No. 19-603

IN THE

Supreme Court of the United States

MARK SILGUERO AND AMY WOLFE,

Petitioners,

v.

CSL PLASMA, INC.,

Respondent.

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

BRIEF FOR *AMICI CURIAE* CURRENT AND FORMER MEMBERS OF CONGRESS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amici are a bipartisan group of current and former United States Senators and Representatives who were instrumental in sponsoring and enacting the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* Their names are listed in Appendix A. In this case, the court of appeals adopted an unduly narrow construction of the language that *amici* and their colleagues deliberately selected to create a broad public accommodations provision. This misreading of a landmark civil rights statute warrants the Court's intervention.

SUMMARY OF ARGUMENT

Congress enacted the Americans with Disabilities Act ("ADA" or the "Act") to eliminate widespread discrimination against people with disabilities. Title III broadly prohibits discrimination that denies individuals the ability to be consumers, patrons, or clients of "public accommodations." Plasma donation centers fall within the plain meaning of "service establishment" in the definition of "public accommodations" and therefore cannot deny access to individuals on the basis of those individuals' disabilities. As the principal sponsors of the Act, *amici* offer a unique perspective on the text, structure, and drafting history supporting that conclusion.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. In accordance with this Court's Rule 37.2, all parties were timely notified of the *amici*'s intent to file this brief, and all parties consented to the filing.

Taken together, the ADA's titles cover all aspects of civic life. This Court has recognized that "one of the Act's most impressive strengths" is "its comprehensive character." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (internal quotation marks omitted). In particular, Title III's public accommodations provision sweeps more broadly than both the state public accommodations laws that predated it and Title II of the Civil Rights Act of 1964. Title III bans virtually all entities open to the public from implementing "exclusionary qualification standards and criteria" that categorically exclude prospective patrons on the basis of their disabilities. 42 U.S.C. § 12101(a)(5).

The decision in this case both creates a circuit split on the interpretation of a landmark federal civil rights statute and threatens to undermine the Act's comprehensive character. The Fifth Circuit concluded that plasma donation centers are not "service establishment[s]." In doing so, it inappropriately applied the *ejusdem generis* canon, adopting a cramped interpretation of "service establishment" that contravenes both the ordinary meaning of the language that Congress deliberately selected and the ADA's duly enacted findings. Nothing about the business model that plasma donation centers use should exempt them from Title III's prohibition on discrimination against members of the public with disabilities.

* * *

ARGUMENT

I. Title III of the ADA broadly defines the "public accommodations" that cannot discriminate against people with disabilities.

Petitioners have shown that plasma donation centers fall within the ordinary meaning of "service establishment" and are therefore covered by Title III's public accommodations provision. Pet. 22-28; *see also infra* pages 11-14. And as *amici* are uniquely positioned to explain, petitioners' interpretation of the operative statutory text is powerfully reinforced by both the Act's specific findings and *amici*'s deliberate drafting decisions that confirm "public accommodations" must be read to reach virtually all public-facing entities.

A. The ADA's text and structure require full integration of people with disabilities across all aspects of civic life.

1. In 1990, Congress "invoke[d] the sweep of congressional authority" to pass the ADA, a bipartisan effort "to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). It issued detailed findings to support the legislation. As this Court has recognized, those findings have served a "critical[]" role in judicial construction of the Act's scope. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484 (1999); *see Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197-98 (2002).

In particular, the Act announced the goals of "full participation, independent living, and economic self-sufficiency" for Americans with disabilities. 42 U.S.C.

§ 12101(a)(7).[2] Given this mission, Congress structured the ADA to ensure its applicability in virtually all parts of American life: in employment (Title I); in transportation and civic life (Title II); in economic and social life (Title III); and in communications (Title IV). 42 U.S.C. § 12111 *et seq.*[3] Together, these provisions constitute a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).

2. Title III realizes that commitment by guaranteeing people with disabilities "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). By prohibiting public-facing entities from implementing "exclusionary qualification standards and criteria," Title III secures the rights of persons with disabilities to engage these entities on the same terms as all other members of the public. 42 U.S.C. § 12101(a)(5).

