No. 19-603

In the
Supreme Court of the United States

MARK SILGUERO AND AMY WOLFE,
Petitioners,

v.

CSL PLASMA, INCORPORATED,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a plasma collection center that provides no service to the public, receives donations of human plasma, and compensates donors for their time and inconvenience during the process, a "service establishment" akin to a laundromat, dry-cleaner, bank, barber shop, beauty shop, shoe repair service, funeral parlor, gas station, bank, or other establishments listed in 42 U.S.C. § 12181(7)(F) of Title III of the Americans with Disabilities Act?

CORPORATE DISCLOSURE STATEMENT

CSL Plasma Inc. is a subsidiary of CSL Behring LLC. CSL Behring LLC is a subsidiary of CSL Limited. Shares of CSL Limited are traded on the Australian Stock Exchange with no parent company. No other publicly traded corporation owns, directly or indirectly, ten percent (10%) or more of CSL Plasma Inc.'s stock.

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STATEMENT OF THE CASE

The petition for certiorari should be denied. This case involves a question of importance to a single business entity and others like it in that narrow industry, but it is not a question of national importance or wide application. This case does not present a broad challenge to the fundamental purpose of the ADA.

The issue is whether the antidiscrimination provisions of Title III of the ADA applicable to a "place of public accommodation" apply to a manufacturing business that exists to collect raw material (blood plasma) from eligible donors and provides no direct service or product to the members of the public. CSL Plasma compensates eligible donors for their time and inconvenience during the plasmapheresis process. A unanimous panel of the U.S. Court of Appeals for the Fifth Circuit held correctly that a plasma collection center is not a place of public accommodation and, accordingly, not subject to the antidiscrimination provisions of Title III of the ADA. *Silguero v. CSL Plasma, Inc.,* 907 F.3d 323 (5th Cir. 2018).

CSL Plasma acknowledges that three Courts of Appeals have addressed this issue and that two other courts of appeals have ruled that a plasma collection center is a place of public accommodation. See *Levorsen v. Octapharma Plasma, Inc.,* 828 F.3d 1227 (10th Cir. 2016); *Matheis v. CSL Plasma, Inc.,* 936 F.3d 171 (3d Cir. 2019). This "circuit split" is of recent vintage, and two of the cases involve CSL Plasma. In their effort to bring this issue to this Court's attention now petitioners overstate the impact of the differing opinions of the courts of appeals. The issue is not ripe for this Court's

consideration, given its limited application, and should be allowed to develop further in the lower courts.

ARGUMENT

A. The ADA Distinguishes Commercial Facilities Like a Plasma Collection Center from Places of Public Accommodation.

Two distinct types of establishments are described in Title III of the ADA. First, the statute defines "commercial facilities" as facilities "(A) that are intended for nonresidential use; and (B) whose operations will affect commerce."[1] Second, the statute defines a "place of public accommodation." These definitions establish the path to applying the statute, given the different level of regulation Title III imposes on each type of establishment. Commercial facilities are subject only to the barrier-elimination provisions of Title III. Places of public accommodation are subject to the antidiscrimination provisions of Title III. See 42 U.S.C. § 12182(a). While the definition of commercial facilities is relatively straightforward, the definition of a place of public accommodation is multifaceted and complex and requires a fact-intensive examination of the nature of the facility. 42 U.S.C. § 12181(7).

The sole statutory provision at issue in this case is the seventh category, which defines a "service establishment." That section states:

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[1] 42 U.S.C. § 12181(2). This section excludes certain facilities such as railroad cars and facilities that are expressly exempted from coverage under the Fair Housing Act of 1968. These exceptions are not implicated in this case.

> (7) Public accommodation
>
> The following of this subchapter, if the operations of such entities affect commerce—
> * * * *
>
> (F) a laundromat, dry-cleaner, bank, barbershop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a healthcare provider, hospital, or other service establishment;

42 U.S.C. § 12181(7)(F). Although the parties agree on little else, they agree on this much: (A) no other section or subpart of the statute could apply to a plasma collection center, and (B) a plasma collection center is not listed among the examples in this section.

