, and then re-circulates the remaining elements of blood into their system. After CSL Plasma extracts the plasma, it pays the individual. There is no indication in the record that members of the public pay CSL Plasma in exchange for plasma collection or that it offers any services for which the public can pay. CSL Plasma sells the plasma it collects to other private entities who use it for various medical purposes.[2] Nothing in the record indicates that CSL Plasma enters into any sort of contingency fee arrangement with members of the public, where the individual donating receives a percentage of the eventual sale price.

Silguero and Wolfe are two individuals who attempted to donate plasma at CSL Plasma but were both deferred. Silguero had previously donated before his deferral, while Wolfe had never donated before. The parties dispute the precise motivation for why Silguero and Wolfe were each deferred. But all agree that the deferrals were based on pre-existing policies implicating Silguero's and Wolfe's disabilities.[3]

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[2] The parties do not dispute the district court's characterization that CSL Plasma sells the plasma. Some of the record evidence indicates that CSL Plasma may keep the plasma within its corporate family rather than selling it to completely unrelated parties. We do not believe the difference is material to the outcome of the case.

[3] CSL Plasma argues that it implemented the policies in an effort to comply with the FDA's general regulation that collection centers only allow those in "good health" to donate. 21 C.F.R. § 630.10(a). The parties disagree about the extent to which the particular policies at issue are necessary to comply with the FDA regulations. Obviously, any specific FDA regulations necessary to protect the health of the plasma donors or recipients would override any contrary statutes of general application, such as the ADA.

Silguero was initially deferred in December 2013, and he says that the deferral was based on CSL Plasma's policy not to accept donors who have an "unsteady gait," though the precise reason for his initial deferral has changed over time. Silguero has bad knees and requires the use of a cane to walk. After the initial deferral, CSL Plasma permanently deferred him because he allegedly later threatened employees for initially deferring him. Silguero has presented evidence that he never threatened employees or reacted inappropriately to the initial deferral; he asserts that CSL Plasma's reason for his permanent deferral is essentially a pretext to cover for discrimination based on his disability. He remains permanently deferred.[4]

Wolfe was deferred in October 2016 based on CSL Plasma's policy not to accept donors whose anxiety was severe enough to require the use of a service animal.[5] The parties agree that CSL Plasma had a preexisting policy that applied to all individuals who used animals to treat anxiety. At the time Wolfe tried to donate, a doctor at CSL Plasma was contacted to verify that she would be unable to donate due to her service animal.[6] The record is unclear to what extent

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Given our holding in this case, we need not explore this potential dichotomy further.

[4] Were we to conclude that the ADA applies here, there would be a fact question as to the reason for his permanent deferral.

[5] The record is unclear whether the animal was a "service animal" as that term is used in various statutes and regulations. However, because we view the facts in the light most favorable to the non-moving party and the issue was not specifically briefed by CSL Plasma before the district court, we assume it was a "service animal."

[6] We offer no opinion here on whether use of a service animal renders a person "disabled" for purposes of the ADA sections in

the doctor reviewed information unique to Wolfe. But regardless of her unique circumstances, she will be unable to donate so long as she uses her service animal to treat the anxiety.

Silguero and Wolfe both sued, alleging unlawful discrimination under Title III of the ADA, 42 U.S.C. § 12182, and Chapter 121 of the THRC, TEX. HUM. RES. CODE § 121.001 *et seq*. CSL Plasma moved for summary judgment, arguing that it was neither a "public accommodation" under the ADA nor a "public facility" under the THRC. It also argued that Silguero and Wolfe could not identify a genuine issue of material fact or show that CSL Plasma had done anything other than impose a legitimate safety requirement. The district court granted summary judgment, concluding that neither the ADA nor the THRC applied to CSL Plasma. It did not address CSL Plasma's other arguments. Silguero and Wolfe now appeal.

II. Standard of Review

This court reviews de novo a district court's grant of summary judgment, applying the same standard as the district court. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 328 (5th Cir. 2017) (citing *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001)). It reviews all evidence in the light most favorable to Silguero and Wolfe, the non-moving parties. *See id.* at 328–29.

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question. *See* 42 U.S.C. 12102(1) & (3) (defining "disability" and "regarded as" having a disability). We assume arguendo that it does.

III. Discussion

We first address why we agree with the district court that CSL Plasma is not a "public accommodation" under the ADA. We then explain why we certify questions about the THRC to the Supreme Court of Texas and set out the necessary information for the Supreme Court of Texas to answer the questions.

A. ADA Claim

The crux of this case is whether CSL Plasma is a "service establishment" under 42 U.S.C. § 12181(7)(F). If it is, then it is a "place of public accommodation," and Title III of the ADA applies to it. *See* 42 U.S.C. § 12182(a). If it is not, then it cannot be held liable for discrimination under Title III.[7]

The term "service establishment" appears in the definition of public accommodation. The definition includes twelve different categories of accommodations. The single category at issue in this case includes an enumerated list of fifteen establishments, followed by the catchall phrase "or other service establishment." 42 U.S.C. § 12181(7)(F).[8] Silguero and Wolfe do not argue that plasma collection centers are among the enumerated items listed in that category.

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[7] Of course, this opinion in no way countenances any such discrimination not grounded in safety and health regulations, but our inquiry is limited to the scope of the ADA's coverage here—nothing more, nothing less.

[8] The list is as follows: "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).

Instead, the dispute is over the catchall phrase "other service establishment."[9] The parties agree that a "service establishment" is, unsurprisingly, an "establishment" providing "services" to others. They also agree that CSL Plasma is an "establishment." They disagree about whether CSL Plasma provides "services" to others.[10]

The word "service" generally denotes some "helpful act" or an "act giving assistance or advantage to another." *See Service*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (10th ed. 1993); *Service*, WEBSTER NEW WORLD COLLEGIATE DICTIONARY (3d ed. 1996). The adjective "helpful" in the first definition implies that someone receives help from the act. In the second definition, the verb "giving" and the preposition "to"

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[9] The Department of Justice filed an amicus brief expressing its view that plasma collection centers are "service establishments" under Title III. Neither the DOJ nor the parties contend that the DOJ's views are entitled to *Chevron* deference. Rightly so, because agencies are not entitled to deference when they assert their statutory interpretations solely through litigation briefs. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587, (2000); *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 805–06 (5th Cir. 2010), *aff'd on other grounds*, 566 U.S. 624 (2012); *see also Ball v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 365 (4th Cir. 2000). At most, the DOJ's views would be entitled to "respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which is given "only to the extent that [the government's] interpretations have the power to persuade." *ExxonMobil Pipeline Co. v. United States Dep't of Transp.*, 867 F.3d 564, 574 n.4 (5th Cir. 2017) (quoting *Moore v. Hannon Food Serv., Inc.*, 317 F.3d 489, 497 (5th Cir. 2003)). Because we are unpersuaded by the DOJ's interpretation, we do not defer to it.

[10] Silguero and Wolfe argue that CSL Plasma advertises plasma collection as a "service" it gives for customers. How a party advertises the work it performs has no bearing on what Congress meant by the term "service."

indicate that the "assistance or advantage" is conveyed from the act to the individual. Congress's use of the word "service" thus suggests not only that the establishment performed some action but also that the action helped or benefited the recipient. In the case of a "service establishment," the establishment serves the members of the public who are "helped" or "benefited" by the service. Other definitions from authoritative dictionaries bolster this reading. For example, service can also be defined as "the provision (of labour, material appliances, etc.) for the carrying out of some work for which there is constant public demand." *Service*, OXFORD-ENGLISH DICTIONARY (2d ed. 1988); *see also Service*, RANDOM HOUSE DICTIONARY (2d ed. 1987) ("[T]he organized system of apparatus, appliances, employees, etc., for supplying some accommodation required by the public."). The "provision" of the "work" goes to the "public" who "demands" it.[11]

Based on these dictionary definitions, a "service establishment" is an establishment that performs some act or work for an individual who benefits from the act or work.[12] Our definition is materially similar to the one

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[11] Silguero and Wolfe also rely on Black's Law Dictionary to define "service," but it cuts against their argument. Black's defines "service" to mean work that is usually done in exchange "for a fee," which Silguero and Wolfe concede did not happen here. *Service*, BLACK'S LAW DICTIONARY (10th ed. 2010).

[12] Silguero and Wolfe emphasize the definition for the word "service" that we have used in other contexts. *See Frame v. City of Arlington*, 657 F.3d 215, 226 (5th Cir. 2011) (en banc) (noting that "service" under Title II of the ADA generally means "the performance of work commanded or paid for by another," or "an act done for the benefit or at the command of another"); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (noting that "service" under a provision of the Airline Deregulation Act generally means "a bargained-for or anticipated pro-

developed by the Tenth Circuit, the only other federal court of appeals to address the ADA's applicability to plasma collection centers. *See Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016). It defined a "service establishment" to mean "a place of business or a public or private institution that, by its conduct or performance, assists or benefits someone or something or provides useful labor without producing a tangible good for a customer or client." *Id.* at 1231. Though its definition has additional verbs, each of the verbs connote aid or benefit performed by the establishment for the customer.[13]

We disagree with the Tenth Circuit, however, about whether plasma collection centers provide a "service" to customers. Three textual clues lead us to that result. First, the word "service" implies that the customer is benefitted by the act, and no such benefit occurs here. Second, the list preceding the catchall term "other service establishment" does not include any establishments that provide a "service" without a detectable benefit to the customer. Finally, third, the structure of the ADA indicates that an establishment typically does not pay a customer for a "service" it provides.

First, the words "service establishment" alone imply that the plasma donation at issue here is not a

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vision of labor from one party to another"). We do not rely on the definitions of "service" in other contexts because differing contexts can create different meanings. But we note that even if we were to rely on those definitions, they would reinforce the definition we have identified here.

[13] We need not decide whether a "service" cannot produce a tangible good. If anything, it supports our conclusion that plasma collection is not a "service" because the goal of the process is to create marketable plasma. But the parties have not focused their briefing on this point, and we therefore need not address it.

"service." As our review of the dictionary definitions above demonstrates, the "service" in "service establishment" is generally viewed as flowing from the establishment to an individual. Here, donors receive no obvious "benefit" or "help" which would make the plasma collection center's act a "service." They are hooked up to a machine and drained of life-sustaining fluid, subjecting them to discomfort and medical risks. Donors do not have the plasma earmarked for themselves or to aid a specific third party for whom they are concerned. Instead, the plasma becomes the property of the plasma collection center to do with it whatever it pleases. The labor is not "useful" to the donor; it is "useful" to the establishment. The donor is benefitted only by the payment of money, which is wholly collateral to the act of plasma collection. Thus, as plasma collection occurs in this case, the individual performs a service for the establishment, not the other way around.

Second, this reading of "service establishment" is bolstered by the enumerated list preceding that catchall phrase. Generally, a catchall phrase should be read in light of the preceding list, an interpretive maxim known as ejusdem generis ("of the same kind"). *See Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991). Silguero and Wolfe argue we should not apply ejusdem generis here for two reasons. One, the term "public accommodation" is to be liberally construed. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676–77 (2001). But even when a statute is to be construed liberally, it is still not untethered from its text. *See Watson v. Philip Morris Cos.,* 551 U.S. 142, 147 (2007). Canons of interpretation help ensure that words are not stretched past the limits Congress intended. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). If Congress wanted to cover all "establishments" it could have done so, omitting the word

"service." So a "liberal" reading cannot be one which reads out one of the words. Thus, applying ejusdem generis helps us ensure we honor Congress's legislative choices.

The second reason they offer for ignoring ejusdem generis is the legislative history. Legislative history is a last resort for ambiguous statutes, and it does not help the plaintiffs here in any event.[14] *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 634 (2018).

Applying ejusdem generis highlights how oddly plasma collection centers would fit into the list. Each of the items on the list in 42 U.S.C. § 12181(7)(F) involves establishments acting in some way that clearly benefits the individual. Dry-cleaners press customers' shirts. Lawyers file clients' pleadings. Hospitals mend patients' broken bones. For each, the establishment performs an action that directly benefits the individual, just as we defined the term above. But plasma collection does not provide any detectable benefit for donors.

