

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARK SILGUERO,

Plaintiff-Appellant

AMY WOLFE,

Intervenor-Appellant

v.

CSL PLASMA, INCORPORATED,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING
NEITHER PARTY

JOHN M. GORE
Acting Assistant Attorney General

TOVAH R. CALDERON
ELIZABETH NASH
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section - RFK 3736
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-3412

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTEREST OF THE UNITED STATES	1
STATEMENT OF THE ISSUE.....	3
STATEMENT OF THE CASE.....	3
SUMMARY OF THE ARGUMENT	6
ARGUMENT	
A PLASMA DONATION CENTER IS A “SERVICE ESTABLISHMENT” AND THEREFORE A “PLACE OF PUBLIC ACCOMMODATION” UNDER TITLE III OF THE ADA	8
<i>A. Statutory And Regulatory Background</i>	<i>8</i>
<i>B. Under The Plain Meaning Of Title III, A Plasma Donation Center Is A “Service Establishment”</i>	<i>10</i>
<i>C. Interpreting Title III To Cover Plasma Donation Centers Does Not Conflict With FDA Regulations</i>	<i>17</i>
CONCLUSION	22
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES:	PAGE
<i>Baughman v. Walt Disney World Co.</i> , 685 F.3d 1131 (9th Cir. 2012)	18
<i>Circuit City Stores, Inc. v. Adams</i> , 532 U.S. 105 (2001).....	5
<i>Estrada v. South St. Prop., LLC</i> , No. 2:17-CV-00259-CAS(JCx), 2017 WL 3461290 (C.D. Cal. Aug. 11, 2017)	15
<i>Freeman v. Quicken Loans, Inc.</i> , 566 U.S. 624 (2012).....	5-6
<i>Levorsen v. Octapharma Plasma</i> , 828 F.3d 1227 (10th Cir. 2016)	<i>passim</i>
<i>Magee v. Coca-Cola Refreshments USA, Inc.</i> , 833 F.3d 530 (5th Cir. 2016), cert. denied, 138 S. Ct. 55 (2017).....	10
<i>Martin v. PGA Tour, Inc.</i> , 204 F.3d 994 (9th Cir. 2000), aff'd, 543 U.S. 661 (2001).....	20
<i>Maslenjak v. United States</i> , 137 S. Ct. 1918 (2017).....	10
<i>NPR Investments, LLC v. United States</i> , 740 F.3d 998 (5th Cir. 2014)	10
<i>Perrin v. United States</i> , 444 U.S. 37 (1979).....	10
<i>PGA Tour, Inc. v. Martin</i> , 532 U.S. 661 (2001).....	16
<i>Sandifer v. United States Steel Corp.</i> , 134 S. Ct. 870 (2014).....	10
<i>United States v. Williams</i> , 553 U.S. 285 (2008).....	6

STATUTES:

PAGE

Americans with Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.* (Title III) 1

 42 U.S.C. 12101(a)(1) 8

 42 U.S.C. 12101(a)(3) 8

 42 U.S.C. 12101(b)(1) 8

 42 U.S.C. 12181(7)..... 3, 9

 42 U.S.C. 12181(7)(E)..... 10

 42 U.S.C. 12181(7)(F) *passim*

 42 U.S.C. 12182(a) 9

 42 U.S.C. 12186(b)..... 2

 42 U.S.C. 12188(b)..... 2

Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*..... 2

42 U.S.C. 262(a) 2

Ala. Code § 7-2-314(4) (1975) 12

Cal. Health & Safety Code § 1606 (West 2017) 13

Kan. Stat. Ann. § 65-3701 (West 2017) 13

Miss. Code Ann. § 41-41-1 (West 2017)..... 12

Neb. Rev. Stat. Ann. § 71-4001 (West 2017)..... 13

Tex. Civ. Prac. & Rem. Code Ann. § 77.003(a) (West 2017)..... 13

Utah Code Ann. § 26-31-201(1) (West 2017) 13

Vt. Stat. Ann. tit. 9A, § 2-108 (West 2017)..... 13

REGULATIONS:

21 C.F.R. 606.100(b) 18

21 C.F.R. 607.3(d) 21

21 C.F.R. 630.10(a)..... 18-19

REGULATIONS (continued):	PAGE
21 C.F.R. 630.10(d)	18
21 C.F.R. Pt. 630.....	2
28 C.F.R. 36.301(b)	17-19
28 C.F.R. Pt. 36.....	2
28 C.F.R. Pt. 36, App. C (2017)	9, 20
56 Fed. Reg. 35,544 (July 26, 1991).....	17-18

LEGISLATIVE HISTORY:

H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 100 (1990).....	16
H.R. Rep. No. 558, 101st Cong., 2d Sess. 71 (1990)	16
S. Rep. No. 116, 101st Cong., 1st Sess. 59 (1989).....	16

RULE:

Fed. R. App. P. 29(a)	1
-----------------------------	---

MISCELLANEOUS:

<i>Ejusdem generis</i> , Black’s Law Dictionary (10th Ed. 2014)	5
<i>Service</i> , Random House Dictionary.com, http://dictionary.reference.com/browse/service (last visited Feb. 6, 2018)	11
Webster’s Third New International Dictionary 2075 (2002)	11
CSL Plasma, <i>Find a Donation Center</i> , https://www.cslplasma.com/locations/search-results-state (last visited Feb. 6, 2018).....	13
BioLife Plasma Services, <i>Who We Are</i> , https://biolifeplasma.com/us/#/about-biolife/who-we-are (last visited Feb. 6, 2018)	13

MISCELLANEOUS (continued):	PAGE
Immunotek, http://www.immunotek.com (last visited Feb. 6, 2018).....	14
<i>Settlement Agreement Between the United States of America And Bio-Medics</i> , available at https://www.ada.gov/bio-medics.htm	2, 19
U.S. Dep't of Justice, <i>ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities</i> § III-1.2000, www.ada.gov/taman3.html	9, 20

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING
NEITHER PARTY

INTEREST OF THE UNITED STATES

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

The United States has a direct interest in this appeal, which asks whether a plasma donation center is a public accommodation covered by Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. 12181 *et seq.* The Department

of Justice has authority to enforce and promulgate regulations implementing Title III. See 42 U.S.C. 12186(b), 12188(b); 28 C.F.R. Pt. 36. In addition, the Food and Drug Administration (FDA) is responsible for protecting the public health by, in part, ensuring the safety of biological products, and has established donor eligibility requirements for assuring the safety of blood products and protecting donor health. See 21 U.S.C. 301 *et seq.*; 42 U.S.C. 262(a); 21 C.F.R. Pt. 630.

The United States has filed briefs in the Tenth Circuit addressing ADA coverage of plasma donation centers. See U.S. Br. as Amicus Curiae, *Levorsen v. Octapharma Plasma*, 828 F.3d 1227 (10th Cir. 2016) (No. 14-4162); U.S. Reply Br. as Amicus Curiae, *Levorsen, supra* (No. 14-4162). In addition, the United States has enforced Title III against a plasma donation center, taking the position that it is a “service establishment” and therefore a “place of public accommodation.” 42 U.S.C. 12181(7)(F). That action resulted in a settlement agreement that permits individuals with disabilities to donate their plasma for a fee provided they pass the physical examination that all donors are required to pass. See *Settlement Agreement Between the United States And Bio-Medics*, available at <http://www.ada.gov/bio-medics.htm>.

STATEMENT OF THE ISSUE

The United States addresses the following issue only:

Whether a plasma donation center is a “service establishment” and therefore a “place of public accommodation” covered by Title III of the ADA, 42 U.S.C. 12181(7).

STATEMENT OF THE CASE

1. CSL Plasma, Inc. is a national corporation that operates plasma donation centers, which collect plasma from donors to create medical treatments.