A plasma collection center sells no products and provides no service to donors or to the public. Instead, donors provide a service to the plasma collection center when they give their plasma to it for further manufacturing into pharmaceuticals. A plasma collection center is not a medical office or clinic and provides no health service to donors. Donors have no further claim to their plasma after they complete the donation process, and they have no expectation the plasma, which is likely to be aggregated with thousands of other donations, will be used for themselves, a friend or family member, or anyone they may know personally.

A plasma collection center is unlike the illustrative examples in section 12181(7)(F) as to form, function,

purpose, or operation. A plasma collection center exists solely to collect human source plasma, a biological product to be used in further manufacturing.[2] With CSL Plasma, virtually all the plasma it collects is sent to its parent company to be manufactured into plasma protein therapies, which are used to treat individuals with rare diseases. This entire process is undertaken to benefit CSL Plasma. Donors need not have their plasma removed and given to a third party. Whether donors come to CSL Plasma out of a sense of altruism or for the modest compensation they receive, they provide a service to the plasma collection center. In every example in section 12181(7)(F), the service establishment provides a service or sells a product to the public.

B. Plasma Collection Centers are Commercial Facilities.

A plasma collection center is a unique type of business. It is the point of entry or gateway to a specialized pharmaceutical manufacturing process closely regulated in the United States by the Food and Drug Administration (FDA) and its counterparts in other countries. The FDA deems a plasma collection center to be part of an integrated manufacturing process. See 21 C.F.R. § 640.71(a) (2019). CSL Plasma

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[2] Regulations promulgated by the FDA provide the definition of this term in the context of the manufacturing process. "The proper name of the product shall be Source Plasma. The product is defined as the fluid portion of human blood collected by plasmapheresis and intended as source material for further manufacturing use. The definition excludes single donor plasma products intended for intravenous use." 21 C.F.R. § 640.60 (2019).

seeks donations only from that subset of the public who may be sufficiently healthy and willing to donate to come to the center, where they are evaluated to determine their suitability to donate, under FDA regulations and guidelines. For their time and inconvenience in undergoing the plasmapheresis process, which can require up to several hours of their time, donors receive modest compensation. All of this is done solely to benefit CSL Plasma.

C. A Plasma Collection Center Provides No Service to the Public.

The crux is whether a plasma collection center is an "other service establishment," within the catch-all term that follows the examples set out in section 12181(7)(F). It is the only category in the definitions that would allow the arguments petitioners make, but their efforts to shoehorn a plasma collection center into it strains the statutory language. Far from the plain language reading petitioners now press in this Court, the statute requires some analysis and interpretation when one of the listed establishments is not involved.

Petitioners' arguments that a plasma collection center provides a service or some benefit to donors, aside from the compensation they receive, are untethered from the context of the Title III definition of a "service establishment" and from the realities of the purpose and operation of a plasma collection center. For example, they analogize a plasma collection center to a bank that pays interest to its depositors. But, the depositors' money is their property, and the bank provides services such as safeguarding those funds, which the depositors may withdraw upon demand or at

the end of a timed deposit. A plasma donor cannot reclaim his plasma donation, which becomes the property of the plasma collection center. Similarly, petitioners argue that the specialized equipment required to remove their plasma allows them to "monetize" their plasma. That argument, however, is akin to a landowner who discovers oil under his property and in return receives royalty payments from an oil company. The oil company is not converted from a manufacturer into a service establishment.

D. The Fifth Circuit's Decision is Correct.

A panel of the Fifth Circuit, comprised of judges Carolyn Dineen King, Jennifer Walker Elrod, and Catharina Haynes, ruled that a plasma collection center did not fit the definition of a service establishment under section 12181(7)(F) and was not a place of public accommodation subject to section 12182. This decision is correct.