B. Congress adopted a definition of "public accommodations" that covers virtually all public-facing entities.

Congress did not write on a blank slate when it crafted Title III's definition of a "public accommodation," 42 U.S.C. § 12181(7). Title II of the

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[2] For the convenience of the reader, we use the current numbering of the relevant findings. Those findings are carried over unchanged, but renumbered, from the original 1990 version of the Act. *See* 42 U.S.C. § 12101 note.

[3] Title IV, the telecommunications section of the Americans with Disabilities Act, is codified at 47 U.S.C. § 225.

Civil Rights Act of 1964 and state statutes provided templates. Moreover, some state courts at the turn of the twentieth century had given unreasonably narrow constructions to state public accommodations laws, and Congress wished to avoid that danger. *See infra* pages 21-22. Comparing what Congress did in the ADA with those prior federal and state models underscores Title III's broad reach. The ADA defined public accommodations using an extensive set of categories, illustrated those categories with numerous examples, and added a catchall to each category to capture what was not specifically enumerated. That combination both reached the discrimination of which Congress was already aware and prohibited discrimination by a broad swath of entities going forward.

1. The definition of "public accommodations" in Section 12181(7) of the ADA goes far beyond the definition in Title II of the Civil Rights Act of 1964. The 1964 Act limited itself to places of lodging, facilities principally engaged in selling food, and places of exhibition or entertainment. Civil Rights Act, Pub. L. No. 88-352, § 201(b), 78 Stat. 241, 243 (1964), codified as 42 U.S.C. § 2000a(b). By contrast, the ADA covers a much larger portion of the private sector—reaching, for example, everything from adoption agencies to hardware stores to accountants' or lawyers' offices. 42 U.S.C. § 12181(7)(K), (E), (F).

In fact, in Section 12181(7) Congress listed more than fifty specific "private entities" that "are considered public accommodations" as long as they affect commerce. Congress drew many of its enumerated examples from states, which had a wealth of experience regulating public accommodations, *see*

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 259 (1964) (observing that state regulation of public accommodations dates to at least the 1880s). For instance, "funeral parlor" and "travel service" are examples of service establishments enumerated in state public accommodations laws before 1990. *See, e.g.*, Colo. Rev. Stat. § 24-34-601 (1989) (funeral parlor); Haw. Rev. Stat. § 489-2 (1988) (travel service).

Still other enumerated entities in Section 12181(7) came from congressional testimony. For example, emphasizing the ubiquitous nature of disability discrimination, a paralyzed veteran referred to "the drycleaner, grocery store, theater and bank that I can't get into." Those businesses are enumerated in Paragraphs F, E, C, and F, respectively. Another witness described the difficulty Americans with disabilities had in accessing "the bakery shop or the shoe repair service"—enumerated in Paragraphs E and F. Further witnesses described experiences of discrimination that occurred at libraries (Paragraph H) and movie theaters (Paragraph C). And a Senate report referred to children with disabilities having been refused admission to a zoo (Paragraph I).[4]

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[4] For reference to discrimination involving a drycleaner, a grocery store, a theater, and a bank, see *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the Comm. on the Judiciary and the Subcomm. on the Civil and Constitutional Rights of the Comm. on the Judiciary*, 101st Cong. 48 (1989) (statement of Peter Adesso, Paralyzed Veterans of America). For reference to a bakery shop and a shoe repair service, see *id.* at 57 (statement of Chai R. Feldblum, Legislative Counsel, American Civil Liberties Union). For reference to libraries, see *Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988 Before the Subcomm. on Select Education of the Comm. on Education and Labor*, 100th Cong. 70 (1988)

2. Ultimately, the more than fifty enumerations drawn from congressional testimony and state models provide only "a few examples" of the entities covered within the twelve categories Congress used to define "public accommodations." S. Rep. No. 101-116, pt. 6, at 59 (1989). These categories cover a wide range of entities, from "place[s] of lodging" to "sales or rental establishment[s]" to "place[s] of recreation" to "service establishment[s]." *See* 42 U.S.C. § 12181(7)(A)-(L). Taken together, these categories cover virtually every form of private entity open to the public.