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[14] The legislative history argued by Silguero and Wolfe does not support their conclusion. They point out only that a previous version of the bill wrote the catchall as "other *similar* places." *See* H.R. Conf. Rep. No. 101-596, at 75 (1990). The House Report indicates the word "similar" was removed because plaintiffs would "not have to prove that the entity being charged with discrimination is similar to the examples listed." H.R. Rep. No. 101-485, pt. 3, at 54 (1990). Putting a finer point on it, the Report explained that "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. It is sufficient that the jewelry store sells items to the public." *Id.* This example shows that Congress was concerned about unduly limiting the catchalls to be limited to variants of the enumerated items. Here, we do not use ejusdem generis to limit "service establishments" to certain types of services; we use it to determine what a "service" is.

Silguero and Wolfe contend that the list, however, supports a broader reading of "service establishment" for two reasons. One, they argue that some of the establishments on the list may perform services for free. For instance, legal aid clinics provide services to the indigent free of charge. But the absence of payment does not change the fact that lawyers' work unambiguously is done to benefit clients so that the work would be a "service." Two, Silguero and Wolfe contend that one of the examples, a bank, may not only perform some services for free but may pay customers through interest on savings. But in that instance, any "free" services and payment are directly linked to the act the bank performs to benefit the customer. Banks manage money. They benefit customers by storing and leveraging it. Any payment customers receive is not a result of the customer's labor but is instead an intrinsic result of the act the bank performs to serve the customer. Contrast that with plasma collection centers. After the donor expends his time and resources donating plasma, the plasma belongs to the plasma collection center. The plasma collection center does not manage or oversee the plasma on behalf of the donor. Donors are therefore unlike bank customers because they are not benefitted by the act the establishment performs.

The third reason we conclude that CSL Plasma does not provide a "service" is that CSL Plasma pays for plasma donation, which the structure of the ADA indicates is governed by other provisions. The parties agree that CSL Plasma pays all donors for plasma donation. That relationship is more akin to employment or contract work, not the provision of a "service" to a customer. Indeed, our lexicon confirms that society thinks of those relationships as different. "Customers" are "*purchaser*[*s*] of goods and services." *See Customer*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (emphasis

added). In contrast, an "employee" is a "person who works for an employer . . . for wages or a salary." *See Employee*, OXFORD ENGLISH DICTIONARY (2d. 1989). Payment is thus relevant because it may indicate whether an individual is a customer or is instead an employee or other hired laborer.

The distinction between customer relationships and employment relationships is embodied in the structure of the ADA. Title I applies to employment relationships, while "service establishment" defines "public accommodations" under Title III. *Compare* 42 U.S.C. § 12112(a) *with* 42 U.S.C. § 12181(a). Congress made specific legislative choices about how broadly Title I would apply. For instance, Title I protects only "employees" and extends only to employers hiring a sufficient number of employees. *See* 42 U.S.C. § 12111(4)–(5). Thus, courts have often determined that employees at small businesses and independent contractors are not protected by Title I of the ADA. *See Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 441 (2003) (noting that the ADA "is inapplicable to very small businesses"); *Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422, 427 & n.20 (5th Cir. 2016) (collecting persuasive authority that independent contractors are not covered by Title I of the ADA). If we interpret "service establishment" in Title III so broadly that it includes employment and employment-like relationships, we risk overrunning Congress's legislative choices in Title I.

The way that Silguero and Wolfe interpret "service," Title III makes Title I largely redundant. They contend plasma collection benefits donors (and is therefore a "service") because it enables them to "realize" the "commercial value" of their plasma, which they

could not otherwise do without CSL Plasma.[15] That conception of a "service" would turn virtually every employer and entrepreneur into a "service establishment." After all, a small restaurant enables cooks to "realize" the "commercial value" of their skills by providing a location for hungry people to come. A construction general contractor enables construction independent contractors to "realize" the "commercial value" of their machinery by connecting them with clients in need. A commercial landscaper buying gravel from a rock quarry enables the quarry to "realize" the "commercial value" of its gravel by putting it to commercial use. Under Silguero and Wolfe's interpretation, employees or contractors of these establishments could simply dodge the narrowing scope of Title I and sue under Title III. It is illogical to construe one title to eviscerate the other.

We thus reject Silguero and Wolfe's argument that the direction of payment for services is irrelevant. In doing so, we reject the Tenth Circuit's conclusion that a service is provided "regardless of whether [establishments] provide or accept compensation as part of that process." *Octapharma Plasma, Inc.*, 828 F.3d at 1233–34. We do not hold that payment from a customer to the establishment is necessary to be considered a "ser-

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[15] In passing, Silguero and Wolfe also contend that CSL Plasma "offers discrete medical services even apart from evaluation and medical extraction," including "advice about how to improve hematocrit and protein levels" and "donors' blood pressure." These supposed services do not change the outcome in this case. First, Silguero and Wolfe have not contended that they sought but were denied these supposed services. Indeed, nothing in their complaints suggests that they want to avail themselves of these supposed services rather than donate. Second, these were not services but were instead incidental to the donation process. They are no more "services" than is a background check for a job application.

vice establishment" or that a "service" is never performed when an establishment compensates an individual. We conclude merely that payment—to or by the establishment—is highly relevant in determining whether an establishment provides a "service" to a customer and is therefore a "service establishment."[16]

Here, CSL Plasma pays donors who receive no detectable benefit from the act of donation. Its entire business model is structured this way. It thus does not offer plasma collection as a "service" to the public and is therefore not a "service establishment." We affirm the district court's order granting summary judgment to CSL Plasma on Silguero's and Wolfe's ADA claims.

B. THRC Claim

Silguero and Wolfe have also sued under § 121.003(a) of the THRC, which provides similar protection for disabled individuals under state law. The district court concluded that CSL Plasma was not a "public facility" under the THRC and therefore was not subject to liability. We examine whether Texas has already addressed this question and, if not, whether we can and should certify the question to the state's highest civil court.

The THRC differs significantly from the ADA. It was enacted before the ADA. It is not split into various titles that cover distinctly different activities. It uses different terms to define its scope. Instead of apply ing to "public accommodations," it applies to "public facilit[ies]." *See* TEX. HUM. RES. CODE. § 121.003(a).

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[16] This conclusion is consistent with *PGA Tour, Inc.*, where the Supreme Court determined that a golfer entering a tournament open to the public was protected by Title III partly because the golfer paid $3,000 to enter the tournament. *See* 532 U.S. at 679.

The term "public facility" is defined in an entirely different manner than "public accommodation" under the ADA. *See* TEX. HUM. RES. CODE § 121.002(5). Recognizing these differences, the Supreme Court of Texas has said it will not look to federal courts' interpretations of "public accommodation" to interpret the term "public facility." *See Beeman v. Livingston*, 468 S.W.3d 534, 542–43 (Tex. 2015). We cannot simply assume that, because CSL Plasma is not a "public accommodation" under the ADA, it is not a "public facility" under the THRC.

But answering the question of whether a plasma collection center is a "public facility" is difficult. Texas courts have not interpreted the term "public facility" often. The Supreme Court of Texas only appears to have done so once and in a far different context from this case. *See id.* No Texas appellate court, to our knowledge, has addressed the application of the THRC to plasma collection centers. Thus, we examine whether we can and should certify the question to the Supreme Court of Texas.

The Texas Constitution grants the Supreme Court of Texas the power to answer questions of state law certified by a federal appellate court. TEX. CONST. art. V, § 3-c(a). Texas rules provide that we may certify "determinative questions of Texas law having no controlling Supreme Court [of Texas] Precedent" to the Supreme Court of Texas. TEX. R. APP. P. 58.1. Our case law provides factors to use in deciding whether to certify a question:

> (1) the closeness of the question and the existence of sufficient sources of state law; (2) the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; and (3) practical

> limitations of the certification process: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court.

Swindol v. Aurora Flight Scis. Corp., 805 F.3d 516, 522 (5th Cir. 2015) (internal quotation marks omitted) (quoting *Williamson v. Elf Aquitaine, Inc.*, 138 F.3d 546, 549 (5th Cir. 1998)).

Turning to the first factor, we have no state law guidance, and our federal analogue is not analogous. Applying the second factor, the answer to this important question could either impose future liability on many Texas businesses or preclude Texans from relying on an important anti-discrimination statute. In a prior case addressing these two factors, we have acknowledged that cases like this one—"where important state interests are at stake and the state courts have not provided clear guidance on how to proceed," *Louisiana v. Anpac La. Ins. Co.* (*In re Katrina Canal Breaches Litig.*), 613 F.3d 504, 509 (5th Cir. 2010) (quoting *Free v. Abbott Labs.*, 164 F.3d 270, 274 (5th Cir. 1999))—are candidates for certification.

With respect to the final factor, we perceive no hardship in certifying the question. We can formulate discrete issues for consideration, and the Supreme Court of Texas has been prompt in its responses. (Of course, it has the discretion to decline certification if it disagrees with our analysis of these factors.) When asked at oral argument, neither party presented any reasons not to certify the relevant questions to the Supreme Court of Texas. We thus conclude certification is prudent and appropriate in this case.

Accordingly, we certify the following questions to the Supreme Court of Texas:[17]

1. Is a plasma collection center like the one described in Section I of this opinion a "public facility" under Texas Human Resources Code § 121.002(5)?
2. If so, would Texas law allow the plasma collection center to reject a "person with a disability," *see* TEX. HUM. RES. CODE § 121.002(4), based on the center's concerns for the individual's health that stem from the disability? What standard would apply to determining whether the plasma collection center properly rejected the person, rather than committed impermissible discrimination under Texas Human Resources Code § 121.003(a)?

We disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified.

IV. Conclusion

We AFFIRM the district court's grant of summary judgment on Silguero's and Wolfe's claims under the ADA. We CERTIFY to the Supreme Court of Texas the questions identified above.

[SEAL]
A True Copy
Certified Oct 23, 2018
/s/ Lyle W. Cayce
Clerk, U.S. Court of
Appeals, Fifth Circuit

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[17] The stipulated facts are set forth in the facts section above, and the style of the case is at the beginning of this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 9, 2019]

No. 17-41206

MARK SILGUERO,
Plaintiff-Appellant,

AMY WOLFE,
Intervenor-Appellant,

v.

CSL PLASMA, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:16-CV-361

Before KING, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:[*]

Mark Silguero and Amy Wolfe sued CSL Plasma, Inc., a plasma collection center, for disability discrimination under the Americans with Disabilities Act (ADA) and Texas state law. We previously affirmed the district

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.[*]

court's judgment in favor of CSL on the ADA claim, but we submitted two certified questions to the Supreme Court of Texas regarding the state law claims. *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 333 (5th Cir. 2018). Specifically, we asked about whether a plasma collection center is a "public facility" under Texas Human Resources Code § 121.002(5) and what standard applies to determine whether a facility's rejection of a person constitutes impermissible discrimination. *Id.* The Supreme Court of Texas has now answered those questions. *See Silguero v. CSL Plasma, Inc.*, No. 18-1022, 2019 WL 2668888 (Tex. June 28, 2019).

Consistent with the Supreme Court of Texas's analysis of relevant state law, we REVERSE the district court's judgment on the state law claims because it was based upon the incorrect conclusion that a plasma collection center is not a "public facility" under Texas Human Resources Code § 121.002(5). We REMAND to the district court for further proceedings. Before addressing the merits of the case, the district court should reconsider whether it should exercise supplemental jurisdiction over Silguero's and Wolfe's state law claims in light of the revelation that the federal and state laws are different in this context and the affirmance of the judgment in CSL's favor on the federal claims, leaving no current federal law claims. *See* 28 U.S.C. § 1367(c); *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997); *see also, e.g.*, *Enochs v. Lampasas Cty.*, 641 F.3d 155, 158–59 (5th Cir. 2011). We express no opinion at this juncture as to whether such jurisdiction should be exercised. If the district court does exercise supplemental jurisdiction, then it should proceed to the merits of the state law claims in accordance with the Supreme Court of Texas's answers to the certified questions.

In sum, we AFFIRM the district court's judgment as it applies to plaintiffs' ADA claims. We REVERSE and REMAND the judgment as it applies to plaintiffs' claims under the Texas Human Resources Code.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

[Filed November 03, 2017]

Civil No. 2:16-CV-361

MARK SILGUERO, *et al,*

Plaintiff,

v.

CSL PLASMA, INCORPORATED,

Defendant.