The court of appeals began with the language of the statute. Noting that section 12181(7)(F) does not list a plasma collection center, and neither party contended otherwise, the court focused on the term "other service establishment." 907 F.3d 328. The court of appeals synthesized dictionary definitions of the words "service" and "establishment" and concluded that service establishment "is an establishment that performs some act or work for an individual who benefits from the act or work." *Id.* Proceeding further with its analysis, and declining to follow the reasoning of the Tenth Circuit in *Levorsen,* the court of appeals considered this definition in its application to plasma collection centers:

> Three textual clues lead us to that result. First, the word "service" implies that the customer is benefited 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 in establishment typically does not pay a customer for a "service" it provides.

Silguero, 907 F.3d at 329.

The Fifth Circuit addressed each point petitioners press in this Court. First, donors receive no obvious benefit from undergoing plasmapheresis. Nothing in the record supports petitioners' contention that CSL Plasma confers a benefit on them or that removing plasma from their bodies is medically necessary or even desirable. Donors receive modest compensation for their time and inconvenience, but that payment "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." *Silguero*, 907 F.3d at 329.

Petitioners claim the Fifth Circuit's use of two long-established and oft-applied canons of statutory construction, *ejusdem generis* and *noscitur a sociis* cannot be used here to determine Congress's intent because the ADA is a remedial statute and is to be liberally construed. But, where, as here, the statute sets out a definition by way of a list of examples of service establishments followed by a general term like "other service establishment," the legislature is telling

us two things. First, the listing is not exhaustive; second, the other service establishments not specifically listed should be of the same genus as those in the preceding list. An unlisted "other service establishment" should be similar to the listed service establishments. As the Fifth Circuit explained, "[I]f 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." *Silguero*, 907 F.3d at 329; *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018); *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1725 (2017). Petitioners' reading of the statute would render other provisions of the same section superfluous. This Court has consistently ruled that all parts and words of a statute enacted by Congress should be given effect. *Nat'l Ass'n of Mfrs. v. Dep't of Def.,* 138 S. Ct. 617, 632 (2018) ("As this Court has noted time and time again, the Court is 'obliged to give effect, if possible, to every word Congress used.'" *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979). The court of appeals was correct to employ these canons of construction in its reading of section 12181(7)(F).

Last, although petitioners make much of the direction-of-payment discussion in the cases, it was a minor point in the Fifth Circuit's analysis, albeit a valid one: in our society the person to whom or on whose behalf the services are rendered pays for that service. The Fifth Circuit's treatment of the issue is on point: "[w]e do not hold that payment from a customer to the establishment is necessary to be considered a

'service establishment' or that a 'service' is never performed when 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.'" *Silguero*, 907 F.3d at 331-32.

E. Reasons For Denying The Petition

This case involves the application of the antidiscrimination provisions of ADA Title III to a single industry, plasma collection. That industry is unique, and applying the definition of "place of public accommodation" is fact-bound. Here, the Fifth Circuit correctly held that CSL Plasma's centers are not places of public accommodation based on the record evidence. The court of appeals properly construed and applied ADA Title III.

This case is not the ideal vehicle for review of this question because the petitioners present situations involving differing reasons why they were not accepted as donors that could cause a decision against them even if CSL Plasma's centers were a place of public accommodation. Silguero was deferred permanently based on his threatening behavior toward a member of the center's staff, not because of his disability. Wolfe has not clearly established that her dog is a "service animal" rather than a comfort animal. Department of Justice regulations and guidance distinguish the types

of animals and state that the need for a comfort animal does not have to be accommodated.[3]

Petitioners urge this Court to grant certiorari because of the differing conclusions reached by the Tenth and Third Circuits. This argument is not as compelling as it otherwise might be under Supreme Court Rule 10. The Tenth Circuit's decision focused on the direction-of-payment issue because that was the basis for the decision below. The Third Circuit adopted the same reasoning, but that case was reversed and remanded to the district court for further proceedings because summary judgment should not have been granted on the record before the court. Finally, various state laws may impose obligations on plasma collection centers, and a decision, at this time, will not eliminate disparate results.

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[3] See Department of Justice *Frequently Asked Questions about Service Animals and the ADA* https://www.ada.gov/regs2010/service_animal_qa.html (last visited January 20, 2020).

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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