ROA.143; ROA.1454.¹ Through a process called plasmapheresis, CSL Plasma uses specialized medical equipment to collect a donor’s blood, separate the plasma from the red blood cells, retain the plasma, and return the red blood cells to the donor. ROA.1454. CSL Plasma provides financial compensation to plasma donors. ROA.1454.

Mark Silguero is a longtime plasma donor who, the parties agree, qualifies as a person with a disability under the ADA because he has bad knees. ROA.1455. In January 2015, Silguero attempted to donate plasma at a CSL Plasma donation center in Corpus Christi, Texas, but was turned away. ROA.9; ROA.1455. During the donor screening process, a CSL Plasma staff member told Silguero that he

¹ “ROA.____” refers to consecutively numbered pages of the Record on Appeal.

could not donate because he had an unsteady gait that required him to use a cane. ROA.1455. The staff member expressed concern that Silguero would be unable to get on and off of the donation bed safely. ROA.1455.

Amy Wolfe attempted to donate plasma for the first time in October 2016 at a CSL Plasma donation center in Houston, Texas. ROA.62-63; ROA.1456. The parties agree that Wolfe qualifies as a person with a disability under the ADA because she suffers from severe anxiety. ROA.1456. Wolfe uses a service dog to help manage her anxiety. ROA.1456. When Wolfe arrived at CSL Plasma with her service dog, she was informed that she would not be allowed to donate as long as she needed a service dog to manage her anxiety. ROA.1456. CSL Plasma guidelines stated that donors with severe anxiety are not permitted to donate because there is a risk that the donation process will trigger an anxiety attack. ROA.147-148.

2. Silguero sued CSL Plasma alleging that it discriminated against him on the basis of his disability in violation of Title III of the ADA and an analogous state civil rights law. ROA.7-15. Wolfe intervened, also alleging discrimination on the basis of her disability. ROA.57-58.

CSL Plasma moved for summary judgment arguing, in relevant part, that a plasma donation center is not a “place of public accommodation” under the ADA because it is not a “service establishment,” one of the categories of public

accommodations covered by Title III. ROA.154-159. According to CSL Plasma, a plasma donation center is dissimilar to the types of service establishments listed in the statute, for two reasons. First, unlike the listed examples in the statute, plasma donation centers do not provide services to the public and do not charge a fee for any services. ROA.155. Instead, donors give their plasma and receive compensation for their time. ROA.155. Second, the public is not allowed “unfettered access” to its donation centers because it is required by the FDA to screen out donors for health and safety reasons. ROA.157. Thus, CSL Plasma contended, donation centers are actually commercial facilities that exist to gather raw materials for the manufacture of pharmaceuticals, not service establishments open to the public. ROA.158.

The district court granted CSL Plasma’s motion for summary judgment. ROA.1454. Relying on two canons of statutory construction—*ejusdem generis*² and *noscitur a sociis*³—the court agreed with CSL Plasma’s argument that a

² *Ejusdem generis* is the principle that “[w]hen 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); see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001).

³ *Noscitur a sociis* is the principle that “a word is given more precise content by the neighboring word with which it is associated.” *Freeman v. Quicken*
(continued...)

plasma donation center is not a “service establishment,” and therefore not a “place of public accommodation” covered by Title III of the ADA, because it differs from the other types of establishments listed in that category. ROA.1459-1461. The court reasoned that each “service establishment” listed in the statute provides a good or service in exchange for compensation. ROA.1460-1461. A plasma donation center, on the other hand, operates in reverse: The donor provides the good and the center provides compensation. ROA.1460-1461. The court did not address CSL Plasma’s argument that plasma donation centers are not service establishments because they are commercial facilities regulated by the FDA.

SUMMARY OF THE ARGUMENT

Title III of the ADA ensures that individuals with disabilities have the same access to all public accommodations as other members of the public. The statute defines public accommodation by setting out 12 broad categories, one of which is “service establishments.” Under a plain language reading of the statutory text, a plasma donation center is a service establishment because it provides plasma procurement services. Plasma procurement is a service under an ordinary interpretation of that word. That many state laws expressly define plasma

(...continued)

Loans, Inc., 566 U.S. 624, 634-635 (2012) (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)).

procurement as a service supports this plain meaning, as does the fact that many plasma donation centers describe plasma procurement as a service.