MEMORANDUM AND ORDER

This Court now considers motions for summary judgment filed by Defendant CSL Plasma Inc. ("CSL"), Plaintiff Mark Silguero ("Silguero"), and Plaintiff Amy Wolfe ("Wolfe"), Dkt. Nos. 34-36. For the reasons stated below, the Court GRANTS Defendant's Motion for Summary Judgment, Dkt. No. 34, and DENIES AS MOOT Plaintiffs' motions for summary judgment, Dkt. Nos. 35-36.

I. Background

A. Undisputed Facts[1]

CSL operates a network of plasma-donation centers across the United States. Plasma donation involves a

[1] The undisputed facts in this order are taken from the uncontested deposition testimony of Silguero, Wolfe, CSL medical staff associates Michelle Mailey ("Mailey"), Juliana Sanchez ("Sanchez"), and Melanie Garcia ("Garcia"), and CSL Divisional Medical Director Dr. John Nelson ("Nelson").

procedure called plasmapheresis, whereby a donor's blood is removed, their blood plasma is separated from their red blood cells, and the red blood cells are then returned to the donor's bloodstream. CSL compensates donors for their plasma, which it then sells to pharmaceutical companies.[2] Nelson Dep. 25:5-19, Dkt. No. 34 APP 37. The plasma-extraction process is regulated by the Secretary of Health and Human Services and by the Food and Drug Administration ("FDA"). *See* 42 U.S.C. § 262(a); 21 C.F.R. §§ 630.1-630.35. Specifically, the FDA sets standards for donor eligibility, licenses plasma-donation centers, and audits those centers to ensure compliance with FDA regulations. *See* 21 C.F.R. § 630.1-630.35.

To comply with FDA regulations, CSL individually screens potential donors to determine whether they are eligible to donate plasma. Mailey Dep. 17:19-19:5, Dkt. No. 34 APP 20. At CSL, potential donors answer health-related questions in the reception area and their vital signs are tested. Nelson Dep. 30:16-23. Then, additional individualized screening is performed by a Medical Staff Associate ("MSA"), who observes the potential donor and may ask about a variety of factors that could affect their eligibility to donate, such as their medical history, current medications, and recent tattoos. *Id.* at 30:24-31:3; Mailey Dep. at 18:13-19:9. MSAs often consult CSL's medical guidelines on eligibility (which provide, for example, that a person is ineligible to donate if they suffer from anxiety requiring the use of a service dog) and may also contact CSL

[2] Because individuals are compensated for supplying their plasma, it is inaccurate to refer to them as "donors" or to the process as "donation." However, the Court recognizes the common use of these terms, and adopts them for simplicity.

physicians by phone to discuss particular cases. Garcia Dep. 13:21-14:8; *see* Dkt. No. 34 APP 110.

Silguero is a longtime plasma donor who also suffers from bad knees. Silguero Dep. 11:16-21, Dkt. No. 34 at APP 81; *id.* at 13:5-14:17. The parties agree that Silguero qualifies as a person with a disability under the Americans with Disabilities Act (ADA) and the Texas Human Resources Code (THRC). *See* Dkt. No. 35 at 4; Dkt. No. 37 at 9.

Between January and April of 2014, Silguero donated plasma at CSL multiple times. *Id.* at 22:12-19. Then, after several months without visiting CSL, Silguero attempted to donate on January 2, 2015. *Id.* at 36:22-37:7. At that time, the condition of Silguero's knees had been deteriorating and they "were in bad shape. Needed to be replaced." *Id.* at 19:4-7. When Silguero visited CSL on January 2, 2015, he completed the donor screening process and met with MSA Mailey. *Id.* at 36:22-24, 38:1-39:7; Mailey Dep. 76:10-77:1. Mailey questioned Silguero regarding his unsteady gait and use of a cane, and informed him that he could not donate that day because it appeared that he could not safely transfer to and from the donation bed. Silguero Dep. at 39:5-19, 41:2-5; Mailey Dep. 77:3-6, 80:3-5. Silguero became upset, shook his finger at Mailey, and told her that she was "going to be sorry." Silguero Dep. 39:22-40:1. Mailey then called the assistant center manager, Dennis Thomas, who spoke with Silguero. Mailey Dep. 78:16-79:4. CSL subsequently banned Silguero from donating at CSL. *See* Dkt. No. 34 APP 99.

Wolfe has suffered from anxiety for several years, and adopted her service dog, Harley, in May 2015. Wolfe Dep. 20:3-23, 13:13-14:3, Dkt. No. 34 APP 89, 91. The parties agree that Wolfe qualifies as a person

with a disability under the ADA and the THRC. *See* Dkt. No. 36 at 4-12; Dkt. No. 38 at 10.

On October 9, 2016, Wolfe went to CSL to donate plasma for the first time. Wolfe Dep. 29:9-12, 26:20-24. Because the CSL receptionist noticed that Wolfe had a service dog, Wolfe skipped the standard intake process and immediately met with MSA Sanchez to determine whether Wolfe could donate. *Id.* at 31:7-32:8, 37:1638:15. Although Sanchez observed that Wolfe appeared calm, she sent Wolfe home until CSL could determine whether her service dog precluded her from donating. *Id.* at 33:13-34:11. Sanchez then discussed the case with Dr. Nelson. Sanchez Dep. 34:23-35:22, Dkt. No. 34 APP 68; *see* Dkt. No. 34 APP 122. Nelson informed Sanchez that Wolfe could not donate for as long as she required a service animal to treat her anxiety, and Sanchez relayed the decision to Wolfe by phone. Dkt. No. 34 APP 122; Wolfe Dep. 35:14-25. Nelson's decision aligned with CSL guidelines that a person is ineligible to donate if they suffer from anxiety requiring the use of a service dog. *See* Dkt. No. 34 APP 110.

B. Procedural History

On August 24, 2016 Silguero filed his complaint against CSL, alleging disability discrimination. Dkt. No. 1. He seeks injunctive relief under Title III of the Americans with Disabilities Act and both injunctive relief and damages under Texas Human Resources Code Chapter 121. *Id.* CSL filed its answer on September 27, 2016. Dkt. No. 8. On March 3, 2017, Wolfe moved to intervene as a plaintiff, arguing that her disability discrimination claims against CSL presented common questions of law and fact. Dkt. No. 17; *see* FED. R. CIV. P. 24(b)(1)(B). The Court granted Wolfe's motion on March 28, 2017. Dkt. No. 21.

On August 14, 2017, CSL, Silguero, and Wolfe each filed a motion for summary judgment. Dkt. Nos. 34-36. On September 1, 2017, CSL filed its responses to Plaintiffs' motions, Dkt. Nos. 37-38. Plaintiffs filed their joint response to CSL's motion on September 5, 2017. Dkt. No. 39. On September 15 and September 19, 2017, Plaintiffs and CSL, respectively, filed their replies. Dkt. Nos. 41-42. The parties' deadline to file pretrial motions and the Joint Pretrial Order is November 2, 2017, Dkt. No. 44, and the Final Pretrial Conference is set for November 16, 2017 at 2:00 p.m., Dkt. No. 40.

This Court now considers the parties' motions for summary judgment.

II. Legal Standard

"[A] court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant." *Piazza's Seafood World, L.L.C. v. Odom*, 448 F.3d 744, 752 (5th Cir. 2006) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial and mandates the entry of summary judgment for the moving party." *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333, 337 (5th Cir. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)) (internal quotation marks omitted).

The Court must view all evidence in the light most favorable to the non-moving party. *Piazza's Seafood*

World, 448 F.3d at 752. Factual controversies must be resolved in favor of the non-movant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "When assessing whether a dispute to any material fact exists, [courts] consider all of the evidence in the record but refrain from making credibility determinations or weighing the evidence." *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398–99 (5th Cir. 2008).

"Once the moving party has initially shown `that there is an absence of evidence to support the non-moving party's cause,' the non-movant must come forward with 'specific facts' showing a genuine factual issue for trial." *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002) (quoting *Celotex*, 477 U.S. at 325). The non-movant may not merely rely on conclusory allegations or the pleadings. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). The non-movant's burden is not satisfied by "conclusory allegations," "unsubstantiated assertions," or "by only a scintilla of evidence." *Little*, 37 F.3d at 1075 (internal quotations and citations omitted). Courts are not required to search the record on the non-movant's behalf for evidence that may raise a fact issue. *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988).

III. Analysis

A. Applicability of the Americans with Disabilities Act

The ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accom-

modations of any place of public accommodation." 42 U.S.C. § 12182(a). The Act defines eligible "public accommodations" according to twelve enumerated categories. 42 U.S.C. § 12181(7). These categories "should 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) (citations omitted). In this case, the first issue to be resolved by this Court is whether CSL is a service establishment. Section 12181(7)(F) defines a "service establishment" as

> 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). At issue is whether a plasma-donation center qualifies as an "other service establishment."

Plaintiffs argue that a plasma-donation center falls within the plain meaning of "service establishment" because "[t]he extraction of plasma itself is a service." Dkt. 35 at 16. In support of its argument, Plaintiffs cite *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016), in which the Tenth Circuit held that "a [plasma-donation center] is a 'service establishment' for two exceedingly simple reasons: It's an establishment. And it provides a service." *Id.* at 1229. Plaintiffs argue that CSL provides a service by extracting a donor's plasma, and that the plasma itself "is in effect the payment [by the donor] for that service." Dkt. 41 at 6. Even if the direction of payment is relevant, Plaintiffs argue that plasma-donation centers

qualify as service establishments because the donors pay for the service of plasma extraction with their own blood plasma.

CSL argues that a plasma-donation center does not qualify as a service establishment because it is "fundamentally different" from the listed examples in § 12181(7)(F). Dkt. No. 34 at 16. It claims that the Tenth Circuit in *Levorsen* "erroneously stretch[ed] the language of the ADA beyond what is reasonable" and that the dissent in that case correctly "recognized that plasma centers do not receive a fee from the public in exchange for services, unlike every other example in subsection (7)(F)." *Id.* at 21. Because donors do not pay plasma-donation centers, it argues, the centers do not have the necessary trait in common with the other examples listed in § 12181(7)(F). CSL alternatively argues that, at most, plasma-donation centers are "mixed-use facilities," so that the ADA applies to a center's public lobby, but not to its donation area. *Id.* at 23.

Although the ADA provides protections for persons with disabilities in a wide range of places, those protections are restricted to the categories specifically enumerated in § 12181(7). The Court must therefore determine the plain meaning of "other service establishment" as used in the ADA. *See Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005) ("The appropriate starting point when interpreting any statute is its plain meaning.") (citations omitted). If the meaning is unambiguous, a court "must apply the statute according to its terms." *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013) (quoting *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009)).

Two canons of statutory construction are particularly useful here: *ejusdem generis* and *noscitur a sociis*.

See also Magee v. Coca-Cola Refreshments USA, Inc., 833 F.3d 530, 534 (5th Cir. 2016) (applying those canons to determine whether a vending machine qualifies as a "sales establishment" under the ADA). Under the canon of *ejusdem generis*, "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." *Ejusdem generis*, BLACK'S LAW DICTIONARY (10th ed. 2014).[3] Under *noscitur a sociis*, "a word is known by the company it keeps." *Ali v. Federal Bueau of Prisons*, 552 U.S. 214, 226 (2008) (quoting *S.D. Warren Co. v. Me. Bd. Of Envtl. Prot.*, 547 U.S. 370, 378 (2006)); *see United States v. Williams*, 553 U.S. 285, 294 (2008) (stating that *noscitur a sociis* "counsels that a word is given more precise content by the neighboring words with which it is associated").

Here, the examples of service establishments listed in § 12181(7)(F) give precise meaning to the term "other service establishment" because the examples share a common trait: the provision of goods or services by the establishment in exchange for compensation. The public is invited to each service establishment—whether a laundromat, gas station, or hospital—in order to pay for services provided by the establishment. The catchall term "other service establishment" incorporates same trait—providing a service to the public in exchange for compensation.

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[3] The example given in Black's Law Dictionary is illustrative: "[I]n the phrase *horses, cattle, sheep, pigs, goats, or any other farm animals*, the general language *or any other farm animals*—despite its seeming breadth—would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens." *Id.*

Plasma-donation centers operate in reverse to the examples listed in § 12181(7)(F). At a plasma-donation center, a donor provides the good (blood plasma) and the center offers compensation. This Court disagrees with the Tenth Circuit that this is a "superficial distinction." *Levorsen*, 828 F.3d at 1229. According to the plain text of the ADA, that plasma-donation centers pay donors for their plasma—rather than offer a service in exchange for compensation—bars them from qualifying as service establishments under § 12181(7)(F). Therefore, CSL is not a "service establishment, the ADA's anti-discrimination provisions are inapplicable in this case, and CSL is entitled to judgment as a matter of law.