Not only are the categories broad when taken together, but they also overlap. Thus, there are many enumerated entities that could qualify as public accommodations under more than one category. For example, while an auditorium is listed as an example of a "place of public gathering" in Paragraph D, it could just as easily have been included in the list of "place[s] of exhibition or entertainment" delineated in Paragraph C. And while a gas station is listed explicitly in Paragraph F as a "service establishment," it also undoubtedly qualifies as a "sales" establishment under Paragraph E. There are also many unenumerated private entities that would qualify under more than one category. Imagine a cabaret. It would qualify both as an "establishment serving food or drink" (Paragraph B) and as a "place of exhibition or entertainment" (Paragraph C). This redundancy was not inadvertent. Rather, it is a consequence of

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(statement of Shelley Teed-Wargo, Chairman, Connecticut Union of Disability Action Groups). For reference to movie theaters, see *id.* at 38 (statement of William Cavanaugh, Executive Director, Ad Lib, Inc.). For reference to zoos, see S. Rep. No. 101-116, pt. 4, at 7 (1989).

Congress's commitment to the "comprehensive . . . elimination of discrimination against individuals with disabilities," including discrimination by entities holding themselves out to the public. 42 U.S.C. § 12101(b)(1).

3. Moreover, many of the categories are themselves "extensive," *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676 (2001)—that is, they reach a wide range of private entities. For example, Paragraph K, which covers "social service center establishment[s]," is illustrated with examples ranging from "adoption agenc[ies]" to "food bank[s]." 42 U.S.C. § 12181(7)(K). The breadth of the public accommodations provision is reinforced by Congress's decision to add a catchall phrase into each category. For example, Paragraph B refers to "a restaurant, bar, or other establishment serving food or drink." 42 U.S.C. § 12181(7)(B).

Congress also specifically rejected a proposal that would have narrowed those catchall provisions. Congress considered—and rejected in the reconciliation process—including the word "similar" after the word "other" in each category. 136 Cong. Rec. H11472 (daily ed. May 22, 1990) (statement of Rep. Hoyer). For example, "other similar social service center establishment" became just "other social service center establishment." 42 U.S.C. § 12181(7)(K). Congress made that change to make clear that "a person alleging discrimination does not have to prove that a particular [unenumerated] business is similar to one of the businesses listed." 136 Cong. Rec. H11472. Instead, a plaintiff must prove only that "the

business falls within the general category described." *Id.* [5]

C. The "public accommodations" provision reaches all establishments that provide services to the public.

Perhaps the best example of the breadth of Section 12181(7) is the category at issue in this case: "service establishment[s]," as delineated in Paragraph F. The category contains such varied institutions as hospitals, banks, offices of accountants and lawyers, and laundromats. 42 U.S.C. § 12181(7)(F). Thirteen of the fifteen entities enumerated in the service establishment category of Title III were listed in at least one state law prior to Title III's drafting. But Paragraph F added two examples—"office of an accountant or lawyer"—to ensure that professional services beyond health care services (which many state statutes had expressly included) are also covered.[6]

At the same time, where states differed in the breadth of their coverage, Congress adopted the broader construction. For example, eleven states and

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[5] By contrast, elsewhere in the ADA, Congress did choose to use the narrowing function of the term "similar." *See, e.g.*, 42 U.S.C. § 12111(9)(B) (discussing employment-related reasonable accommodations); 42 U.S.C. § 12103 (discussing auxiliary aids and services).