The district court concluded that a plasma donation center is not a service establishment because, unlike the examples listed in the statute, individuals do not pay the center for its services. But that direction-of-compensation analysis of “service establishment” is incorrect. Some commercial entities that qualify as service establishments, such as banks and recycling centers, do not always receive a fee for their services; on the contrary, in some circumstances, these establishments pay clients for their patronage. Instead, the common trait linking the listed examples of service establishments is that they each provide services by supplying expertise or specialized equipment or both. And like the listed examples, a plasma donation center provides services by supplying expert technicians and medical staff and specialized equipment like apheresis machines.

Finally, ADA coverage of plasma donation centers does not conflict with FDA regulations. Title III regulations permit public accommodations to impose legitimate safety requirements that are necessary for safe operation. Thus, plasma donation centers may reject potential donors who do not satisfy donor eligibility criteria, developed under standard operating procedures required by FDA regulations, to protect donor health and to assure the safety of blood products. But many potential donors with disabilities are able to satisfy such criteria for plasma

donation and should not be prevented from donating simply because they have disabilities. Moreover, that plasma donation centers may be considered manufacturers under FDA regulations does not mean that they cannot also qualify as service establishments under Title III.

ARGUMENT

A PLASMA DONATION CENTER IS A “SERVICE ESTABLISHMENT” AND THEREFORE A “PLACE OF PUBLIC ACCOMMODATION” UNDER TITLE III OF THE ADA

A. Statutory And Regulatory Background

Congress enacted 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). Congress found that discrimination has diminished the ability of individuals with disabilities “to fully participate in all aspects of society,” including “employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.” 42 U.S.C. 12101(a)(1) and (3). Congress therefore provided a broad range of protections from discrimination for individuals with disabilities in employment (Title I), public services or programs (Title II), and public accommodations (Title III).

Title III of the ADA provides that “[n]o 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). A private entity is a public accommodation when its operations affect commerce, and when it falls into at least one of 12 categories. See 42 U.S.C. 12181(7). Among these categories is a “service establishment.” 42 U.S.C. 12181(7)(F). Section 12181(7)(F) lists some examples of entities that fall within the “service establishment” category:

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). “While the list of categories is exhaustive, the representative examples of facilities within each category are not. Within each category only a few examples are given.” 28 C.F.R. Pt. 36, App. C. Accordingly, the listed examples serve merely as illustrations of entities that qualify as service establishments.⁴

⁴ See U.S. Dep’t of Justice, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* § III-1.2000, www.ada.gov/taman3.html.

B. Under The Plain Meaning Of Title III, A Plasma Donation Center Is A “Service Establishment”

An analysis of what constitutes a “service establishment” under Section 12181(7)(F) begins with the statutory text. See *Maslenjak v. United States*, 137 S. Ct. 1918, 1924 (2017); *Levorsen v. Octapharma Plasma*, 828 F.3d 1227, 1231 (10th Cir. 2016). Because the ADA does not define “service establishment,” it must be given its “ordinary, contemporary, common meaning.” *Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); cf. *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 533 (5th Cir. 2016) (starting analysis of what constitutes a “sales establishment” under Title III with the term’s plain meaning), cert. denied, 138 S. Ct. 55 (2017).⁵ In addition, undefined terms must be interpreted consistent with the “overall policies and objectives of the statute.” *NPR Investments, LLC v. United States*, 740 F.3d 998, 1007 (5th Cir. 2014).