B. Applicability of the Texas Human Resources Code

Because this Court grants summary judgment for CSL on Plaintiffs' ADA claims, the Court must decide whether to keep jurisdiction over Plaintiffs' remaining Texas law claims. Under 28 U.S.C. § 1367(c), a court may decline to exercise jurisdiction over a state-law claim in certain circumstances, including when "the claim raises a novel or complex issue of state law" or when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(1), (3). Although the federal claims giving rise to this Court's subject-matter jurisdiction are dismissed, the Court elects to retain supplemental jurisdiction over Plaintiffs' remaining state-law claims. *See Baker v. Farmers Elec. Co-op., Inc.*, 34 F.3d 274, 283 (5th Cir. 1994) ("[Supplemental jurisdiction] may continue even after the federal claims upon which jurisdiction is based have been dismissed or rendered moot.) (citing *Hefner v. Alexander*, 779 F.2d 277, 281 (5th Cir. 1985)).

THRC § 121.003 provides that "[p]ersons with disabilities have the same right as persons without disabilities to the full use and enjoyment of any public facility in the state." Tex. Hum. Res. Code § 121.003(a). The Code defines a "public facility," in part, as a "retail business, commercial establishment, or office building to which the general public is invited . . . and any other place of public accommodation, amusement, convenience, or resort to which the general public or any classification of persons from the general public is regularly, normally, or customarily invited." Tex. Hum. Res. Code § 121.002(5).

Plaintiffs argue that a plasma-donation center qualifies as a retail business and commercial establishment to which the general public is invited and, alternatively, under the catchall "other place of public accommodation" to which the general public is regularly invited because the Texas Code's language is broader than that of the ADA. *See* Dkt. No. 35 at 21-22. To support their argument, they point to the dictionary definition of "accommodation" as "something supplied for convenience or to satisfy a need." *Accommodation*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1990); *see* Silguero's Brief, Dkt. No. 35 at 31.

CSL argues that the Texas Code does not apply because plasma-donation centers do not invite the general public to donate; only some potential donors actually qualify for donation. Dkt. No. 34 at 30. CSL argues that plasma-donation centers are therefore similar to prison facilities, which impose strict eligibility requirements, and which the Texas Supreme Court has held were not public facilities. *Id.* at 29-30; *see Beeman v. Livingston*, 468 S.W.3d 534 (Tex. 2015).

In interpreting a Texas statute, a court "rel[ies] on the plain meaning of the text unless a different mean-

ing is supplied by statutory definition, is apparent from the context, or the plain meaning would lead to an absurd or nonsensical result." *Beeman v. Livingston*, 468 S.W.3d 534, 538 (2015) (citing *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010)).

The Texas Supreme Court has clarified that "the Legislature used the term 'public' to indicate a status of openness and accessibility, and not a public use." *Beeman v. Livingston*, 468 S.W.3d 534, 540. This understanding is confirmed by § 121.002(5)'s frequent statements that public facilities are places "to which the general public is invited." *See* Tex. Hum. Res. Code § 121.002(5).

The Court concludes that plasma-donation centers are not public facilities under Texas Human Resources Code § 121.002(5). First, plasma-donation centers are not places of public accommodation. An "accommodation" is "something supplied for convenience or to satisfy a need." *Accommodation*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1990); *see also Accommodation*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A convenience supplied by someone; esp., lodging and food."). As this Court notes above, a plasma-donation center does not supply any good or service for convenience or need. Rather, the donor sells blood plasma to the center. Because the roles of seller and buyer are reversed in the plasma-donation context, plasma-donation centers such as CSL do not qualify as places of public accommodation under Texas Human Resources Code § 121.002(5).

Second, plasma-donation centers are not retail businesses or commercial establishments to which the general public is invited. Although a plasma-donation center is arguably a commercial establishment be-

cause it buys blood plasma from those who meet FDA regulations for eligibility, it does not invite the general public to donate. At most, it invites the general public to find out whether they meet the criteria for donating. This does not represent the level of openness and accessibility reflected in § 121.002(5). Chapter 121.002(5)'s emphasis on places "to which the general public is invited" refers to whether the general public are generally invited to obtain the goods or services provided by a business, public accommodation, or other public facility. CSL and other plasma-donation centers do not provide a service for the general public to purchase—they simply offer to buy plasma from the eligible few. *See* Nelson Dep. 30:4-31:3, Dkt. No. 34 APP 39. Therefore, CSL does not qualify as a "public facility" under § 121.002(5), and the Court grants CSL's motion for summary judgment.

IV. Conclusion

For the above reasons, this Court:

- GRANTS Defendant CSL Plasma Inc.'s Motion for Summary Judgment, Dkt. No. 34;
- STRIKES AS MOOT Plaintiffs' motions for summary judgment, Dkt. Nos. 35-36;
- STRIKES AS MOOT Plaintiffs' Motion to Preclude Unreliable and Irrelevant Opinions of Defendant's Expert John Nelson, Dkt. No. 46; and
- VACATES all remaining Court settings in this case.

Judgment in this case will be entered separately in accordance with Federal Rule of Civil Procedure 58.

The Court ORDERS the Clerk of Court to close this case after entering the judgment.

SIGNED this 2nd day of November, 2017.

/s/ Hilda Tagle
Hilda Tagle
Senior United States District Judge

APPENDIX D

IN THE SUPREME COURT OF TEXAS

No. 18-1022

MARK SILGUERO AND AMY WOLFE,

Appellants,

v.

CSL PLASMA, INCORPORATED,

Appellee.

On Certified Questions from the
United States Court of Appeals
for The Fifth Circuit

Argued March 13, 2019

JUSTICE GREEN delivered the opinion of the Court.

In this opinion we consider two questions certified to this Court by the Fifth Circuit Court of Appeals: (1) Is a plasma collection center a "public facility" under Texas Human Resources Code (THRC) section 121.002(5), and if so, (2) what standard applies for determining whether a public facility's rejection of a person with a disability constitutes impermissible discrimination under the THRC? We hold that a plasma collection center is a "public facility" under section 121.002(5). We further hold that a plasma collection center may reject a person with a disability—eliminating their opportunity to donate plasma and receive compensa-

tion—without committing impermissible discrimination under section 121.003(a) when: (1) the plasma center's rejection does not meet the THRC's definition of "discrimination" or satisfies an exception to the definition of "discrimination," such as the application of eligibility criteria that screen out persons with disabilities, but are shown to be necessary for the provision of services; or (2) the defendant establishes that allowing the person with a disability full use and enjoyment of the public facility would pose a direct threat to the health or safety of others. *See* 42 U.S.C. § 12182(b)(2)(A)(i), (b)(3).

I. Background

CSL Plasma, Inc. operates plasma collection centers across the United States. At these centers, CSL extracts the donor's blood, separates the donor's plasma from the red blood cells, and then returns the red blood cells to the donor's bloodstream.[1] After this extraction process, CSL compensates the donor,[2] processes the plasma to create a marketable plasma byproduct, and ultimately sells this byproduct to pharmaceutical

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[1] Both the district court and the Fifth Circuit Court of Appeals are cautious about using the words "donate" or "donor" in this context because the individuals (or donors) receive compensation for supplying their plasma and are therefore not making a donation in the ordinary sense of the term. *See* 907 F.3d 323, 325 n.1 (5th Cir. 2018). This opinion uses the term "donor" and similar words, as the Fifth Circuit did, to follow the terminology in the plasma industry, and it refers to the facilities at issue as "plasma collection centers," as the Fifth Circuit did.

[2] Amicus curiae Plasma Protein Therapeutics Association, whose members operate more than 750 plasma collection centers, makes a point to say that plasma collection centers do not pay donors for their plasma; rather, the "compensation is for their time and inconvenience, not a quid pro quo for their plasma."

companies. The federal Food and Drug Administration (FDA) regulates this plasma extraction process. The FDA licenses and audits plasma collection centers. Under the FDA's regulations, CSL must screen all potential donors to determine whether each individual is eligible to donate. *See* 21 C.F.R. § 630.10. During the screening, potential donors answer health-related questions, and CSL's medical staff, referring to CSL's medical guidelines, determine their eligibility by checking their vital signs and considering their medical history, current medications, and whether they have recent tattoos. For example, CSL's medical guidelines on eligibility provide that if a potential donor suffers from anxiety requiring the use of a service dog, he or she is ineligible to donate. CSL's medical staff is permitted to contact CSL physicians to discuss particular potential donors. Individuals who fail the screening are deferred, meaning they are not permitted to donate and receive no compensation. Mark Silguero and Amy Wolfe were potential donors at CSL.

Silguero suffers from bad knees and uses a cane. CSL and Silguero agree that Silguero qualifies as a person with disabilities under the Americans with Disabilities Act (ADA) and the THRC. Silguero had previously donated plasma at CSL between January and April 2014. Silguero attempted to donate again on January 2, 2015. At that time, the condition of Silguero's knees had worsened to the point of needing knee replacements. Silguero went through CSL's donor-screening process, and CSL informed him that he would be deferred and unable to donate that day. Silguero claims he was deferred because of his "unsteady gait" and because CSL believed that he could not transfer safely to and from the donation bed. Silguero became upset, shook his finger at the medical staff,

and told them they would be sorry. As a result, CSL deferred Silguero permanently, banning him from donating at CSL.

Wolfe suffers from an anxiety disorder and utilizes a service dog to improve her symptoms. Having never donated at CSL before, Wolfe went to CSL to donate plasma on October 9, 2016. Both CSL and Wolfe agree that Wolfe qualifies as a person with a disability under the ADA and the THRC. CSL did not allow Wolfe to donate because she required a service animal to treat her anxiety. In deferring her, CSL relied on its guidelines that a person is ineligible to donate if they suffer from anxiety requiring the use of a service dog.

Silguero filed suit against CSL in federal court on August 24, 2016, alleging unlawful discrimination on the basis of his disability. He sought injunctive relief under Title III of the ADA and both injunctive relief and damages under chapter 121 of the THRC. The district court allowed Wolfe to intervene as a plaintiff on March 28, 2017, because her claims against CSL for disability discrimination presented common questions of fact and law. On August 14, 2017, each side moved for summary judgment. CSL argued that it was neither a place of "public accommodation" under the ADA, because it did not qualify as a "service establishment," nor a "public facility" under the THRC. It further asserted that Silguero and Wolfe (collectively, the "plaintiffs") could not establish a genuine issue of material fact as to whether CSL fell under the ADA or THRC. The plaintiffs argued that a plasma collection center falls within the plain meaning of "service establishment" under the ADA because it is simply an establishment that provides a service. The plaintiffs cited a Tenth Circuit Court of Appeals case in support of this argument. *See Levorsen v. Octapharma Plasma,*

Inc., 828 F.3d 1227, 1234 (10th Cir. 2016) (holding that a plasma collection center was a "service establishment" under the ADA). Under the THRC, the plaintiffs argued that a plasma collection center qualifies as a retail business and commercial establishment to which the general public is invited or, alternatively, as an "other place of public accommodation."

The district court granted summary judgment in favor of CSL. No. 2:16-CV-361, 2017 WL 6761818, at *1 (S.D. Tex. Nov. 3, 2017) (slip copy). The district court first concluded that a plasma collection center is not a place of "public accommodation" under section 12181(7) of the ADA. *Id.* at *4. The court reasoned that plasma collection centers are not "other service establishment[s]" under section 12181(7)(F) because they pay donors for their plasma rather than offering a service in exchange for compensation. *Id.*

Having decided that the ADA does not apply, the district court elected to maintain supplemental jurisdiction over the plaintiffs' state law claims. *See id.* at *5 (citing *Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 283 (5th Cir. 1994)). Explaining that the THRC provides for persons with disabilities to have full use and enjoyment of a public facility in Texas, the court analyzed whether a plasma collection center falls within the meaning of "public facility" under the THRC. *Id.*; *see also* TEX. HUM. RES. CODE § 121.003(a). The court looked to the plain meaning of "public facility" under the THRC, concluding that a plasma collection center does not qualify as a public facility because it is not a place of public accommodation under section 121.002(5). 2017 WL 6761818, at *5. Specifically, the court reasoned:

> [A] plasma-donation center does not supply any good or service for convenience or need. Rather,

> the donor sells blood plasma to the center. Because the roles of seller and buyer are reversed in the plasma-donation context, plasma-donation centers such as CSL do not qualify as places of public accommodation under Texas Human Resources Code § 121.002(5).