[6] *See, e.g.*, Colo. Rev. Stat. § 24-34-601 (1989) (funeral parlor); D.C. Code § 2-1401.02 (1987) (laundromat, dry-cleaner, insurance office, hospital, bank); Haw. Rev. Stat. § 489-2 (1988) (travel service, pharmacy); 775 Ill. Comp. Stat. 5/5-101 (1980) (shoe repair service); Mass. Gen. Laws ch. 272, § 92A (1989) (barber shop, gas station, beauty shop); N.Y. Exec. Law § 292 (1982) (professional office of a health care provider).

the District of Columbia included a "barber shop" as an example of a public accommodation. Oklahoma and Delaware, by contrast, explicitly excluded "barber shops" from their definitions. Congress included "barber shop" in Paragraph F to avoid any ambiguity about whether a barber shop qualifies as a service establishment, not to limit the scope of Paragraph F. This was part of Congress's overall strategy of enumerating examples in each category to ensure broad coverage.[7]

Although the enumerated examples within the category identified by Paragraph F have in common that the entity is providing a service (rather than, for example, selling a tangible good), they differ sharply across a number of dimensions. For example, they use very different business models. Laundromats are often self-serve. Lawyers may work on contingency, for free, or for an hourly rate. Banks pay depositors interest in order to obtain funds that the banks can use for their own purposes. Hospitals often bill third-party payors, sometimes under a fee-for-service model and sometimes under risk-sharing arrangements, and they are obligated by law to serve some patrons at no cost.

Of particular salience to this case, Congress did not adopt the model some states had used of restricting

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[7] For examples of state statutes expressly including barber shops, see Alaska Stat. § 18.80.300 (1987); Colo. Rev. Stat. § 24-34-601 (1989); Haw. Rev. Stat. § 489-2 (1988); 775 Ill. Comp. Stat. 5/5-101 (1980); Me. Rev. Stat. Ann. tit. 5, § 4553 (1987); Mass. Gen. Laws ch. 272, § 92A (1989); Mont. Code Ann. § 49-2-101 (1989); N.Y. Exec. Law § 292 (1982); Ohio Rev. Code Ann. § 4112.01 (1980); 43 Pa. Cons. Stat. § 954 (1986); 11 R.I. Gen. Laws Ann. § 11-24-3 (1956); and D.C. Code § 2-1401.02 (1987). For examples of states that excluded barber shops, see Okla. Stat. tit. 25, § 1401 (1968) and Del. Code Ann. tit. 6, § 4501 (1963).

public accommodations to entities that provided a service "for a fee or charge." Iowa Code § 601A.2 (1988); *see also, e.g.*, N.D. Cent. Code § 14-02.4-02 (1989) ("for a fee, charge, or gratuity"). Thus, for example, the professional office of a lawyer or a health care provider is a "public accommodation" whether it provides a service for a fee, pro bono, or upon payment by a third party.

In short, the text and structure of the ADA require reading the "public accommodations" provision broadly to cover virtually any entity that provides a service to the public.

II. Because plasma donation centers are "service establishment[s]," they fall within Title III's definition of "public accommodations."

Plasma donation centers perform a service for individuals who seek to donate plasma. As such, they constitute "service establishment[s]," like the other professional providers listed in 42 U.S.C. § 12181(7)(F). Contrary arguments that focus either on the nature of plasma donation or the fact that plasma donation centers compensate their donors are unpersuasive.

A. The ordinary meaning of "service establishment" covers plasma donation centers.

Congress did not provide a special definition for "service establishment" in Title III. Thus, the ordinary meaning of those words controls. *See Sebelius v. Cloer*, 569 U.S. 369, 376 (2013).

1. CSL Plasma plainly constitutes an "establishment." That word connotes an "institution or place of business." *Establishment*, Webster's New

International Dictionary (2d ed. 1945); *see also* Pet. App. 9a. As the Fifth Circuit acknowledged, both parties "agree that CSL Plasma is an 'establishment.'" *Id.* 7a.