⁵ In *Magee*, this Court held that a vending machine is not a “sales or rental establishment” under 42 U.S.C. 12181(7)(E) and therefore not a “place of public accommodation” under Title III. 833 F.3d at 535. The United States filed a brief in the Supreme Court agreeing with that interpretation and urging denial of the petition for a writ of certiorari. See U.S. Br. as Amicus Curiae, *Magee v. Coca-Cola Refreshments USA, Inc.*, 138 S. Ct. 55 (2017) (No. 16-668). The United States argued that a vending machine is not an “establishment” because it lacks features like a standalone location or identity and a proprietor or employees. See *id.* at 10-12. Here, there is no dispute that CSL Plasma’s donation centers are establishments.

The word “service” is not ambiguous, and under any ordinary definition of the term, a plasma donation center provides a “service.” Dictionary definitions of “service” easily encompass the act of taking people’s blood plasma to use for medicines and treatments. One dictionary defines service as “an act of helpful activity.”⁶ Another dictionary defines “service” as “conduct or performance that assists or benefits someone or something.” *Levorsen*, 828 F.3d at 1231 (citing Webster’s Third New International Dictionary 2075 (2002)). If a person wishes to provide blood plasma for use in the production of medical treatments, he or she will need help to do that. Blood plasma centers, which act as intermediaries in a commercial transaction for blood plasma between donors and pharmaceutical entities, supply that assistance in the form of trained personnel and necessary medical equipment. Without this helpful activity or assistance—that is, service—individuals who wish to provide blood plasma for medical use would be unable to do so. See *ibid.*

The Tenth Circuit reached the same conclusion—that the plain meaning of “service” easily encompasses blood plasma procurement—in *Levorsen*. In that case, a plasma donation center run by Octapharma Plasma refused to allow Brent Levorsen to donate plasma because he suffers from borderline schizophrenia.

⁶ *Service*, Random House Dictionary.com, <http://dictionary.reference.com/browse/service> (last visited Feb. 6, 2018).

Levorsen, 828 F.3d at 1229. Like CSL Plasma here, Octapharma Plasma argued that a plasma donation center is not a service establishment and therefore not a public accommodation under Title III. *Id.* at 1230. The Tenth Circuit disagreed, concluding that plasma donation centers provide a “service” under ordinary dictionary definitions of the word. *Id.* at 1231. To conclude otherwise, the Tenth Circuit stated, would require it to “bend over backwards to give the term ‘service establishment’ a definition that is more narrow than the plain meaning of its component parts.” *Id.* at 1232.

State-law treatment of blood plasma procurement supports the conclusion that the term “service” in Title III is naturally read to include plasma collection. Many state laws expressly define procurement of blood plasma as a service. In the Fifth Circuit, Mississippi’s State Code defines “the procurement, processing, storage, distribution, and/or use of whole blood, plasma, blood products and blood derivatives * * * for the purpose of injecting, transfusing, transplanting or transferring the same or any of them into the human body for all purposes whatsoever” as “the *rendering of a service.*” Miss. Code Ann. § 41-41-1 (West 2017) (emphasis added). Many other States also define procurement of blood products as a “rendition of a service.” See, e.g., Ala. Code § 7-2-314(4) (1975) (stating that procuring plasma, as well as other blood products and human tissues “is declared *for all purposes to be the rendition of a service*”) (emphasis added);

Cal. Health & Safety Code § 1606 (West 2017) (similar); Kan. Stat. Ann. § 65-3701 (West 2017) (similar); Neb. Rev. Stat. Ann. § 71-4001 (West 2017) (similar); Utah Code Ann. § 26-31-201(1) (West 2017) (similar); Vt. Stat. Ann. tit. 9A, § 2-108 (West 2017) (similar).⁷

Indeed, even the names of CSL Plasma’s competitors and descriptions of their businesses confirm that procuring blood plasma is commonly understood within that industry to be a rendition of a service. For example, one blood plasma firm is called “BioLife Plasma Services.” On its website, BioLife Plasma Services states that part of its “vision” is that “[e]very donor is recognized for his or her contribution and *given exceptional service.*”⁸ Another organization called “Immunotek” states that it “is strategically positioned to partner with

⁷ Although Texas law defines procurement of blood components as an “activity,” Tex. Civ. Prac. & Rem. Code Ann. § 77.003(a) (West 2017), that definition does not preclude it from also being a “service.” Indeed, as noted above, at least one dictionary defines “service” as “an act of helpful activity.” See *supra* & n.6. In any event, CSL Plasma operates plasma donation centers nationally, including in States that define blood-component procurement as a “service.” See CSL Plasma, *Find a Donation Center*, <https://www.cslplasma.com/locations/search-results-state> (last visited Feb. 6, 2018).

⁸ BioLife Plasma Services, *Who We Are*, <https://biolifeplasma.com/us/#/about-biolife/who-we-are> (last visited Feb. 6, 2018) (emphasis added).

pharmaceutical entities to open, manage, and operate plasma donor centers *as a service.*”⁹

In reaching a different conclusion, the district court incorrectly applied principles of statutory construction, namely *ejusdem generis* and *noscitur a sociis*, see p. 5-6 n.2 & 3 (defining these canons), *supra*, to narrow improperly the meaning of service establishment. The district court began by identifying a purported common trait linking the listed examples of service establishments: “[T]he provision of goods or services by the establishment in exchange for compensation.” ROA.1460. The court then reasoned that a plasma donation center is not a service establishment because it operates in reverse: The plasma donation center compensates donors for donating their plasma.

The district court’s reasoning is flawed. Nothing in the statutory text imposes “a direction-of-compensation requirement,” *Levorsen*, 828 F.3d at 1233, and while many commercial service establishments require payment for services rendered, others do not. For instance, a bank, one of the listed examples in Section 12181(7)(F), typically pays interest to people who open savings accounts. In addition, many banks do not ordinarily charge a customer for common banking services like withdrawing or depositing money. Other service establishments that

⁹ Immunotek, <http://www.immunotek.com> (last visited Feb. 6, 2018) (emphasis added).

are not listed in the statute also do not receive compensation from customers. For example, a recycling center has been held to be a “service establishment” under Title III. See, *e.g.*, *Estrada v. South St. Prop., LLC*, No. 2:17-CV-00259-CAS(JCx), 2017 WL 3461290, at *3 (C.D. Cal. Aug. 11, 2017). But a recycling center may not charge individuals for its recycling collection services and, like plasma donation centers, may actually compensate them for the bottles, cans, and scrap metal it collects.

The common trait linking the listed examples of a “service establishment” in Section 12181(7)(F) is thus not the receipt of compensation for services but, rather, that each commercial establishment provides services by supplying expertise or equipment or both. For example, a hospital provides specialized equipment like a CAT-scan machine and trained doctors and nurses; a barber has expertise in cutting hair and uses a variety of tools like scissors and razors for doing the job; a shoe repair service uses both trained cobblers and particular equipment; and so on. Plasma donation centers share the same characteristics: They provide the specialized equipment needed to procure plasma (*e.g.*, needles, tubing, apheresis machines) and trained medical personnel to assess donor eligibility and operate the equipment. Thus, contrary to the district court’s reasoning, a correct application of relevant canons of statutory interpretation confirms that a plasma donation center fits comfortably into the ordinary meaning of “service establishment.”

Construing “service establishment” to include a plasma donation center also is consistent with the ADA’s purpose. As the Supreme Court has explained, Title III was designed “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, 676-677 (2001) (citing S. Rep. No. 116, 101st Cong., 1st Sess. 59 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 100 (1990)). Indeed, in enacting the ADA, Congress changed the language of Section 12181(7)(F) from “other similar service establishments” to “other service establishments” to make it easier for individuals to establish that an entity is covered by Title III. H.R. Rep. No. 558, 101st Cong., 2d Sess. 71 (1990). Construing “service establishment” to exclude a plasma donation center would defeat Title III’s purpose by denying people with disabilities equal access to a service that is available to people without disabilities. See *Levorsen*, 828 F.3d at 1232-1233.¹⁰

¹⁰ In the district court, CSL Plasma relied on the United States’ brief in *Magee* to argue that, because plasma donation centers existed at the time the ADA was enacted, Congress would have listed them expressly in Section 12181(7)(F) if it had intended that they be covered. See ROA.938-939 (citing U.S. Br. as Amicus Curiae at 11-12, *Magee, supra* (No. 16-668)). That argument misconstrues the government’s brief. In *Magee*, the United States argued that, because vending machines were ubiquitous at the time the ADA was enacted, “Congress’s failure to identify any enumerated category of ‘public accommodation’ that meaningfully resembles vending machines” indicates that Congress did not intend to include them within the definition of that term. U.S. Br. as Amicus Curiae at 11-12, *Magee, supra* (No. 16-668). Here, although plasma donation centers existed at the

(continued...)

C. *Interpreting Title III To Cover Plasma Donation Centers Does Not Conflict With FDA Regulations*

Finally, ADA coverage of plasma donation centers would not conflict with FDA regulations. Although the district court did not address this issue in its analysis of the plaintiffs' ADA claim,¹¹ CSL Plasma argued that as a commercial facility regulated by the FDA, it could not also be a "service establishment" subject to Title III's antidiscrimination requirements. This argument fails.

First, ADA coverage of plasma donation centers would not impair CSL Plasma's ability to establish and follow standard operating procedures, as required by FDA regulations, describing donor eligibility criteria developed to protect donor health and to assure the safety of blood products. Title III coverage does not mean that a public accommodation must serve every person who walks through the door. Indeed, a bank, which Title III expressly covers, is not required to provide a loan to every person with a disability who enters the bank. The bank is permitted to apply eligibility criteria for loans, including, for example, income and credit score

(...continued)

time the ADA was enacted, they were far from "a familiar feature of the commercial landscape." *Id.* at 12. More importantly, they fit within the catch-all provision of Section 12181(7)(F) because they share characteristics common to the listed service establishments: (1) they provide a service, (2) they have a standalone presence, and (3) they are operated by employees. Cf. *id.* at 9.

¹¹ But see ROA.1463 (citing FDA regulations in its analysis of plaintiffs' state civil rights claim).

requirements. Similarly, in this context, Title III regulations state that “[a] public accommodation may impose legitimate safety requirements that are necessary for safe operation.” 28 C.F.R. 36.301(b). This regulation permits public accommodations to “impose neutral rules and criteria that screen out, or tend to screen out, individuals with disabilities, if the criteria are necessary for the safe operation of the public accommodation.” 56 Fed. Reg. 35,544, 35,564 (July 26, 1991); see also 28 C.F.R. 36.301(b). Any safety requirement imposed, however, “must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.” 28 C.F.R. 36.301(b); see *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1137 (9th Cir. 2012).

Complying with FDA regulations to protect donor health and to assure the safety of blood products is “necessary for the safe operation” of a plasma donation center. 56 Fed. Reg. 35,544, 35,564; see also 28 C.F.R. 36.301(b). FDA regulations require donation centers to have written standard operating procedures addressing all steps they must follow in the collection of blood. 21 C.F.R. 606.100(b). A donation center must screen potential donors before collecting blood products by assessing a donor’s medical history and performing a physical assessment. See 21 C.F.R. 630.10(a) and (d). And a donor is only eligible to donate if he or she is “in good health and free from transfusion-transmitted infections.” 21 C.F.R. 630.10(a). Accordingly, a plasma donation center would

not face liability under the ADA if it turned away a donor with a disability who was not “in good health” or whose plasma posed a safety risk to the blood supply, just like a bank would not be liable for turning away a customer with a disability who did not meet its income and credit score requirements. See *Levorsen*, 828 F.3d at 1234 n.9; see also *Settlement Agreement Between The United States of America And Bio-Medics*, available at <https://www.ada.gov/bio-medics.htm> (stating that individuals with disabilities should be permitted to donate plasma “as long as they pass the physical examination that all donors are required to pass”).

That some individuals with disabilities will not be eligible (or may be less likely than other individuals to be eligible) as plasma donors is not a reason to categorically exempt plasma donation centers from ADA coverage. Many individuals with disabilities are “in good health,” 21 C.F.R. 630.10(a), and otherwise eligible to donate plasma in accordance with FDA regulations. For example, individuals who are blind or deaf or have certain mobility impairments may be able to meet the criteria used to determine eligibility for being a plasma donor. It is not a legitimate safety requirement to turn away every potential donor with a disability based on the assumption that a person with a disability is not “in good health” under FDA regulations. See 28 C.F.R. 36.301(b); 21 C.F.R. 630.10(a). On the contrary, Title III regulations require that eligibility criteria be

based on actual risks and not on generalizations about people with disabilities. See 28 C.F.R. 36.301(b).

CSL Plasma's argument in the district court that the donor screening process renders a plasma donation center a "mixed use facility" lacks merit. The mixed-use concept applies only to commercial facilities that generally are not open to the public but provide access to the public for a limited purpose (*e.g.* movie studios or factories that offer tours). See 28 C.F.R. Pt. 36, App. C at 940-941 (2017). CSL Plasma admits that its plasma donation centers generally are open to the public, but argued to the district court that they are exempt from Title III because access to the donor floor portion of a center (as opposed to its reception area) is restricted. ROA.158-159 (citing 28 C.F.R. Pt. 36, App. C at 940–941 (2017)). But "[t]he fact that entry to a part of a public accommodation may be limited" or that "users of a facility are highly selected does not mean that the facility cannot be a public accommodation." *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 997-998 (9th Cir. 2000), *aff'd*, 543 U.S. 661 (2001).¹²

¹² See also U.S. Dep't of Justice, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities* § III-1.2000, www.ada.gov/taman3.html (explaining that a medical care center that serves patients in the same building where administrative offices are located is still considered a place of public accommodation, "even if one or more floors are reserved for the exclusive use of employees").

Relatedly, that CSL Plasma qualifies as an establishment engaged in manufacturing under FDA regulations does not mean that it cannot also qualify as a service establishment under Title III. Under FDA regulations, “[m]anufacture” is defined to include “the collection, preparation, processing, or compatibility testing * * * of any blood product which meets the definition of drug as defined in section 201(g) of [the Federal Food, Drug, and Cosmetic Act], and including manipulation, sampling, testing, or control procedures applied to the final product or to any part of the process.” 21 C.F.R. 607.3(d). Under this definition of “manufacture,” a hospital also would qualify as an establishment engaged in manufacturing. Yet, a hospital is one of the enumerated examples of a service establishment in Section 12181(7)(F). Similarly, certain recycling centers manufacture new products from recyclable materials.

Indeed, there is no “authority establishing that an entity can’t simultaneously be both a manufacturer and a service establishment for purposes of [Section] 12181(7)(F), especially if—as is the case here—that entity provides a service to some customers while producing a tangible good for others.” *Levorsen*, 828 F.3d at 1234 n.8. As already explained, CSL Plasma falls within the plain meaning of Title III because it provides a service to people who wish to donate their plasma. Accordingly, FDA regulations requiring that donors be eligible to donate do not prevent CSL Plasma from qualifying as a service establishment under the ADA.

CONCLUSION

This Court should vacate the district court's judgment and remand the case for further proceedings.

Respectfully submitted,

JOHN M. GORE
Acting Assistant Attorney General

s/ Elizabeth Nash
TOVAH R. CALDERON
ELIZABETH NASH
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section – RFK 3736
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-3412

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY:

(1) complies with Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 4,681 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in 14-point Times New Roman font.

s/ Elizabeth Nash
ELIZABETH NASH
Attorney

Dated: February 6, 2018

CERTIFICATE OF SERVICE

I certify that on February 6, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY with the Clerk of the Court for the United States Courts of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Elizabeth Nash
Elizabeth Nash
Attorney