Id. The district court also reasoned that the public is not generally invited to a plasma collection center. *Id.* at *6. It noted that although a plasma collection center is arguably a commercial business, it only purchases plasma from those who pass the screening, and it does not invite the general public, in its entirety, to donate; "[a]t most, it invites the general public to find out whether they meet the criteria for donating." *Id.* Therefore, the district court determined that a plasma collection center does not represent the open and accessible nature of the establishments listed in section 121.002(5) and could not be considered a public facility under the THRC. *Id.*

The Fifth Circuit affirmed the district court's holding that a plasma collection center is not an "other service establishment" under the ADA. 907 F.3d 323, 332 (5th Cir. 2018). After concluding that the ADA does not apply to a plasma collection center, the Fifth Circuit certified questions to this Court as to whether the THRC governs plasma collection centers such as CSL's. *Id.* at 333. Those questions are:

1. Is a plasma collection center [like those operated by CSL] a "public facility" under Texas Human Resources Code § 121.002(5)?
2. If so, would Texas law allow the plasma collection center to reject a "person with a disability," *see* TEX. HUM. RES. CODE § 121.002(4), based on the center's con-

> cerns for the individual's health that stem from the disability? What standard would apply to determining whether the plasma collection center properly rejected the person, rather than committed impermissible discrimination under Texas Human Resources Code § 121.003(a)?

Id. We accepted the certified questions. 62 Tex. Sup. Ct. J. 90 (Oct. 26, 2018).

II. Texas Human Resources Code Chapter 121

Chapter 121 of the THRC, which was enacted before and differs substantially from its federal counterpart in the ADA, embodies the purpose of "encourag[ing] and enabl[ing] persons with disabilities to participate fully in the social and economic life of the state, to achieve maximum personal independence, . . . and use all public facilities available within the state." TEX. HUM. RES. CODE § 121.001; *see also* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. ch. 126); Act of May 20, 1969, 61st Leg., R.S., ch. 416, 1969 Tex. Gen. Laws 1374 (codified at TEX. HUM. RES. CODE ch. 121). The Legislature has instructed that the provisions of THRC chapter 121 are to be "construed in a manner compatible with other state laws relating to persons with disabilities." TEX. HUM. RES. CODE § 121.009. Additionally, the statute "shall be liberally construed to achieve [its] purpose and to promote justice." TEX. GOV'T CODE § 312.006(a).

The THRC provides that "[p]ersons with disabilities have the same right as persons without disabilities to the full use and enjoyment of any *public facility* in the state." TEX. HUM. RES. CODE § 121.003(a) (emphasis added). Specifically:

> (c) No person with a disability may be denied admittance to any *public facility* in the state because of the person's disability. No person with a disability may be denied the use of a white cane, assistance animal, wheelchair, crutches, or other device of assistance.
>
> (d) The discrimination prohibited by this section includes a refusal to allow a person with a disability to use or be admitted to any *public facility*, a ruse or subterfuge calculated to prevent or discourage a person with a disability from using or being admitted to a *public facility*, and a failure to:
>
> > (1) comply with Chapter 469, Government Code;
> >
> > (2) make reasonable accommodations in policies, practices, and procedures; or
> >
> > (3) provide auxiliary aids and services necessary to allow the full use and enjoyment of the *public facility*.

Id. § 121.003(c), (d)(1)–(3) (emphasis added). The THRC defines "public facility" as including:

> a street, highway, sidewalk, walkway, common carrier, airplane, motor vehicle, railroad train, motor bus, streetcar, boat, or any other public conveyance or mode of transportation; a hotel, motel, or other place of lodging; a public building maintained by any unit or subdivision of government; a retail business, commercial establishment, or office building to which the general public is invited; a college dormitory or other educational facility; a restaurant or other place where food is

> offered for sale to the public; and any other place of public accommodation, amusement, convenience, or resort to which the general public or any classification of persons from the general public is regularly, normally, or customarily invited.

Id. § 121.002(5). A "person with a disability" is a person who has "a mental or physical disability," "an intellectual or developmental disability," "a hearing impairment," "deafness," "a speech impairment," "a visual impairment," "post-traumatic stress disorder," or "any health impairment that requires special ambulatory devices or services." *Id.* § 121.002(4)(A)–(H).

The THRC expressly requires that persons with disabilities have the same use and enjoyment of "public facilities" as non-disabled persons—more specifically, a public facility cannot deny admittance to a person with a disability because of his or her disability, deny a person with a disability use of a device of assistance, such as an assistance animal, and must make reasonable accommodations in policies, practices, and procedures, providing support and services to allow the person with a disability full use and enjoyment of the facility. *Id.* § 121.003(a), (c), (d)(1)–(3).

In answering certified questions, we are limited to answering only the questions before us. *See, e.g.*, *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 798 (Tex. 1992) ("[A] certified question is a limited procedural device that constrains us to answer only the question certified 'and nothing more.'" (citation omitted)). Both certified questions present issues of statutory interpretation of THRC chapter 121.[3] We

[3] To answer only the questions certified to us, we must not consider the facts relating to the plaintiffs or to CSL, and we instead

review issues of statutory construction de novo. *E.g.*, *Harris Cty. Appraisal Dist. v. Tex. Workforce Comm'n*, 519 S.W.3d 113, 118 (Tex. 2017) (citations omitted); *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011) (citation omitted). In construing statutes, our primary objective is to give effect to the Legislature's intent. *E.g.*, *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (per curiam) (citation omitted); *Molinet*, 356 S.W.3d at 411 (citation omitted). "It is the Legislature's prerogative to enact statutes; it is the judiciary's responsibility to interpret those statutes according to the language the Legislature used, absent a context indicating a different meaning or the result of the plain meaning of the language yielding absurd or nonsensical results." *Molinet*, 356 S.W.3d at 414–15 (citing TEX. GOV'T CODE § 311.011(a), which explains that words and phrases shall be read in context and construed according to rules of grammar and common usage).

In interpreting statutes, we must look to the plain language, construing the text in light of the statute as a whole. *See id.* at 411 (citation omitted); *see also Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 572 (Tex. 2016) (citation omitted). A statute's plain language is the most reliable guide to the Legislature's intent. *See Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) (quoting *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012)). The statutory terms bear their common, ordinary meaning, unless the text provides a different meaning or the common meaning leads to an absurd result. *See Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830,

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must decide, as a general matter, whether a plasma collection center qualifies as a public facility, recognizing that the structure of plasma collection centers and their policies can vary.

838 (Tex. 2018) (citation omitted). This Court may not impose its own judicial meaning on a statute by adding words not contained in the statute's language. *See Lippincott*, 462 S.W.3d at 508. If the statute's plain language is unambiguous, we interpret its plain meaning, presuming that the Legislature intended for each of the statute's words to have a purpose and that the Legislature purposefully omitted words it did not include. *See id.* at 509 (citation omitted); *Janvey*, 487 S.W.3d at 572 (reviewing a certified question and explaining that the Court's "primary objective in construing a statute is to ascertain and effectuate the Legislature's intent without unduly restricting or expanding the statute's scope" (citation omitted)). The statutory words must be determined considering the context in which they are used, not in isolation. *See Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 59 (Tex. 2015) (citations omitted).

III. "Public Facility" Under the Texas Human Resources Code

We begin by considering the first certified question: Is a plasma collection center a "public facility" under THRC section 121.002(5)? The plaintiffs argue that a plasma collection center, such as those operated by CSL, qualifies as a "public facility" under the THRC. Specifically, the plaintiffs argue that a plasma collection center invites the general public to engage in the commercial transaction of giving plasma in exchange for payment. The fact that some individuals are determined to be ineligible to donate is of no consequence, according to the plaintiffs, because the plasma collection center is inviting the general public to donate, public facilities often have certain screening rules, and the THRC applies to facilities that invite "any classification of persons from the general public."

On the other hand, CSL argues that the Legislature did not intend to apply the THRC to a plasma collection center, such as CSL's, and that a plasma collection center differs from an establishment with an open invitation for the public to visit the premises and receive a product or service in exchange for payment. Although the ADA and THRC differ, CSL argues that the district court's and the Fifth Circuit's reasoning in determining that a plasma collection center is not a place of public accommodation should likewise lead to the conclusion that a plasma collection center is not a "public facility" under the THRC.

The Legislature's definition of "public facility" is broad. *See* TEX. HUM. RES. CODE § 121.002(5). The THRC provides an extensive definition of "public facility" with seven enumerated lists, each followed by a catch-all phrase.[4] *See id.* But that definition of "public facility" includes the word "public" seven times and defines "facility" in terms of the lists of examples of what "'public facility' includes." *See id.* We often look to dictionary definitions to shed light on the ordinary meaning of a statutory term. *See Beeman v. Livingston*, 468 S.W.3d 534, 539 (Tex. 2015). "Public" means "accessible to or shared by all members of the community," "a place accessible or visible to all members of the community." *See Public*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). "Facility" is defined as "something that is built, constructed, installed, or established to perform some particular

[4] The enumerated lists in the THRC, however, are not nearly as specific and comprehensive as the list in the ADA, which specifies types of businesses. *Compare* 42 U.S.C. § 12181(7)(A)–(L), *with* TEX. HUM. RES. CODE § 121.002(5). The THRC contains broader, more general terms for modes of transportation, businesses, and establishments. *See* TEX. HUM. RES. CODE § 121.002(5).

function or to serve or facilitate some particular end." *See Facility*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). In defining "public facility" in the THRC, the Legislature has narrowed the plain language to broad categories. *See generally* TEX. HUM. RES. CODE § 121.002(5).

Two of the THRC's categories are potentially applicable to a plasma collection center: "a retail business, commercial establishment, or office building to which the general public is invited"; and "any other place of public accommodation, amusement, convenience, or resort to which the general public or any classification of persons from the general public is regularly, normally, or customarily invited." *Id.* We first analyze whether a plasma collection center falls under the THRC's definition of "public facility" as a "retail business, commercial establishment, or office building to which the general public is invited." *Id.* More specifically, the question is whether a plasma collection center is a "commercial establishment . . . to which the general public is invited." *Id.*

"Commercial" is not defined in the THRC, but it is generally defined as being related to or dealing with commerce. *See Commercial*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002); *Commerce*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) ("[T]he exchange or buying and selling of commodities especially on a large scale and involving transportation from place to place."). And "establishment" is defined as "a public or private institution." *See Establishment*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). Plasma collection centers are for-profit businesses that extract plasma, compensate donors, and package and ship plasma for it to be processed and sold. Under the plain language of the

statute, a plasma collection center, of the type operated by CSL, is a commercial establishment, as plasma collection centers are profit-oriented, private institutions that deal in the commerce of extracting and selling plasma and plasma byproducts. *See Rodriguez*, 547 S.W.3d at 838 (providing that statutory terms bear their common, ordinary meaning, unless the text provides a different meaning or the common meaning leads to an absurd result).

Although we conclude that a plasma collection center is a "commercial establishment," the crux of the issue as to whether a plasma collection center is a "public facility" under the THRC is whether it is a facility to which the general public is ordinarily invited. There is no question that a plasma collection center invites the general public into its business to engage in the donation-screening process to determine donation eligibility. But CSL argues that because a plasma collection center allows only individuals who pass the screening process to donate and reserves the right to reject certain individuals, the general public is not invited to donate plasma. Therefore, we must determine whether, under the plain meaning of the THRC, a facility is public by virtue of its general invitation for anyone to enter and be screened, or whether such a facility is nevertheless excluded from the definition of "public facility" because its invitation to donate plasma is restricted and limited.