2. CSL Plasma's establishments also provide a "service" to the public. In fact, CSL Plasma itself has used the word "service" to describe the nature of its business. In 2016, CSL Plasma obtained a service mark, rather than a trademark, from the United States Patent and Trademark Office. It based its application on the sworn representation that it provides "[b]lood bank services; medical services; [and] medical testing and screening services for diagnostic or treatment purposes." CSL PLASMA, Registration No. 4976372. CSL Plasma's marketing materials drive home the character of its interactions with the public. Those materials state that CSL Plasma is "committed to providing the best in customer service to [its] loyal plasma donors."[8] Having described plasma donors as customers and itself as a provider of "services" outside this litigation, CSL Plasma cannot plausibly deny that its activities fall within the word's ordinary meaning.

Other traditional indicia confirm that CSL Plasma's own usage comports with the ordinary meaning of "service." Dictionary definitions of "service" include a "performance of labor for the benefit of another," *Service*, Webster's New International Dictionary (2d ed. 1945) and "professional assistance," *Service*, Oxford English Dictionary (2d ed. 1989). This Court agrees. *See Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158, 2165 (2015). These definitions apply

[8] *Contact Us*, CSL Plasma, https://www.cslplasma.com/contact-us (last visited Nov. 17, 2019).

to the activities CSL Plasma engages in with respect to plasma donors.

Services can be provided in a multiplicity of ways, as the enumerated examples within Paragraph F show. Some enumerated establishments, such as shoe repair shops, provide a single, simple service. Others, like banks, provide services that can be described in various ways. Take a bank that offers customers an interest-bearing checking account: In one view, it is providing a safe place to store money. In another, it is facilitating an easy and secure way for the depositor to make payments to third parties. In a third, the bank pays interest to the depositor in exchange for the opportunity to use the customer's deposits. Each of these characterizations supports the conclusion that a bank is a service establishment.

CSL Plasma's services to donors can likewise be characterized in multiple ways, all of which confirm that it falls within the category of "service establishment[s]." For example, CSL Plasma serves donors by using specialized medical equipment and assistance from trained medical professionals to extract their plasma. U.S. C.A. Br. 11. Another way to frame this service is that CSL Plasma, as a licensed extractor and seller of plasma to the biotherapeutic market, is an intermediary that enables individuals to monetize their plasma. As a matter of economic reality, CSL Plasma is compensated for this service because it deducts from the payment it gives to its donors the cost of the supplies, equipment, and labor required to screen them, extract their plasma, and return the remaining blood to their bodies.

Regardless of how one describes CSL Plasma's activities, the practical reality is that individuals can

sell their plasma only if they receive the assistance of a business like CSL Plasma. Because CSL Plasma "perform[s]" a "labor for the benefit of" its donors, it falls under the plain meaning of "service" establishment. *See Service*, Webster's New International Dictionary (2d ed. 1945). Here, the "analysis begins and ends with the text" since its ordinary meaning is clear. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014). CSL Plasma is therefore covered by Title III.

B. The Fifth Circuit erred in distinguishing plasma donation centers from other service establishments.

As *amici* have explained, Congress defined public accommodations by delineating "twelve extensive categories" and providing examples in each category drawn from congressional testimony and pre-existing state civil rights statutes. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676 (2001); *see supra* pages 4-9. The Fifth Circuit, however, treated those examples as if they were meant to limit the reach those categories would otherwise have. It did so by applying *ejusdem generis*, which teaches that when general words follow specific words, the general words include things only of the same nature as those specifically enumerated, William N. Eskridge, Jr. et al., *Cases and Materials on Statutory Interpretation* 852 (2012 ed.).

The Fifth Circuit erred in thinking that *ejusdem generis* separates plasma donation centers from the examples listed in Paragraph F. Moreover, its overly aggressive application of *ejusdem generis* is particularly out of place here because it ignores the drafting history of Title III and undermines the statute's articulated purposes. This Court should

grant review and clarify that the approach taken by the Third and Tenth Circuits—each of which held that plasma donation centers are "service establishment[s]" within the meaning of Paragraph F—better comports with the text and structure of the ADA. *See Matheis v. CSL Plasma, Inc.*, 936 F.3d 171 (3d Cir. 2019); *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016).

1. The Fifth Circuit erred in distinguishing plasma donation centers from the enumerated examples in Paragraph F on the grounds that, unlike those entities' services, "plasma collection does not provide any detectable benefit for donors." Pet. App. 11a. That assumption beggars reality: Donors are better off after they receive the extraction services that CSL Plasma provides because they have a saleable object that CSL then purchases, leaving donors with more money than they had before their plasma was collected. The Fifth Circuit failed to understand this straightforward point because it thought that the "payment of money" was "wholly collateral to the act of plasma collection." *Id.* 10a.

To the contrary, the payment and the collection are inextricably linked. Individuals who want payment for their plasma must find an entity that can "collect [their] plasma using a special process called plasmapheresis" that depends on "sophisticated high-tech machine[s]" to separate out the plasma and then "return[] the other parts of the blood back to [them]."[9] Plasma centers provide that service, which obviously benefits donors. It does not matter that donors may

[9] *Donation Process*, CSL Plasma, https://www.cslplasma.com/become-a-donor/the-donation-process (last visited Nov. 17, 2019).

have no "independent desire to get rid of their plasma" absent a payment. Def. C.A. Br. 33. After all, individuals who put their money into a savings account have no "independent desire to get rid of" their money; the reason they give it to the bank is to make more money.[10]

The Fifth Circuit's approach would improperly exempt from Title III a significant number of entities that provide services analogous to those provided by CSL Plasma. For example, in a clothing consignment shop, the shop provides the following service to people who want to sell their clothes: It prices the clothes, displays the clothes, interacts with potential buyers, and when the clothes are sold provides a payment to the consignor. The fact that the ultimate benefit the consignor seeks is money does not change the fact that the store is a service establishment. So, too, an auction house provides a service to members of the public who seek to sell their goods.

2. The Fifth Circuit also found it "highly relevant" that CSL Plasma pays its donors rather than the other way around. Pet. App. 15a.[11] That too was an error. For several reasons, the formal direction of payment

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[10] Even less can the fact that the service CSL provides may subject donors "to discomfort and medical risks," Pet. App. 10a, somehow remove CSL from the category of service providers. After all, health care providers, hospitals, and beauty shops are all enumerated in Paragraph F even though many of the services they provide can subject patrons to discomfort and medical risks even greater than any faced by plasma donors.

[11] Judge Holmes, in his dissenting opinion in *Levorsen*, would have gone even further to hold that service establishments *must* "offer services to the public in exchange for a fee (*i.e.*, monetary compensation)" to come within Title III. 828 F.3d at 1240 (Holmes, J., dissenting).

does not distinguish plasma donation centers from the enumerated examples of service establishments.

First, this purported distinction between CSL Plasma and the enumerated service establishments is descriptively incorrect. It is true that some of the enumerated establishments do fit a business model where a patron rings a service provider's bell seeking to exchange currency for completion of a task. But others do not. "Office of a[] . . . lawyer" encompasses non-profit legal service providers that may actually be forbidden by law from charging their clients. 42 U.S.C. § 12181(7)(F). Still other lawyers' offices provide pro bono legal services or specialize in fee-shifting cases. Moreover, hospitals are required to provide emergency treatment without regard to a patient's ability to pay. These organizations are covered by Paragraph F even when they do not provide a service in exchange for payment from the member of the public protected by Title III.

Indeed, one enumerated service establishment—a bank—does exactly what CSL does: namely, pay its customers. Banks pay interest to customers with a wide range of no-fee accounts. These customers enjoy the same protection under Title III as customers seeking loans.

Furthermore, when Congress drafted the ADA, it had before it state public accommodations statutes that contained direction-of-payment restrictions. *See supra* pages 10-11. Its decision not to include that language in Section 12181(7) is telling—and the Fifth Circuit erred in reading in a limitation that Congress never adopted.

Second, a direction-of-payment limitation would improperly exclude from Title III many businesses

beyond plasma donation centers that plainly provide a service to the public. Take the example of a recycling center, which performs the service of helping people get rid of waste in an ecologically responsible way. These centers have at least three payment models: Some charge customers to take recyclable materials off their hands; some pay customers for recyclable material that customers turn in; and some accept the materials with no exchange of payment at all.[12] In each case, the service is the same. But under the Fifth Circuit's direction-of-payment rationale, coverage would extend only to the first model. That cannot be right. Congress did not make Title III's coverage turn on a particular business model.[13]

Moreover, the Fifth Circuit was wrong to fear that treating CSL Plasma as a service establishment, even though it pays its donors, would blur "[t]he distinction between customer relationships and employer relationships [that] is embodied in the structure of the ADA." Pet. App. 13a. No one could plausibly argue that a plasma donor is an employee of a donation center. Petitioners are not workers seeking the protections Title I of the ADA provides to employees; rather, they

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[12] *See, e.g.*, GreenCitizen's Burlingame EcoCenter, https://greencitizen.com/free-electronics-recycling-drop-off (last visited Nov. 17, 2019) (customer pays recycling center or recycling center accepts some materials free of charge); *Services*, Danny Recycling Inc., https://www.dannyrecyclinginc.com/services (last visited Nov. 17, 2019) (recycling center pays customer).

[13] Indeed, as an economic matter, one can easily reverse the characterization of direction of payment in many transactions. In this case, donors implicitly pay a fee for the time, expertise, and equipment necessary for plasma extraction. The plasma donation center then deducts that fee from the payment to the donor. In the most accurate sense, then, payment flows in both directions.

seek the access to service establishments that Title III secures for members of the public.

In treating donors as solely suppliers who are not protected by Title III, the Fifth Circuit mistakenly resurrected a theory that this Court rejected in *PGA Tour*. There, a professional golfer with a disability claimed that the petitioner violated Title III because it refused his request for an accommodation. The Tour responded that the golfer could not invoke Title III because he was not a "client[] or customer[]" of the Tour and Title III is limited to protecting the public. *PGA Tour*, 532 U.S. at 662. In the Tour's view, the golfer was "a provider rather than a consumer of the entertainment" the Tour supplied to public spectators. *Id.* at 678.

This Court rejected the Tour's attempt to narrow the scope of Title III. The fact that the golfer helped the Tour supply entertainment to spectators did not prevent him from bringing a claim under the public accommodations provision. *PGA Tour*, 532 U.S. at 680.

Plasma donors are in an analogous position. The fact that donors provide an "input" to the donation centers' business—namely, plasma—does not undercut the reality that they also seek access to the services CSL Plasma provides to members of the public.

3. Both of the Fifth Circuit's theories relied on the application of *ejusdem generis*. But its mechanical use of the canon was particularly inappropriate here because it inserted into the statute a word Congress deliberately omitted, frustrated Congress's statutorily expressed purpose, and ignored Congress's reasons for including an enumerated list.

First, *ejusdem generis* "implies the addition of *similar* after the word *other*." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). For that reason, then-Judge Kavanaugh opined that the canon should be "toss[ed] . . . into the pile of fancy-sounding canons that warrant little weight in modern statutory interpretation" because it illegitimately reads a word ("similar") into statutory text against the drafters' will. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2160-61 (2016) (book review). But at the very least, the Fifth Circuit erred in using the canon to pencil *similar* back into the phrase "other service establishment," given that Congress deliberately deleted that word from a prior draft. And we know why Congress did so: It did not want to impose on plaintiffs the obligation to show that the defendant entity was similar to the enumerated businesses. *See supra* page 8. Thus, it is enough for petitioners to show that CSL Plasma is an establishment that provides a service to the public. They do not also have to explain how it resembles a "laundromat" or a "funeral parlor."

Second, the Fifth Circuit's application of *ejusdem generis* flouted this Court's directive that the canon should not be used to "defeat the obvious purpose of legislation," *Gooch v. United States*, 297 U.S. 124, 128 (1936); *see United States v. Powell*, 423 U.S. 87, 90 (1975). Here, Congress wrote the remedial purpose of the ADA into its text. *See supra* pages 3-4. That is why this Court has declared that Title III should be read "liberally to afford people with disabilities equal access to the wide variety of establishments available to the non-disabled." *PGA Tour*, 532 U.S. at 676-77 (internal quotation marks omitted).

Using *ejusdem generis* here does the opposite. It introduces an arbitrary criterion—either an idiosyncratic notion of what constitutes a "benefit" or an atextual direction-of-payment principle—to narrow the meaning of the word "service." This reading undermines Title III by allowing plasma donation centers to categorically exclude prospective patrons with disabilities. Such an interpretation countenances exactly the sort of "exclusionary qualification standards and criteria" that interfere with those patrons' "economic self-sufficiency" and "right to fully participate in all aspects of society." 42 U.S.C. § 12101(a)(1), (5), (7).

There is a long provenance for rejecting the use of *ejusdem generis* to narrow the scope of public accommodations statutes. In modern times, state courts interpreting their own public accommodations laws—the models on which Title III is based—have disfavored the canon. They reason that a public accommodations provision, "when read in the light of [its] obviously broad legislative purpose, strongly indicates the enumerated specific examples . . . do not restrict" the general statutory language "or provide a basis for applying the principle of ejusdem generis." *Local Fin. Co. of Rockland v. Mass. Comm'n Against Discrimination*, 242 N.E.2d 536, 538 (Mass. 1968); *see also Kan. Comm'n on Civil Rights v. Sears, Roebuck & Co.*, 532 P.2d 1263, 1271-72 (Kan. 1975).

Those courts have strong historical reasons to distrust application of this canon to public accommodations laws. In the past, parties had often escaped liability for their discrimination by using *ejusdem generis* to gut antidiscrimination laws. *See, e.g.*, *Cecil v. Green*, 43 N.E. 1105 (Ill. 1896) (using the

canon to exempt soda fountains from a statute covering "inns, restaurants, eating houses, . . . [and] other places of accommodation and amusement"); *Rhone v. Loomis*, 77 N.W. 31 (Minn. 1898) (exempting saloon from "inn, tavern, restaurant, eating house, soda-water fountain, [and] ice cream parlor"); *Brown v. J.H. Bell Co.*, 123 N.W. 231 (Iowa 1909) (exempting a booth at a food show from "inns, restaurants, chophouses, eating houses, lunch counters, and all other places where refreshments are served").

Finally, this Court has held that the inference required for application of *ejusdem generis*—that Congress meant to narrow the scope of a catchall by a preceding list of enumerated examples—is "negate[d]" where Congress has "special reasons" for specifying the terms it did enumerate. *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 44 n.5 (1983); *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 140 (2001) (Souter, J., dissenting). As explained above, Congress had precisely such reasons here: It drew its enumerated list from establishments with a demonstrated history of discrimination, taking a "belt and suspenders" approach to ensure that courts would not carve these businesses out. *See supra* pages 4-9. To invoke *ejusdem generis* and use Congress's enumeration to narrow the scope of the public accommodations provision would thwart the statutory scheme.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

AMICI CURIAE CURRENT AND FORMER MEMBERS OF CONGRESS

Representative Steve Bartlett (R-Tex.) served in the United States House of Representatives from 1983 to 1993. He was a sponsor of the Americans with Disabilities Act.

Representative Tony Coelho (D-Cal.) served in the United States House of Representatives from 1979 to 1989. He introduced the Americans with Disabilities Act in the House on May 9, 1989.

Senator David Durenberger (R-Minn.) served in the United States Senate from 1978 to 1995. He was a sponsor of the Americans with Disabilities Act.

Senator Tom Harkin (D-Iowa) served in the United States Senate from 1985 to 2015. He was the chief sponsor of the Americans with Disabilities Act in the Senate.

Representative Steny H. Hoyer (D-Md.) is the Majority Leader in the House of Representatives, where he has served since 1981. He was the chief sponsor of the Americans with Disabilities Act in the House.