The plain language of the terms "invite," "invitation," and "invited" suggests that allowing any member of the general public to enter a facility and be present for, or participate in, a screening process is "inviting" the member of the public. *See Invite*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) (meaning "to offer an incentive or inducement";

"to provide opportunity or occasion for"; "open the way"; "increase the likelihood of"; "open the door"); *Invitation*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) (meaning "the requesting of a person's company or participation"; "a written or verbal request to be present or participate"; "a written or verbal request to do or undertake"); *Invited*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) (meaning "present or done by invitation"). It follows that the plain language of the THRC's definition of "public facility"—specifically, a "commercial establishment . . . to which the general public is invited"—means that a member of the general public is "invited" by a plasma collection center when it merely opens the door to them, allowing them to be present in the facility and providing them the opportunity to participate in the plasma donation process, beginning with screening. *See* TEX. HUM. RES. CODE § 121.002(5). And as such, a member of the public need not actually be able to engage in a business transaction—that is, plasma extraction and resulting compensation—to be "invited" to the commercial establishment. *See generally id.*

Here, CSL, like other plasma collection centers, extends an invitation to all members of the public to enter its collection facilities and engage in the donor screening process. In fact, a plasma collection center, such as CSL's facilities, desires to admit and screen as many potential donors as possible to increase the number of donors, in turn increasing the supply of plasma that can be processed and ultimately sold for profit.[5]

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[5] In explaining that CSL would not defer a blind individual merely because of his or her disability, counsel for CSL admitted that CSL needs as many members of the public as possible to donate plasma.

That a plasma collection center may not then invite all who accepted the initial invitation—made to the general public—to participate further in the plasma donation process, by allowing them to donate and receive compensation, is of no consequence. At that point, the plasma collection center, a commercial establishment, has already invited the general public into its facility for a commercial opportunity. Thus, the plasma collection center's selectivity in extending donation invitations has no bearing on whether CSL is a "public facility" under the THRC. Under the plain language of the statute, as long as the facility is a commercial establishment to which the general public is invited for some purpose, it is a "public facility" subject to the THRC.[6] *See id.*

In *Beeman v. Livingston*, in which deaf inmates at a state prison filed suit under the THRC, this Court held that the prison was not a "public facility" subject to the THRC. 468 S.W.3d at 543. The inmates claimed that the prison violated the THRC by denying deaf inmates an opportunity to participate in and benefit from certain programs available to inmates without disabilities. *Id.* at 536. They appealed to this Court, asserting that the court of appeals misconstrued the phrase "public building" within the THRC's definition of "public facility." *Id.* at 537. The inmates argued that under the plain meaning of "public building" in section

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[6] We note that there is no indication in our record as to the physical structure of CSL's plasma collection centers, whether Silguero and Wolfe attempted to donate at the same facility or different facilities, or the extent to which CSL's plasma collection centers may differ in structure from one to the next. We limit our answer to the question before us, which asks generally about plasma collection centers of the type described in the certified question.

121.002(5), a building must be used for a public purpose, but need not be open and accessible to the general public. *Id.* We concluded that "construing the term 'public facility' to include prisons [did] not reflect [the] legislative intent as expressed in the term's definition and the statute as a whole." *Id.* at 539. When looking to the definition of "public facility" as a whole and the plain language, we concluded that the "Legislature used the term 'public' to indicate a status of openness and accessibility, and not a public use." *Id.* at 540. "[E]ven assuming inmates are part of the public," we noted that nothing in the statute indicates that the "Legislature intended for one small subset of the public that is involuntarily segregated from the public and has seriously constricted freedoms (*i.e.* [prison] inmates) [to] qualif[y] as the 'public'—the community as a whole." *Id.* at 542. Additionally, we noted that section 121.002(5)'s use of "public building" and "a building to which the general public is invited" could not have the same meaning. *Id.* at 540. The phrase "a building to which the general public is invited" includes "privately owned buildings that are not public buildings because they are maintained for private purposes, but to which the premises owner has extended an invitation to the general public." *Id.* at 541. This differs from a public building maintained by the government, such as a prison. *See id.* at 541–42.

Beeman's plain language definition of "public"—open and accessible to the general population—applies with equal force to this certified question. As we observed in *Beeman*, prison inmates are not the general public—though they may be a small part of it—and prisons are not generally open to persons who are not inmates, with the exception of certain prison personnel and employees. *See id.* at 542. Unlike prisons, which confine inmates and separate them from the

general public, a plasma collection center is a commercial establishment which offers anyone the opportunity to initiate the plasma donation process, beginning with eligibility screening. As part of its public invitation, a plasma collection center offers an incentive—compensation for those eligible donors whose plasma is extracted—to help increase the number of donors and the amount of plasma byproduct that can be sold for profit. A plasma collection center is not open only to certain members of the population—it is open to everybody, though the extraction process is limited to those who are eligible based on the screening process.[7] This is consistent with *Beeman*'s analysis that "a building to which the general public is invited" includes privately owned buildings to which the "owner has extended an invitation to the general public." *Id.* at 541.

CSL argues that the THRC's definition of "public facility" should be construed in the same manner as

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[7] To be clear, the fact that a facility meets the definition of a "public facility" under the THRC does not mean that the public must be invited to all areas of the facility, nor does it mean that the facility must allow persons with disabilities full use and enjoyment of all parts of the facility. Indeed, most public facilities will necessarily have areas the public is not permitted to use or enjoy; in those areas, excluding persons with disabilities from use and enjoyment does not constitute discrimination under the THRC because all members of the general public are equally excluded. *See* TEX. HUM. RES. CODE § 121.003(a) (reciting the general discrimination prohibition under which "[p]ersons with disabilities have the same right as persons without disabilities to the full use and enjoyment of any public facility in the state"); *see also Sapp v. MHI P'ship, Ltd.*, 199 F. Supp. 2d 578, 588–89 (N.D. Tex. 2002) (holding that a model home that was not designed to be used exclusively as a private residence, and that contained an office to which the general public was invited, made it a "public facility" under the THRC).

the corresponding ADA definition of place of "public accommodation" in determining whether a plasma collection center qualifies as a "public facility." *Compare* TEX. HUM. RES. CODE § 121.002(5), *with* 42 U.S.C. § 12181(7)(A)–(L). But we held in *Beeman* that the ADA's definition did not apply to the Court's analysis of the THRC's definition of "public facility." *See* 468 S.W.3d at 542–43 (explaining that the ADA's definition of "public entity" was not informative to the Court's analysis as to the THRC's meaning of "public facility"). We explained that the THRC's definition of "public facility" was enacted in 1969, while the ADA was enacted in 1990, and that any amendments to the THRC did not show a legislative intent to align the THRC's definition of "public facility" with the ADA's definition of "public entity." *See id.* (citing Act of May 20, 1969, 61st Leg., R.S., ch. 416, § 2, 1969 Tex. Gen. Laws 1374, 1375 (amended 2013) (current version at TEX. HUM. RES. CODE § 121.002(5))). Likewise, here, the ADA's definition of "public accommodation" was enacted after the THRC and is reflected in the THRC only through its definition of "public facility" as "any other place of public accommodation." *Compare* TEX. HUM. RES. CODE § 121.002(5), *with* 42 U.S.C. § 12181(7)(A)–(L). Consistent with our reasoning in *Beeman*, we conclude that the ADA's definition of "public accommodation" does not inform the THRC's definition of "public facility" as a "commercial establishment . . . to which the general public is invited." *Compare* TEX. HUM. RES. CODE § 121.002(5), *with* 42 U.S.C. § 12181(7)(A)–(L).[8] Because we hold that a plas-

[8] We note that even if we were to look to the ADA's definition of "public accommodation" and the federal case law interpreting it, there is a federal circuit court split as to whether a plasma collection center falls within the ADA's definition of "public accommodation." *Compare* 907 F.3d at 329–31 (holding that a

ma collection center of the type operated by CSL qualifies as a "public facility" under the THRC as a "commercial establishment . . . to which the general public is invited," we need not determine whether a plasma collection center also qualifies as a "public facility" as "any other place of public accommodation . . . to which the general public or any classification of persons from the general public is regularly, normally, or customarily invited." TEX. HUM. RES. CODE § 121.002(5).

We conclude that a business's selectivity as to whom it ultimately conducts business with does not take it out of the purview of the THRC's definition of "public facility." The Legislature broadly defined "public facility," and we cannot unduly restrict or expand the scope of the THRC. *See Janvey*, 487 S.W.3d at 572; *see also Lippincott*, 462 S.W.3d at 508 (explaining that a court may not impose its own judicial meaning onto a statute). The question of whether a plasma collection center discriminates unlawfully by screening out certain members of the general public, denying particular individuals the opportunity to donate plasma because of their specific disabilities, is relevant not to the applicability of the THRC's "public facility" definition, but to the standards that apply under the THRC.

IV. Texas Human Resources Code Discrimination Standards

Because we hold that a plasma collection center qualifies as a "public facility" under the THRC, we

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plasma collection center is not a "service establishment" and therefore does not fall under the ADA's definition of "public accommodation"), *with Levorsen*, 828 F.3d at 1234–35 (holding that a plasma collection center is a "service establishment" and falls under the ADA's definition of "public accommodation").

next must answer the question of what standard the THRC provides in determining whether a public facility unlawfully discriminates against a person with a disability. In other words, can a plasma collection center of the type operated by CSL ever justify excluding a potential donor based on health concerns related to the individual's disability?[9] At the outset, we note that the answer to this question applies only to facilities that do not fall under the ADA's definition of "public accommodation" but meet the THRC's definition of "public facility." Practically speaking, this situation is uncommon; the ADA applies to most public facilities, and therefore the potential implications of the answer to this question are significant only insofar as they relate to the unusual public facility that is not subject to the ADA's standards.

In construing a statute, our primary goal is to ascertain the Legislature's intent. *See, e.g.*, *Janvey*, 487 S.W.3d at 572 (citation omitted); *Molinet*, 356 S.W.3d at 411 (citation omitted). The THRC provides that "[p]ersons with disabilities have the same right as persons without disabilities to the full use and enjoyment of any public facility in the state." TEX. HUM. RES. CODE § 121.003(a). "No person with a disability may be denied admittance to any public facility . . .

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[9] We do not answer whether CSL unlawfully discriminated against Silguero and Wolfe in denying them full use and enjoyment of CSL's public facility. Nor do we address any structural, physical, or architectural standards CSL, or plasma collection centers generally, must satisfy to accommodate persons with disabilities. And we do not address any physical exclusion from CSL's facility, as the plaintiffs allege no such exclusion, but contend only that they were deprived full use and enjoyment of the facility by CSL's rejecting them from the plasma donation process. These questions are beyond the scope of the questions certified to this Court.

because of the person's disability," and he or she may not be denied the "use of a white cane, assistance animal, wheelchair, crutches, or other device of assistance." *Id.* § 121.003(c). Discrimination that violates the THRC includes a "refusal to allow a person with a disability to use or be admitted to any public facility, [and] a ruse or subterfuge calculated to prevent or discourage a person with a disability from using or being admitted to a public facility." *Id.* § 121.003(d). A public facility also violates the THRC if it fails to: (1) comply with the architectural barrier standards in Texas Government Code chapter 469; (2) "make reasonable accommodations in policies, practices, and procedures"; or (3) "provide auxiliary aids and services necessary to allow the full use and enjoyment of the public facility." *Id.* § 121.003(d)(1)–(3). Additionally, section 121.003(e) provides:

> Regulations relating to the use of public facilities by any designated class of persons from the general public may not prohibit the use of particular public facilities by persons with disabilities who, except for their disabilities or use of assistance animals or other devices for assistance in travel, would fall within the designated class.

Id. § 121.003(e).

Silguero contends that he was discriminated against on the basis of his disability when CSL did not allow him to donate plasma because he has bad knees, requiring use of a cane, and CSL believed that he might not be able to maneuver himself to and from the donation bed. He does not allege that CSL denied him use of his cane, nor does he allege that he was denied entrance into the facility. Wolfe claims that CSL discriminated against her on the basis of her anxiety,

deferring her solely because her use of a service dog indicated that she was severely anxious. Wolfe does not allege that CSL rejected her because it could not accommodate her use of a service dog at the facility, nor does she allege that she was denied entrance into the facility because of her use of a service dog. And CSL points to its policy to defer potential donors who suffer from anxiety requiring the use of a service dog, citing safety concerns about a donor having an anxiety attack while undergoing the extraction process.

Whether CSL violated the THRC in discriminating against the plaintiffs turns on whether CSL can deny the plaintiffs use and enjoyment of a public facility by excluding them from donating plasma on the basis of their disabilities, citing safety concerns or difficulties in carrying out the plasma extraction process. Thus, the question is whether a plasma collection center violates the THRC when it concludes that a potential donor's disability makes him or her unfit, and therefore ineligible, to donate plasma. The Fifth Circuit asks specifically about the standard for determining whether a plasma collection center's rejection of a potential donor would violate the broad prohibition against discrimination in section 121.003(a)—in other words, can a public facility lawfully deprive a person with a disability of full use and enjoyment of the facility? *See* TEX. HUM. RES. CODE § 121.003(a) ("Persons with disabilities have the same right as persons without disabilities to the full use and enjoyment of any public facility in the state.").

Here, the parties agree that certain health concerns and disabilities can justify exclusion from the use and enjoyment of a public facility. The plaintiffs advocate for a standard under which an exclusion is justified if (1) the reason given is not pretextual, and (2) serving

the individual poses a direct threat, would result in an undue burden on the facility, or the facility would be required to fundamentally alter its services to serve the person with a disability. CSL advocates for a more liberal standard—that if the public facility articulates a legitimate business purpose for exclusion from use and enjoyment based on a disability, it does not violate the THRC. Thus, the parties agree that the THRC is not a strict liability statute and that a public facility may lawfully deprive persons with disabilities from use or enjoyment of a public facility under certain circumstances; however, the parties disagree as to the circumstances.

In interpreting the applicability of the THRC's anti-discrimination standards, we must be mindful of the statute's context and its meaning as a whole. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866–67 (Tex. 1999) (indicating that judicial interpretation of a statute involves using its context and any implicit meaning contained in the language). Unlike the ADA, the THRC does not contain specific exemptions that expressly allow for lawful discrimination under certain circumstances. *Cf.* 42 U.S.C. § 12182(b)(2)(A)(i)–(iii), (b)(3) (excluding certain conduct from the definition of discrimination in the case of necessary eligibility criteria, undue burden, and fundamental alteration in goods or services provided, and excusing discrimination when there is a direct threat to the health or safety of others). However, the plain language of the THRC demonstrates that the Legislature did not intend a strict liability anti-discrimination standard. As we have explained, the Legislature set out a broad prohibition on discrimination in section 121.003: "Persons with disabilities have the same right as persons without disabilities to the full use and enjoyment of any public facility

in the state." TEX. HUM. RES. CODE § 121.003(a). Re-emphasizing the right to full use and enjoyment of public facilities, section 121.003(d) provides examples of discrimination prohibited by the THRC. *Id.* § 121.003(d). Among those examples is the "refusal to allow a person with a disability to use or be admitted to any public facility"—fully consistent with the broad discrimination prohibition in section 121.003(a). *Id.* The statute goes on to list other conduct that constitutes prohibited discrimination under the THRC. *Id.*

The plain language of the THRC indicates an intent to prohibit pretextual discrimination—since its enactment in 1969, section 102.003(d) has provided that the discrimination prohibited by the THRC includes "a ruse or subterfuge calculated to prevent or discourage a person with a disability from using or being admitted to a public facility." *Id.*; *see also* Act of May 20, 1969, 61st Leg., R.S., ch. 416, § 3, 1969 Tex. Gen. Laws 1374, 1375 (amended 1997 & 2013) (current version at TEX. HUM. RES. CODE § 121.003(d)) (originally referring to a person with a disability as a "handicapped person," however). "Ruse" is not defined in the THRC, but it means "trick" or "intended to deceive." *See Ruse*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). And "subterfuge" means "deception by artifice or stratagem to conceal, escape, avoid, or evade," or "a deceptive device or stratagem" that "is resorted to in order to save face." *See Subterfuge*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). Therefore, under its plain language, the THRC prohibits a public facility from using tricks or deceptive devices to avoid or evade admitting, or accommodating, a person with a disability. That is, the THRC prohibits pretextual excuses for excluding persons with disabilities from equal use and enjoyment of a public facility. *See* TEX. HUM. RES. CODE § 121.003(d); *see also Farley v. Nationwide Mut.*

Ins., 197 F.3d 1322, 1336 (11th Cir. 1999) (referring to the ADA's prohibition of "pretextual ruse[s] designed to mask retaliation" (citation omitted)); *Bohrer v. Hanes Corp.*, 715 F.2d 213, 218 (5th Cir. 1983) (reasoning that the defendant's actions cannot be "a pretext or ruse designed to conceal a discriminatory motive" in an employment discrimination claim (citation omitted)); *Hamashiach v. Adan*, No. 14-13-00491-CV, 2015 WL 971217, at *6 (Tex. App.—Houston [14th Dist.] Mar. 3, 2015, no pet.) (mem. op.) (holding that evidence of a church's decision to issue ecclesiastical discipline against one of its disabled congregants, banning her from the church for six weeks, showed that the decision was not a ruse or subterfuge to avoid accommodating her disability under the THRC, but rather a punishment because of her threatening tone to the pastor). In doing so, the THRC accounts for the existence of certain acceptable, legitimate reasons for which a public facility may deprive persons with disabilities of full use or enjoyment of a public facility.[10]

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[10] In fact, the Legislature's use of this "ruse or subterfuge" language since it enacted the predecessor to section 121.003, decades before Congress enacted the ADA, shows that the Legislature has long intended that defendants not be liable for certain discriminatory conduct, provided that their reason is not pretextual. *See* Act of May 20, 1969, 61st Leg., R.S., ch. 416, § 3, 1969 Tex. Gen. Laws 1374, 1375 (amended 1997 & 2013) (current version at TEX. HUM. RES. CODE § 121.003(d)) ("The discrimination prohibited by this section includes . . . discrimination based on a ruse or subterfuge calculated to prevent or discourage a handicapped person from using or being admitted to a public facility."). The prohibition of "ruse or subterfuge" discrimination has never changed in the statute's fifty-year history, but as we explain below, the amendment to section 121.003(d) following enactment of the ADA—including the addition of the three-part "failure to" list—further confirms the Legislature's intent that certain discriminatory conduct not

In addition to generally prohibiting discrimination that deprives persons with disabilities of the full use and enjoyment of public facilities, section 121.003(d) further defines the types of conduct that violate the THRC, including "a failure to . . . make reasonable accommodations in policies, practices, and procedures" and a failure to "provide auxiliary aids and services necessary to allow the full use and enjoyment of the public facility," among others. TEX. HUM. RES. CODE § 121.003(d)(2), (3). By using the term "reasonable accommodations," the Legislature accepted that accommodations may be either reasonable or unreasonable, and by using the term "aids and services necessary," the Legislature accepted that the use of auxiliary aids or services may be either necessary or unnecessary. *See id.* And by defining the prohibited discrimination with the "reasonable" and "necessary" limitations, the Legislature demonstrated its intent that failure to make unreasonable accommodations and failure to provide unnecessary aids and services would not constitute "discrimination" within the meaning of the THRC. With that in mind, section 121.003(d) can only be read to mean that excluding a person with a disability from full use and enjoyment of a plasma collection center's donation process will not automatically constitute discrimination prohibited by section 121.003. *See id.* § 121.003. While the parties do not disagree with this conclusion, they disagree about the particular circumstances in which a plasma collection center can reject a person with a disability from donating plasma, without running afoul of the discrimination prohibition in section 121.003.

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violate the THRC. *See* Act of May 22, 1997, 75th Leg., R.S., ch. 649, § 4, sec. 121.003, 1997 Tex. Gen. Laws 2219, 2220 (amended 2013) (current version at TEX. HUM. RES. CODE § 121.003(d)).

Unlike the ADA, the THRC is not explicit in laying out such circumstances. But just as the THRC indicates a clear legislative intent to allow discrimination under some circumstances, it also indicates legislative intent that the circumstances under which discriminatory conduct can be lawful be similar to the ADA.[11] We have utilized comparable federal law as guidance in situations where our state statute and the federal law contain analogous statutory language. *See, e.g.*, *Chatha*, 381 S.W.3d at 505 (citing *Specialty Retailers, Inc. v. DeMoranville*, 933 S.W.2d 490, 492 (Tex. 1996) (per curiam)). And we construe statutory terms considering the context in which they are used, not in isolation. *See Paxton*, 468 S.W.3d at 59 (citation omitted); *cf. Ojo v. Farmers Grp., Inc.*, 356 S.W.3d 421, 433 (Tex. 2011) (utilizing the context of the Legislature's awareness of the potential for disparate impact discrimination in the insurance context, and its deliberate decision not to exact an express prohibition on disparate impact discrimination in the Texas Insurance Code, to support the Court's conclusion that the Legislature did not intend to create a cause of action for disparate impact discrimination in the insurance context). This Court in *Beeman* declined to recognize a statutory exception based on a federal statute that was not

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[11] In fact, the House Human Services Committee Report addressing the bill that was ultimately enacted to amend certain THRC provisions after Congress enacted the ADA stated that the legislation's purpose was to enact "revisionary language [that] conforms with the terminology in the [ADA]." House Comm. on Human Servs., Bill Analysis, Tex. H.B. 2525, 75th Leg., R.S. (1997). A Bill Analysis, prepared by the Senate Research Center, similarly explained that the "'clean up' revisions proposed by the committee would conform Section 121, Human Resources Code, to the terminology in the [ADA]." Senate Research Ctr., Bill Analysis, Tex. H.B. 2525, 75th Leg., R.S. (1997).

analogous, implying that it is not improper to apply an analogous federal statute as an exception to our laws. 468 S.W.3d at 543 ("[T]he definition of 'public facilities' in Chapter 121 has no similar counterpart in the ADA. Therefore, we look only to the text of chapter 121 and not to cases interpreting the federal act." (citation omitted)). In the context of the ADA's standards that allow for lawful discrimination under certain circumstances—some of which were enacted before the THRC's recent amendments—and given the Legislature's choice of terminology, we interpret the THRC to allow for some lawful discrimination not inconsistent with the ADA. *See generally* 42 U.S.C. § 12182(b)(2)(A)(i)–(iii).

Cognizant of the fact that the Legislature enacted some of the discrimination standards in section 121.003 *after* Congress enacted the ADA, and that the purpose of the THRC aligns with the ADA's purpose, we find the ADA and the case law interpreting it helpful in analyzing the circumstances under which a public facility may lawfully discriminate by depriving a person with a disability of full use and enjoyment of the facility. *See Grady v. City of Fort Worth*, No. 4:00-CV-1871-A, 2002 WL 63010, at *3 n.2 (N.D. Tex. Jan. 8, 2002) ("[I]n interpreting Texas antidiscrimination laws, Texas courts consider how federal statutes covering similar subjects are implemented." (citing *Caballero v. Cent. Power & Light Co.*, 858 S.W.2d 359, 361 (Tex. 1993)); *see also* 42 U.S.C. § 12132 (providing the purpose that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").

We observe that the THRC's structure is similar to the ADA's as to prohibited discrimination. *Compare* 42

U.S.C. § 12182 (applying to public accommodations), *with* TEX. HUM. RES. CODE § 121.003 (applying to public facilities). Like the THRC standards, the ADA standards begin with a general rule that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment" of a place subject to the statute. *Compare* 42 U.S.C. § 12182(a), *with* TEX. HUM. RES. CODE § 121.003(a). The ADA then sets out general prohibitions and specific prohibitions. 42 U.S.C. § 12182(b)(1), (b)(2). Under the specific prohibitions, the ADA defines "discrimination" with a list of what discrimination "includes." *See id.* § 12182(b)(2)(A)(i)–(v). Within each definition of "discrimination," the ADA carves out specific exceptions to prohibited discrimination—that is, while defining unlawful discrimination, the ADA also defines what sort of discriminatory conduct is not prohibited. *See id.* Similarly, the THRC's structure begins with section 121.003(a)'s general rule and then defines "discrimination" with a list of what the discrimination prohibited by the THRC "includes." TEX. HUM. RES. CODE § 121.003(a), (d). The THRC then sets out prohibitions on discrimination. *See id.* § 121.003(d)(1)–(3). However, in setting out these prohibitions, the THRC merely implies that there are exceptions to discrimination under the THRC, rather than explicitly providing such exceptions as the ADA does. As explained above, the statutory language indicates that the Legislature intended for there to be exceptions to the THRC's definition of "discrimination." Based on the ADA's congruent structure and analogous purpose, we find the ADA helpful in determining the specific exceptions to the THRC's prohibited discrimination, as the Legislature intended.

The ADA provides that discrimination includes:

> (i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, *unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered*;
>
> (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, *unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations*;
>
> (iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, *unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden . . . .*

42 U.S.C. § 12182(b)(2)(A)(i)–(iii) (emphasis added). Likewise, the THRC provides that persons with disa-

bilities may not be deprived of the full use and enjoyment of a public facility, and the statute sets out similar specific prohibitions, while using language that contemplates the existence of exceptions. *See* TEX. HUM. RES. CODE § 121.003.

Section 12182(b)(2)(A)(i) of the ADA, in particular, is relevant in illustrating how we may draw on the ADA in interpreting the THRC. That ADA provision prohibits certain conduct that constitutes discrimination within the meaning of the ADA—the imposition or use of eligibility criteria that screens out persons with disabilities and deprives them of full use and enjoyment—but it explains that "discrimination includes [such conduct] unless" the use of such criteria is necessary to providing the services being offered. *See* 42 U.S.C § 12182(b)(2)(A)(i). Thus, under this provision, a defendant's conduct may be lawful if it either does not meet the definition of "discrimination" or if it satisfies the exception. *See Emery v. Caravan of Dreams, Inc.*, 879 F. Supp. 640, 644 (N.D. Tex. 1995) (holding that the defendant's policy of allowing smoking in all areas of its theater did not meet the definition of "discrimination" in the ADA's eligibility/screening provision, and that it met the exception in the ADA's modification provision). Although the Texas Legislature declined to provide explicit exceptions to the prohibited discrimination in section 121.003 of the THRC, we note that the Legislature amended the THRC after the ADA was enacted, adopting similar terminology, and the Legislature has amended the THRC numerous times since, each time leaving in place the relevant parallels to the ADA. *See Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) (reciting the presumption that the Legislature knows the existing law when it enacts a statute). We believe the Legislature intended section 121.003 and its

"includes" definition of "discrimination" to reflect the discriminatory conduct exceptions in the ADA, including an exception that would allow a defendant to exclude a person with a disability from full use and enjoyment of a public facility when utilization of eligibility criteria that screens out certain persons with disabilities is necessary to the defendant's provision of services. *See generally* TEX. HUM. RES. CODE § 121.003(d)(1)–(3).

The plaintiffs look to the THRC's reference to "reasonable accommodations" in THRC section 121.003(d)(2) as the basis for their proposed lawful discrimination standard, arguing that although the term is not defined in the THRC, it must be interpreted to have a meaning similar to that in the ADA's modification provision, particularly because the Legislature added this language after the enactment of the ADA. *See generally* 42 U.S.C. § 12182(b)(2)(A)(i)–(iii). By extension, the plaintiffs assert that this understanding of "reasonable accommodation" should inform the standard the Court provides in answering the second certified question, which asks not about claims under the reasonable accommodation provision, but under the general prohibition against deprivation of full use and enjoyment. Without attempting to delineate or define the parameters around what constitutes a "reasonable" modification under the ADA, we recognize that a defendant will not be liable under the ADA for refusal to make an unreasonable modification in policies, practices, or procedures. *See* 42 U.S.C. § 12182(b)(2)(A)(ii); *e.g.*, *McCoy v. Tex. Dep't of Criminal Justice*, No. C-05-370, 2006 WL 2331055, at *9–10 (S.D. Tex. Aug. 9, 2006) (holding that a prison did not unlawfully discriminate against an asthmatic prisoner by refusing to provide alternative housing, when there was no conclusive showing of a reasonable housing alternative or that some other accommodation would

have been reasonable). Nor will a defendant be liable under the ADA for refusal to make a modification that may be reasonable but would fundamentally alter the nature of the service it provides. *See* 42 U.S.C. § 12182(b)(2)(A)(ii) (providing an exception when "the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations"). We likewise read the THRC's use of "reasonable accommodations" to mean that a public facility may lawfully refuse unreasonable accommodations or accommodations that would fundamentally alter the nature of its goods, services, or facilities. *See* TEX. HUM. RES. CODE § 121.003(d)(2).

Similarly, a defendant will not be liable under the ADA for refusal to provide auxiliary aids and services that are not necessary to ensure that persons with disabilities are not treated differently from others. *See* 42 U.S.C. § 12182(b)(2)(A)(iii). Nor will a defendant be liable under the ADA for refusal to provide necessary auxiliary aids or services when doing so would fundamentally alter the nature of services it provides or would create an undue burden. *See id.* (providing an exception when "the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden"); *Greer v. Richardson Indep. Sch. Dist.*, 472 F. App'x 287, 291–92 (5th Cir. 2012). We likewise read the THRC's auxiliary aids and services provision to mean that a public facility defendant may lawfully refuse unnecessary auxiliary aids and services or auxiliary aids or services that would fundamentally alter the nature of its goods, services, or facilities, or would create an undue burden. *See* TEX. HUM. RES. CODE § 121.003(d)(3).

Moreover, the ADA specifically provides that nothing in the ADA "shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others." 42 U.S.C. § 12182(b)(3). The direct-threat exception is utilized as a general affirmative defense to any claim for discrimination. *See, e.g.*, *Bench v. Six Flags Over Tex., Inc.*, 3:13-CV-705-P, 2014 WL 12586743, at *4–5, *8–9 (N.D. Tex. July 7, 2014) (citations omitted). A "direct threat" is "a *significant* risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." 42 U.S.C. § 12182(b)(3) (emphasis added); *see Doe v. County of Centre*, 242 F.3d 437, 447 (3d Cir. 2001) (citing 42 U.S.C. § 12182(b)(3); *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287 n.16 (1987)). And "[t]he existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the [modification] or accommodation, and the risk assessment must be based on medical or other objective evidence." *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (citation omitted). Just as establishment of the direct-threat affirmative defense excuses a defendant from liability for discrimination under the ADA, we hold that a defendant will not be liable for discrimination under the THRC when allowing a person with a disability to participate in or use the defendant's services or facilities would pose a direct threat to the health or safety of others. *See Bench*, 2014 WL 12586743, at *5 n.12 (accepting the defendant's argument that ADA claims and THRC claims "rise and fall together," and concluding that an affirmative defense under the ADA also makes discrimination lawful under state law). In

sum, we hold that a defense or exception that would excuse a defendant from discrimination liability under the ADA—whether it be because of a direct threat, undue burden, fundamental alteration, or necessity of eligibility criteria—would also exclude a public facility defendant from liability under the THRC.

The question certified to this Court asks specifically about deprivation of full use and enjoyment of a public facility under section 121.003(a). Section 121.003(d) references section 121.003(a) in referring to "discrimination prohibited by this section." *See* TEX. HUM. RES. CODE § 121.003(a), (d). So a claim under section 121.003(a) that a person with a disability has been unlawfully deprived of full use and enjoyment of a public facility also constitutes a claim under section 121.003(d) that the individual was refused use of a public facility—as both section 121.003(a) and (d) prohibit depriving a person with a disability from use of a public facility. Therefore, to the extent that section 121.003(d) contemplates lawful discrimination and excuses the exclusion of persons with disabilities from use of public facilities, these exceptions allowing for lawful discrimination extend to claims under section 121.003(a). And to the extent that the plaintiffs here allege claims under section 121.003(a) relating to CSL's rejection of them as plasma donors, their complaints should be construed to also allege claims under the parallel part of section 121.003(d).[12]

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[12] We express no opinion as to whether Silguero's and Wolfe's complaints also allege claims as to pretextual reasons for rejecting them and thus depriving them of the opportunity to donate plasma and receive compensation, or claims as to the failure to make reasonable accommodations as to a policy, practice, or procedure. The record before us does not contain their complaints, and we are therefore limited by the information the Fifth

Generally, a plaintiff alleging a THRC discrimination claim has the burden to establish that the defendant discriminated against the plaintiff due to the plaintiff's disability, and the plaintiff must satisfy that burden by a preponderance of the evidence. *See Tex. State Hotel, Inc. v. Heagy*, 650 S.W.2d 503, 504–05 (Tex. App.—Houston [14th Dist.] 1983, no pet.) (holding that a blind plaintiff claiming a violation of the THRC failed to prove by a preponderance of the evidence that the defendant discriminated against him because he was blind). Analogous employment discrimination cases are relevant here in articulating the burden under the THRC. *See, e.g.*, *Davis v. City of Grapevine*, 188 S.W.3d 748, 758–59 (Tex. App.—Fort Worth 2006, pet. denied), *abrogated on other grounds by Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 87 (Tex. 2018)); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting out the applicable burdens in the employment discrimination context). In the context of ADA claims for discrimination as to public accommodations, a defendant is not liable when the defendant's conduct does not meet the applicable ADA definition of "discrimination," when an exception is satisfied, or when the defendant proves the direct-threat affirmative defense. *See Bench*, 2014 WL 12586743, at *8. We see no reason, and no authority, for a different framework for claims under the THRC.

We hold that a defendant's exclusion of a person with a disability from full use and enjoyment of a

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Circuit has provided to us. We trust that the Fifth Circuit will analyze each plaintiff's complaint to determine exactly what discrimination allegations each makes under section 121.003(d). *See Emery*, 879 F. Supp. at 644 (analyzing the case as if the plaintiff had brought a reasonable accommodations claim, based on the nature of the plaintiff's argument).

public facility, including services provided at the public facility, does not run afoul of the THRC's broad discrimination prohibition in section 121.003(a) when: (1) the defendant's conduct does not meet the definition of "discrimination" contemplated by the THRC or satisfies an exception, such as the exclusion that allows a defendant to use eligibility or screening criteria that exclude persons with disabilities from full use and enjoyment when such criteria are shown to be necessary for the provision of services; or (2) the defendant establishes that allowing the person full use and enjoyment of the public facility would pose a direct threat to the health or safety of others. *See* 42 U.S.C. § 12182(b)(2)(A)(i) (providing the equivalent standard for ADA claims relating to deprivation of full use and enjoyment of a facility via eligibility criteria that screen out persons with disabilities); *id.* § 121282(b)(2)(A)(i)–(iii) (setting out definitions of discriminatory conduct and exceptions); *id.* § 121282(b)(3) (setting out the direct-threat affirmative defense).

V. Conclusion

The Legislature broadly defined "public facility." A commercial establishment that invites the general public into its doors for the opportunity to do business falls within the THRC's definition of "public facility." Therefore, we answer the first certified question in the affirmative—that a plasma collection center, such as those operated by CSL, is a "public facility" under the THRC. The ADA's analogous provisions are informative as to the standards by which a facility may lawfully discriminate on the basis of a disability. Based on the plain language of the THRC and the relevant provisions of the ADA, we conclude that the Legislature intended the THRC to encompass exceptions to the requirement that persons with disabilities

be afforded full use and enjoyment of a public facility to the same extent as the general public. We answer the second certified question that a defendant's exclusion of a person with a disability from full use and enjoyment of a public facility does not run afoul of the THRC's broad discrimination prohibition when: (1) the defendant's conduct does not meet the THRC's definition of "discrimination" or satisfies an exception to the definition of "discrimination," such as the exception for use of eligibility criteria that screen out certain persons with disabilities, but are necessary for the public facility's provision of services; or (2) the defendant establishes that allowing the person with a disability full use and enjoyment of the public facility would pose a direct threat to the health or safety of others. *See* 42 U.S.C. § 12182(b)(2)(A)(i)–(iii), (b)(3).

Paul W. Green
Justice

OPINION DELIVERED: June 28, 2019

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 9, 2019]

No. 17-41206

D.C. Docket No. 2:16-CV-361

MARK SILGUERO,

Plaintiff-Appellant,

AMY WOLFE,

Intervenor-Appellant,

v.

CSL PLASMA, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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JUDGMENT

Before KING, ELROD, and HAYNES, Circuit Judges.

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed in part, reversed in part and

remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-41206

MARK SILGUERO,

Plaintiff-Appellant,

AMY WOLFE,

Intervenor-Appellant,

v.

CSL PLASMA, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ORDER

Appellants have filed a motion to stay issuance of the mandate pending filing of a petition for certiorari. Appellee has declined to oppose or concur in the motion, instead taking no position. The undersigned concludes that it is appropriate to grant the stay to provide time to file the petition but, thereafter, it should be denied unless, of course, a stay is granted by the Supreme Court. Accordingly,

IT IS ORDERED that the mandate in this case is stayed for 90 days whereupon it should issue unless stayed by the Supreme Court.

Signed: 9-3-2019

/s/ Catharina Haynes
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE