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“CATEGORICALLY UNSAFE” TO DONATE

Marielle Forrest*

Abstract

Plasma donation centers routinely adopt policies that preclude individuals with mental illnesses from donating blood plasma. While plasma donation centers assert that their policies are motivated by employee and customer safety, such safety concerns are unsubstantiated. These policies are based on speculation and stereotypes, rather than scientific evidence. But discrimination against people with mental illness is only unlawful if perpetrated by an entity subject to the Americans with Disabilities Act (“ADA”), and circuit courts are split on whether blood plasma donation centers fall within the ADA’s parameters. In 2016, the Tenth Circuit held that blood plasma donation centers are “service establishments” under Title III of the ADA but, two years later, the Fifth Circuit held the opposite. In 2019, the Third Circuit weighed in, agreeing with the Tenth Circuit.

This Note argues that the Fifth Circuit’s holding is unpersuasive, and that blood plasma donation centers should constitute “service establishments” under the ADA. Accordingly, this Note argues for the finding that, when blood plasma donation centers discriminate against individuals with mental illness, the centers are violating the ADA. This Note begins with a discussion of blood plasma donation facilities and the ADA. Next, it summarizes the three Circuit Court cases in question. This Note then proposes three reasons why plasma donation centers are ADA “service establishments”: first, the Department of Justice (“DOJ”), an agency tasked with enforcing the ADA, itself interprets “service establishments” as including plasma donation centers, and the DOJ’s interpretation warrants deference; second, the Fifth Circuit did not adequately respond to the plaintiff’s statutory purpose argument; third, for compelling policy reasons, courts should be motivated to find that plasma collection centers are “service establishments,” namely, to diminish public stigma and the harmful effects that flow therefrom, and to show those with mental illnesses the respect and dignity that they are owed.

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I. INTRODUCTION

Plasma donation centers routinely adopt, under the guise of safety, policies that preclude certain individuals with mental illnesses from donating blood plasma.¹ These policies have the potential to deter one in five adults from making plasma donations.² This prospect is particularly shocking in light of the COVID-19 pandemic, where blood plasma donation has become an important source of income for many people,³ as well as a key aspect of COVID-19 therapy research.⁴ Plasma donation centers obstruct these ends through discrimination. While plasma donation centers assert that their policies are motivated by employee and customer safety,⁵ these safety concerns are unsubstantiated. Indeed, “[n]o medical justification or other scientific evidence undergirds” plasma donation centers’ “implicit conclusion” that all who have a particular mental illness, such as severe anxiety or schizophrenia, “will put staff, other donors, or themselves at risk when donating plasma.”⁶ These policies, rather, are “based on speculation, stereotypes, or generalizations.”⁷

The problem is that it is not inherently unlawful for plasma donation centers to discriminate against people with mental illnesses. Discrimination against those with mental illnesses is only unlawful if perpetrated by an entity subject to the Americans with Disabilities Act (“ADA”)—and circuit courts have split on whether blood plasma donation centers fall within the ADA’s parameters.⁸ First, in 2016, the Tenth Circuit, in *Levorsen v. Octapharma Plasma, Inc.*, held that blood plasma donation centers are “service establishments” under Title III of the ADA.⁹ Then, in 2018, the Fifth Circuit, in *Silguero v. CSL Plasma, Inc.*, held that blood plasma donation

¹ See, e.g., *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 326–27 (5th Cir. 2018); *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174, 180 (3d Cir. 2019); *Levorsen v. Octapharma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016).

² *Mental Health by the Numbers*, NAT’L ALL. ON MENTAL ILLNESS, <https://www.nami.org/mhstats> [<https://perma.cc/5XFW-CNUY>] (last updated Mar. 2021).

³ See, e.g., Grace Juarez, *Plasma Donations Act as Supplemental Income for Some During COVID-19 Pandemic*, LUFKIN DAILY NEWS (May 12, 2020), https://lufkindailynews.com/coronavirus/article_0ce734b2-60cd-5428-bc5e-18708ac846d5.html [<https://perma.cc/5M8C-B5YM>] (“In the midst of a pandemic where money is increasingly tight for some families, people are turning to alternative methods of income like donating plasma.”).

⁴ See, e.g., *AABB COVID-19 Resources*, AM. ASS’N OF BLOOD BANKS, <https://www.aabb.org/regulatory-and-advocacy/regulatory-affairs/infectious-diseases/coronavirus> [<https://perma.cc/ZY5U-BYZT>] (last visited June 13, 2021) (“Convalescent plasma has a long history of helping to reduce the severity of infectious disease outbreaks. Data from clinical trials conducted during the COVID-19 pandemic suggest that, when administered early in the course of COVID-19 infection, CCP may help reduce the length and severity of illness in some patients.”).

⁵ See, e.g., *Silguero*, 907 F.3d at 327; *Matheis*, 936 F.3d at 180.

⁶ *Matheis*, 936 F.3d at 181.

⁷ *Id.*

⁸ See generally *Levorsen v. Octapharma, Inc.*, 828 F.3d 1227 (10th Cir. 2016); *Silguero*, 907 F.3d 323.

⁹ 828 F.3d at 1234.

centers are not Title III “service establishments.”¹⁰ Finally, in 2019, the Third Circuit, in *Matheis v. CSL Plasma, Inc.*, agreed with the Tenth Circuit.¹¹ (In February 2020, the Supreme Court denied certiorari from the Fifth Circuit’s *Silguero v. CSL Plasma, Inc.*).¹²

This Note will analyze this circuit split. Part II of this Note gives background on blood plasma donation facilities and the ADA. Part III reviews the Tenth, Fifth, and Third Circuit Court cases, the various judicial interpretations of “service establishments,” and the circuit courts’ respective holdings. Part IV argues that the Fifth Circuit’s holding is unpersuasive and that blood plasma donation centers should constitute “service establishments” under the ADA. Part IV reaches this conclusion in light of the Department of Justice’s (“DOJ’s”) interpretation of “service establishments” and the deference owed therein, the Fifth Circuit’s inadequate response to the plaintiff’s statutory purpose argument, and the multitude of policy reasons that should motivate courts to find that plasma collection centers are “service establishments.”

II. BLOOD PLASMA DONATION CENTERS, THE ADA, AND “SERVICE ESTABLISHMENTS”

Circuit courts are split on whether blood plasma donation centers fall within the ADA’s Title III “service establishment” parameters. Understanding these conflicting rulings requires first, understanding how blood plasma donation centers operate, and second, understanding the ADA and its Title III “service establishments.”

A. *CSL Plasma and Octapharma Donation Centers*

Two plasma donation companies, Octapharma Plasma, Inc. and CSL Plasma, Inc., were defendants in the circuit split. Octapharma is a U.S.-based company that operates over eighty plasma donation centers in thirty-four states.¹³ CSL Plasma operates “one of the world’s largest . . . plasma collection networks, with more than 270 plasma collection centers in U.S., Europe and China”¹⁴

¹⁰ 907 F.3d at 332.

¹¹ 936 F.3d 171.

¹² 140 S. Ct. 1107, 1108 (2020) (mem.).

¹³ *Donation Centers*, OCTAPHARMA PLASMA, <https://octapharmaplasma.com/donor/donation-centers> [<https://perma.cc/QT22-XUUC>] (last visited June 5, 2021); *About OPI*, OCTAPHARMA PLASMA <https://octapharmaplasma.com/about> [<https://perma.cc/YN99-7VXX>] (last visited June 5, 2021).

¹⁴ *About CSL Plasma*, CSL PLASMA, <https://www.cslplasma.com/about-csl-plasma> [<https://perma.cc/KD5Q-RAFJ>] (last visited June 5, 2021).

At Octapharma and CSL Plasma facilities, employees collect plasma from donors using a process called plasmapheresis.¹⁵ During the process, staff members draw and process each donor's blood, "separating and reserving the plasma before returning the red blood cells to the donor."¹⁶ Octapharma and CSL Plasma sell the collected plasma to pharmaceutical companies, who use it to create "life-saving medicines that treat patients with rare, chronic, and inherited diseases[.]"¹⁷ The plasma is also used in "emergency medicine or trauma, for bleeding disorders like hemophilia, and to treat patients whose bodies have trouble fighting infections because of immune diseases."¹⁸ Octapharma and CSL Plasma compensate donors for their plasma with money.¹⁹

In general, donating plasma is an intense process that can take up to two hours.²⁰ Importantly, to be eligible to donate plasma, prospective donors must pass "an individualized screening process."²¹ "Those who do not pass the screening, for whatever reason, are deferred—told they will not be permitted to donate and will not be paid."²² To be eligible to donate, the individual must meet the Food and Drug Administration's ("FDA's") regulations for donor eligibility.²³ The FDA's regulations state that a donor is not eligible to donate plasma if (A) "the donor is not in good health" or (B) the plasma donation center identifies "any factor(s) that may cause the donation to adversely affect: (1) The health of the donor; or (2) The safety, purity, or potency of the blood or blood component."²⁴

¹⁵ Octapharma's website describes the process: "A trained staff member called a phlebotomist puts a sterile needle in your arm vein to draw blood. The blood is then cycled through special, sterile equipment that separates plasma from the other parts of your blood. Your plasma is then collected in a container, while the other parts are safely returned to your body." *Plasma Donation FAQs*, OCTAPHARMA PLASMA, <https://octapharmaplasma.com/donor/plasma-donation-faq> [<https://perma.cc/K7UQ-JKEM>] (last visited June 5, 2021). CSL Plasma uses the same process. See *Your First Donation*, CSL PLASMA, <https://www.csplasma.com/become-a-donor/your-first-donation> [<https://perma.cc/M2BM-H53X>] (last visited June 5, 2021) ("We collect your plasma using a special process called plasmapheresis that separates the plasma from the blood and collects it in a bottle.").

¹⁶ *Levorsen v. Octapharma*, 828 F.3d 1227, 1229 (10th Cir. 2016); see also *Your First Donation*, *supra* note 15 ("We use a sophisticated high-tech machine that safely collects the plasma and returns the other parts of the blood back to you . . .").

¹⁷ *Your First Donation*, *supra* note 15; *Plasma Donation FAQs*, *supra* note 15; see also *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174 (3d Cir. 2019) (noting that CSL Plasma transports plasma "to be made into medicines").

¹⁸ *Plasma Donation FAQs*, *supra* note 15.

¹⁹ See *id.* ("New Donors can make up to \$250 for their first five plasma donations . . ."); *Your First Donation*, *supra* note 15 (noting that donors can earn up to \$1,100 during their first month donating plasma).

²⁰ *Matheis*, 936 F.3d at 174–75; *Plasma Donation FAQs*, *supra* note 15.

²¹ *Matheis*, 936 F.3d at 175.

²² *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 325 (5th Cir. 2018).

²³ *Id.*; *Levorsen v. Octapharma*, 828 F.3d 1227, 1234 n.9 (10th Cir. 2016).

²⁴ 21 C.F.R. § 630.10(a) (2020).

More specifically, under FDA regulations, plasma donation centers must check a prospective donor’s temperature,²⁵ blood pressure,²⁶ hemoglobin level,²⁷ pulse,²⁸ weight,²⁹ and skin condition.³⁰ Moreover, pursuant to a general safety provision, plasma donation centers may take steps it deems necessary to ensure the health of the donor and the “safety, purity, or potency” of the plasma.³¹ For instance, plasma donation centers may consider an individual’s medications, vaccinations, and pre-existing medical conditions.³² It is also from this general safety provision that Octapharma and CSL Plasma created the company policies at issue in this Note.³³

B. The ADA and Title III “Service Establishments”

In July 1990, Congress passed the ADA in response to its observation that “historically, society has tended to isolate and segregate individuals with disabilities” and that this “continue[s] to be a serious and pervasive social problem.”³⁴ In enacting the ADA, Congress intended to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with [physical and mental] disabilities.”³⁵ Accordingly, the ADA is far-

²⁵ *Id.* § 630.10(f)(1) (“The donor’s oral body temperature must not exceed 37.5 °C (99.5 °F), or the equivalent if measured at another body site.”).

²⁶ *Id.* § 630.10(f)(2) (“The donor’s systolic blood pressure must not measure above 180 mm of mercury, or below 90 mm of mercury, and the diastolic blood pressure must not measure above 100 mm of mercury or below 50 mms of mercury.”).

²⁷ *Id.* § 630.10(f)(3) (“You must determine the donor’s hemoglobin level or hematocrit value by using a sample of blood obtained by fingerstick, venipuncture, or by a method that provides equivalent results.”).

²⁸ *Id.* § 630.10(f)(4) (“The donor’s pulse must be regular and between 50 and 100 beats per minute.”).

²⁹ *Id.* § 630.10(f)(5) (“The donor must weigh a minimum of 50 kilograms (110 pounds).”).

³⁰ *Id.* § 630.10(f)(6) (“(i) The donor’s phlebotomy site must be free of infection, inflammation, and lesions; and (ii) The donor’s arms and forearms must be free of punctures and scars indicative of injected drugs of abuse.”).

³¹ *Id.* § 630.10(a).

³² *Donor Information, First-Time Donors*, OCTAPHARMA PLASMA, <https://octapharma.plasma.com/donor/first-time-donors> [<https://perma.cc/WKZ5-R77Z>] (last visited June 5, 2021).

³³ CSL Plasma considers its policy to defer individuals who require service animals to treat their anxiety as a “safety requirement.” *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 327 (5th Cir. 2018). Moreover, CSL’s policy to defer donors “who use multiple anxiety medications . . . is a safety rule . . .” *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 180 (3rd Cir. 2019). Finally, Octapharma’s decision to defer an individual with schizophrenia was out of a concern for safety because the establishment feared that the prospective donor “might have a schizophrenic episode while donating and dislodge the collecting needle, possibly injuring himself or someone else.” *Levorsen v. Octapharma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016).

³⁴ 42 U.S.C. § 12101(a)(2) (2012).

³⁵ *Id.* § 12101(b)(1).

reaching, prohibiting discrimination on many different fronts, from workplaces and public services to public accommodations.³⁶ The Supreme Court has described the ADA as “‘a milestone on the path to a more decent, tolerant, progressive society’”³⁷

But, while the ADA may be comprehensive on its face, those with mental illnesses are often unprotected.³⁸ Indeed, some argue that there is a “near-total failure of the ADA to protect individuals with psychiatric disabilities”³⁹ This failure arises, to some extent, from the ADA’s nebulous language.⁴⁰ For instance, the ADA’s protections are triggered, in relevant part, when “any person who owns, leases (or leases to), or operates a place of public accommodation” discriminates against an individual “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”⁴¹ The ADA defines “disability” as “a physical or *mental impairment* that *substantially limits* one or more *major life activities* of such individual.”⁴² But the ADA never defines what constitutes a “mental impairment,” what it means to “substantially” limit major life activities, or which “life activities” are considered “major.”⁴³

³⁶ *Id.* § Ch. 126.

³⁷ *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (quoting *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring)).

³⁸ See, e.g., Susan Stefan, *You’d Have to Be Crazy to Work Here: Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 802–03 (1998) (“Plaintiffs with psychiatric disabilities almost always lose ADA discrimination cases, despite EEOC regulations and guidance requiring employers to adjust supervisory methods, or permit employees to work fewer hours, or work different shifts if feasible. This is because courts reflexively assume that conditions which preclude people with psychiatric disabilities from being successful are necessary elements of the workplace. While courts understand that accessible workplaces may require teletypewriters or ramps, and that neither sexual harassment nor race discrimination is an employer prerogative, stress, punishing hours, overwork, unpleasant personality conflicts, and even worker abuse are much more commonly seen as simply intrinsic features of the workplace.”); Kathleen D. Zylan, *Legislation That Drives Us Crazy: An Overview of “Mental Disability” Under the Americans with Disabilities Act*, 31 CUMB. L. REV. 79, 120–21 (2000) (“A quick survey of the case law demonstrates that the ADA lacks the necessary specificity to provide the ‘clear, strong, consistent, enforceable standards addressing discrimination against individuals with (mental) disabilities’ that the statute was enacted to provide.”).

³⁹ Stefan, *supra* note 38, at 805.

⁴⁰ Zylan, *supra* note 38, at 80.

⁴¹ 42 U.S.C. § 12182 (emphasis added).

⁴² *Id.* § 12102(1)(A) (emphasis added).

⁴³ While the ADA lists a handful of activities that constitute “major life activities” (e.g., “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, . . . speaking, breathing, learning, . . . thinking, communicating,” working, and performing major bodily functions), this list is non-exclusive (the definition states that “major life activities include, but are not limited to . . .”). *Id.* § 12102(2). Thus, ambiguity arises for other activities that litigants argue are major life activities, despite lacking an explicit reference in the statute’s definition.

Courts are tasked with interpreting the ADA’s ambiguities. Unfortunately, judicial discretion frequently results in holdings that fail to recognize the nature of mental illness. Courts have held, for example, that documentation from physicians (as opposed to psychiatrists) is insufficient to demonstrate a psychiatric impairment, that post-traumatic stress disorder is not “substantial” enough to be covered under the ADA, and that interacting with others is not a “major life activity”—discounting the difficulties that often come with major depression and anxiety.⁴⁴

In the context of blood plasma donation centers, courts do not reach the question of what constitutes a “disability” under the ADA. Before approaching the ambiguities found in that definition, courts must first decide a separate point of contention—whether blood plasma donation centers are considered public accommodations under ADA Title III. Title III defines “*public accommodations*” as places of: lodging, food and drink, “exhibition or entertainment” (e.g., movie theaters, stadiums), public gatherings (e.g., auditoriums, convention centers, lecture halls), sales and rentals (e.g., grocery stores, clothing stores, shopping centers), public transportation, public display or collection (e.g., a museum), recreation, education, social services (e.g., daycare centers, homeless shelters), exercise, and places that constitute “*service establishment[s]*.”⁴⁵ Title III goes on to define a “*service establishment*” as “a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or *other service establishment*.”⁴⁶

Because Title III’s list of “service establishments” is non-exclusive,⁴⁷ and because Title III does not expressly define “service establishment,” it is up to the courts to interpret what other establishments, in addition to those enumerated, constitute “service establishments.” This Note will address whether blood plasma donation centers constitute “service establishments.”

III. THE CIRCUIT SPLIT: IS PLASMA COLLECTION A “SERVICE”?

While some contend that plasma donation centers fall within Title III’s “other service establishment” catchall,⁴⁸ the centers themselves argue that they fall outside of it and, consequently, outside of the ADA.⁴⁹ In effect, it is up to the courts to decide whether plasma donation centers are considered service establishments and, if so, whether service establishments can discriminate against people based on mental illness. In the Tenth and Third Circuits, plasma donation centers are considered service establishments and are subject to ADA provisions. In the Fifth Circuit,

⁴⁴ Zylan, *supra* note 38, at 90–99.

⁴⁵ *Id.* § 12181(7).

⁴⁶ *Id.* § 12181(7)(F) (emphasis added).

⁴⁷ *See infra* Section III.C.

⁴⁸ *See Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016); *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 176 (3d Cir. 2019); *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 327 (5th Cir. 2018).

⁴⁹ *See, e.g., Levorsen*, 828 F.3d at 1229–30.

plasma donation centers fall outside Title III's catchall. Depending on which circuit court is correct, plasma donation centers may or may not be barred from discriminating against potential donors' mental illnesses. This Part reviews the (A) Tenth, (B) Fifth, and (C) Third Circuit cases, as well as the judicial interpretations of "service establishments," and the circuit courts' respective holdings.

A. The Tenth Circuit: Blood Plasma Donation Centers Are "Service Establishments"

In the Tenth Circuit case of *Levorsen v. Octapharma Plasma, Inc.*,⁵⁰ the court held that blood plasma donation centers are service establishments and, accordingly, must comply with the ADA.⁵¹ In *Levorsen*, a blood plasma donation center (Octapharma) denied a man (Levorsen) the opportunity to donate blood plasma because of his mental illness.⁵² Levorsen, who suffered from "various psychiatric disorders, including borderline schizophrenia,"⁵³ had, for years, donated plasma "to supplement his limited income."⁵⁴

In May of 2013, Levorsen went to donate plasma at a branch of Octapharma located in Salt Lake City.⁵⁵ After learning that Levorsen suffered from borderline schizophrenia, the staff at Octapharma deemed Levorsen ineligible to donate plasma because they were concerned that Levorsen might have a schizophrenic episode and "dislodge the collecting needle, possibly injuring himself or someone else."⁵⁶ The fact that Levorsen had donated plasma in the past was irrelevant.⁵⁷ Levorsen went so far as to present documentation signed by his psychiatrists, indicating that he was "medically suitable to donate plasma twice a week."⁵⁸ The psychiatrists' approval, vouching for Levorsen's fitness, made no difference—Octapharma still barred Levorsen from donating.⁵⁹

The district court, narrowly construing "service establishments" under the ADA, held that Octapharma, as a blood plasma donation center, did not fall within the scope of the statute.⁶⁰ Levorsen appealed the decision to the Tenth Circuit, and the Tenth Circuit granted *de novo* review.⁶¹

The Tenth Circuit reversed the district court's decision, construing Title III broadly and ruling in favor of Levorsen. The court began its analysis by stating that courts are obliged to "construe [the ADA's provisions] liberally to afford individuals

⁵⁰ *Id.* at 1227.

⁵¹ *Id.* at 1234.

⁵² *Id.* at 1229–30.

⁵³ *Id.* at 1229.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1229–30.

⁶⁰ *Id.* at 1236.

⁶¹ *Id.* at 1230–31.

with disabilities access to the same establishments available to those without disabilities.”⁶² With this frame of reference, the court examined the scope of service establishments to see if it included blood plasma donation centers.

The Tenth Circuit arrived at an unambiguous definition of “service establishment,” “begin[ning] and end[ing] with the plain meaning of the words that Congress employed.”⁶³ According to the terms’ dictionary definitions, “[a]n establishment is a ‘place of business’ or ‘a public or private institution ([such] as a school or hospital)’” and “a service is ‘conduct or performance that assists or benefits someone or something,’ or ‘useful labor that does not produce a tangible commodity.’”⁶⁴ From this, the court combined the terms’ definitions and concluded that a service establishment is “a place of business or a public or private institution that, by its conduct or performance, assists or benefits someone or something or provides useful labor without producing a tangible good for a customer or client.”⁶⁵

This ordinary meaning, the court found, “yields a broad definition that is entirely consistent with Title III’s” objective to promote the same opportunities for all individuals, regardless of disability.⁶⁶ Because plasma donation centers are places of business that “‘assist[] or benefit[]’” plasma donors by supplying them with trained personnel and medical equipment, blood plasma donation centers constitute service establishments.⁶⁷ Whether a donor is motivated by “altruistic reasons or for pecuniary gain” is irrelevant.⁶⁸

While the court found that the plain meaning of “service establishment” included blood plasma donation centers, the court went on to consider *ejusdem generis* and *noscitur a sociis*,⁶⁹ canons that Octapharma argued indicate that blood plasma donation centers are beyond the scope of a “service establishment.”⁷⁰ The court arrived at the opposite conclusion.⁷¹

The court conceded that “because—unlike [Title III’s] enumerated examples [of “service establishments”]—[plasma donation centers] provide compensation to, rather than accept compensation from, their customers,” both *ejusdem generis* and *noscitur a sociis* indicate plasma donation centers should not be treated as service establishments. However, citing Tenth Circuit precedent, the court states that “another rule of statutory interpretation counsels against reading such a direction-of-compensation requirement into the statute when one doesn’t appear there.” The

⁶² *Id.* at 1230 (citing *PGA Tour v. Martin*, 532 U.S. 661 (2001)).

⁶³ *Id.* at 1232.

⁶⁴ *Id.* at 1231 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002)).

⁶⁵ *Id.*

⁶⁶ *Id.* at 1232.

⁶⁷ *Id.* at 1234.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1231 (“These canons counsel, respectively, that (1) ‘when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration,’ and (2) ‘a word is known by the company it keeps.’” (citations omitted)).

⁷⁰ *Id.* at 1232–33.

⁷¹ *Id.* at 1233.

court “must ‘ordinarily resist reading words or elements into a statute that do not appear on its face.’”⁷² Thus, in these circumstances, the canons do not “clarify matters” but instead “manufacture ambiguity where none exists.”⁷³ The court turned to the legislative history to settle the matter.

The Tenth Circuit found that the legislative history bolsters the court’s interpretation, noting two key historical points: first, a house committee report explained that an entity *need not be similar* to the examples listed in an ADA definition to constitute an ADA entity; instead, the entity need only to “fall[] within the overall category.”⁷⁴ Second, and most notable, “Congress changed the language in § 12181(7)(F) from ‘other similar service establishments’ to ‘other service establishments,’ presumably to make clear that a particular business need not be similar to the enumerated examples to constitute a service establishment.”⁷⁵ In short, the legislative history confirmed that ADA service establishments do not need to “provide or accept compensation as part of that process.”⁷⁶ The “interpretative gymnastics” that Octapharma asked the court to adopt were, thus, “unnecessary” and “inappropriate.”⁷⁷ Blood plasma donation centers fall squarely within the scope of the ADA.⁷⁸

In a dissenting opinion similar in kind to the majority opinion later adopted by the Fifth Circuit, Judge Holmes wrote: “a plasma-donation center is not a ‘service establishment’ within the meaning of § 12181(7)(F).”⁷⁹ While Judge Holmes’s analysis, much like the majority’s, “rest[ed] squarely on the plain terms of the statute,”⁸⁰ Judge Holmes adopted a different methodology in applying the plain meaning.⁸¹ According to Judge Holmes, “service establishment” is a term of art with “a meaning quite distinct from the dictionary definitions of its component words.”⁸² Relying merely on the ordinary meaning, as the majority does, was insufficient to Judge Holmes.⁸³

Judge Holmes argued that the court must consider canons of construction *alongside* the ordinary meaning, as “aids in construing the language itself—not tools to be relied on only in the face of ambiguity.”⁸⁴ In other words, canons of construction are “part and parcel” of, and not a subsequent step in, the plain meaning analysis.⁸⁵ Using these canons of construction to reach the plain meaning of “service

⁷² *Id.* at 1232.

⁷³ *Id.* at 1233.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1233–34.

⁷⁷ *Id.* at 1238 (Holmes, J. dissenting).

⁷⁸ *Id.* at 1229 (majority opinion).

⁷⁹ *Id.* at 1235 (Holmes, J. dissenting).

⁸⁰ *Id.* at 1244.

⁸¹ *Id.* at 1236–38.

⁸² *Id.* at 1241.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1238.

establishment,” Judge Holmes found three “key unifying traits” of “every service establishment listed in § 12181(7)(F)”:

They offer the public a “service” (1) in the form of (a) expertise (e.g., barbers, beauticians, shoe-repair craftsman, dry cleaners, funeral parlors, lawyers, accountants, insurance offices, pharmacists, health care providers, and hospitals) or (b) specialized equipment (e.g., laundromats and gas stations), (2) for use in achieving some desired end, [⁸⁶] (3) in exchange for monetary compensation.⁸⁷

While plasma donation centers offer public expertise and specialized equipment, they are unlike the enumerated service establishments because they do not “receive a fee from members of the public in exchange for any services that they provide” or provide services “for the public’s use in achieving a desired end.”⁸⁸

According to Judge Holmes, blood plasma donation centers “resemble manufacturers much more than they do” public service establishments.⁸⁹ Judge Holmes stated that blood plasma donation centers “manufacture a product: plasma. They derive this product from a raw commodity—i.e., whole blood—that donors provide in exchange for a fee.”⁹⁰ Indeed—Judge Holmes argued—both Congress and the FDA view plasma donation centers as manufacturers. In regulating biological products, Congress requires “each package of a biological product be marked with the identity ‘of the manufacturer of the biological product.’”⁹¹ Moreover, FDA regulations state that “[a]ll steps in the *manufacturing* of Source Plasma . . . shall be performed by personnel of the establishment licensed to *manufacture* Source Plasma . . .” and that “‘licensed *manufacturer[s]* of blood and blood components, including Source Plasma’” must complete an FDA form.⁹² Judge Holmes concluded that the “Octapharma-Levorsen scenario is patently at odds with the service-establishment paradigm” that the ADA “envisions,”⁹³ and that plasma donation centers “do not fall within the scope of” the ADA.⁹⁴

⁸⁶ See *id.* at 1240 (noting examples of such a desired end include a haircut, clean clothes, and legal advice).

⁸⁷ *Id.* at 1241.

⁸⁸ *Id.* at 1235–36. “[T]o the extent that plasma-donation centers provide services to the public—such as those services identified by Mr. Levorsen and the United States—they do not do so for the public’s use in achieving a desired end; instead, they provide them for the centers’ use in achieving a desired end. More specifically, plasma-donation centers provide the public with the expertise associated with blood screening and the specialized equipment necessary to collect plasma so that the centers can sell the plasma to their customers in the pharmaceutical industry (i.e., the desired end)—not so that they can assist the public to achieve some desired end.” *Id.* at 1243.

⁸⁹ *Id.* at 1244.

⁹⁰ *Id.* at 1235–36.

⁹¹ *Id.* (citing 42 U.S.C. § 262(a)(1)(B)(ii)).

⁹² *Id.* at 1244 (citing 21 C.F.R. §§ 640.71(a), 606.171(a)) (emphasis added).

⁹³ *Id.* at 1243.

⁹⁴ *Id.* at 1236.

B. The Fifth Circuit: Blood Plasma Donation Centers Are Not “Service Establishments”

A little over two years after the Tenth Circuit’s decision in *Levorsen*, a plaintiff appealed a similar case to the Fifth Circuit in *Silguero v. CSL Plasma, Inc.*⁹⁵ In *Silguero*, the court held that blood plasma donation centers do not fall within the scope of service establishments and thus need not comply with the ADA.⁹⁶

Alleging an ADA violation, the plaintiff (Wolfe) brought suit against CSL Plasma donation center (CSL).⁹⁷ Based on Wolfe’s anxiety disorder requiring the regular use of a service dog,⁹⁸ CSL found Wolfe ineligible to donate plasma. CSL cited company policy “not to accept donors whose anxiety [is] severe enough to require the use of a service animal.”⁹⁹ CSL contended that its decision was based on “legitimate safety requirement[s].”¹⁰⁰

The district court granted summary judgment for CSL, concluding that the ADA did not apply to CSL because CSL was not a “public accommodation.”¹⁰¹ Wolfe appealed the court’s grant of summary judgment to the Fifth Circuit, and the Fifth Circuit reviewed the case *de novo*.¹⁰²

Similar to the Tenth Circuit, the Fifth Circuit began its analysis by examining the plain meaning of Title III.¹⁰³ The threshold question, according to the Fifth Circuit, rested on the term “service” and, specifically, “whether CSL Plasma provides ‘services’ to others.”¹⁰⁴ The Fifth Circuit determined that the “word ‘service’ generally denotes some ‘helpful act’ or an ‘act giving assistance or advantage to another.’”¹⁰⁵ Thus, the court stated, “Congress’s use of the word ‘service’ . . . [i]n the case of a ‘service establishment’” suggests that “the *establishment serves the members of the public* who are ‘helped’ or ‘benefited’ by the service.”¹⁰⁶ While the Fifth Circuit’s definition of service establishment is “materially similar to the one developed by the Tenth Circuit,”¹⁰⁷ the Fifth Circuit

⁹⁵ 907 F.3d 323 (5th Cir. 2018). This case involved a second plaintiff, *Silguero*. *Silguero*’s circumstances lie beyond the scope of this Note. CSL deferred *Silguero* from donating plasma “based on CSL Plasma’s policy not to accept donors who have an ‘unsteady gait.’” *Id.* at 326. *Silguero* “has bad knees and requires the use of a cane to walk.” *Id.* Though undoubtedly a travesty against the fair treatment of individuals with disabilities, *Silguero*’s case will not be considered here because this Note’s focus is on mental illnesses rather than disability broadly.

⁹⁶ *See id.* at 332.

⁹⁷ *Id.* at 325.

⁹⁸ *Id.*

⁹⁹ *Id.* at 326.

¹⁰⁰ *Id.* at 327.

¹⁰¹ *Id.* at 325.

¹⁰² *Id.* at 327.

¹⁰³ *Id.* at 331–32.

¹⁰⁴ *Id.* at 328.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ *Id.*

ultimately reached the opposite conclusion. The Fifth Circuit disagreed with the Tenth Circuit’s holding for three reasons.

First, under a plain meaning interpretation, “the word ‘service’ implies that the customer is benefitted by the act.”¹⁰⁸ The Fifth Circuit found that “no such benefit occurs” from donating plasma.¹⁰⁹ Instead, donors are the ones performing a service for the establishment; donors are “hooked up to a machine[,] drained of life-sustaining fluid,” and subjected “to discomfort and medical risks.”¹¹⁰ Nor do donors have a say over what happens to the plasma—the “labor is not ‘useful’ to the donor; it is ‘useful’ to the establishment.”¹¹¹ The Fifth Circuit depicted the act of donating as one of great burden to the donor, while the donation center is the beneficiary.

Second, and relatedly, the court emphasized that, pursuant to the canon of *ejusdem generis*, “a catchall phrase should be read in light of the preceding list”¹¹² In applying this canon, the court noted that plasma donation centers would fit “oddly” within the listed establishments in Title III.¹¹³ As mentioned, all the listed establishments offer “a detectable benefit to the customer.”¹¹⁴ The court explained that “Dry-cleaners press customers’ shirts. Lawyers file clients’ pleadings. Hospitals mend patients’ broken bones.”¹¹⁵ While service establishments perform actions that directly benefit customers, clients, and patients, the court again stressed that “plasma collection does not provide any detectable benefit for donors.”¹¹⁶ Thus, plasma collection does not fit appropriately among the listed service establishments.

Third, and also related to the first two reasons, the Fifth Circuit emphasized that it is atypical for *service establishments* to pay *customers*; rather, it is the *customer* that pays the *establishment* for some benefit received.¹¹⁷ The court distinguished plasma donation centers from service establishments by giving weight to this opposite direction of compensation.¹¹⁸ The court found that the structure of plasma donation centers “is more akin to employment or contract work,” which is governed by Title I (and would therein be excluded, as Title I does not protect small businesses or independent contractors).¹¹⁹ The court again emphasized that interpreting the business of plasma donation and collection as something different would leave “Title I largely redundant.”¹²⁰

Wolfe pushed back on the court’s first rationale, that is, the idea that plasma donation centers do not offer a benefit to the donor. Wolfe argued that there are both

¹⁰⁸ *Id.* at 329.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 330.

¹¹⁴ *Id.* at 329.

¹¹⁵ *Id.* at 329–30.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 330–31.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 331.

tangible and abstract ways that donating plasma benefits donors. First, donors tangibly benefit from donating plasma insofar as donors are compensated with money payments.¹²¹ The court dismissed this benefit by noting that “the payment of money” is a benefit “wholly collateral to the act of plasma collection.”¹²² The court explained that a financial benefit counts as a benefit only when it is an “intrinsic result of the act [performed] to serve the customer,” such as when banks pay customers interest.¹²³ Because the financial benefit associated with plasma donation is not intrinsic to the service, the court does not consider it a detectable benefit.

Undeterred, Wolfe pointed to a more abstract way that donating plasma benefits donors. That is, by enabling donors “to ‘realize’ the ‘commercial value’ of their plasma, which they could not otherwise do without CSL Plasma.”¹²⁴ The court rejected this argument too. According to the court, Wolfe’s argument demanded an interpretation that “would turn virtually every employer and entrepreneur into a ‘service establishment,’”¹²⁵ “eviscerate[ing]” Title I of the ADA.¹²⁶ Title I narrowly governs “employment relationships,” and the court did not want to carve out a way for plaintiffs to “dodge the narrowing scope¹²⁷ of Title I and sue under Title III.”¹²⁸

Wolfe next targeted the court’s second and third rationales for concluding that plasma donation centers do not provide a “service.” Wolfe argued that blood collection fits within the statute’s list because another establishment on the list itself operates by an opposite direction of compensation.¹²⁹ Namely, Wolfe argued that banks perform for customers certain services free of charge and pay customers interest on savings.¹³⁰ Like plasma donors, customers of banks receive money while the establishment does not. But the court found the analogy inadequate, noting that “[a]ny payment customers receive [from banking] is not a result of the customer’s labor but is instead an intrinsic result of the act the bank performs to serve the customer.”¹³¹ The court continued:

¹²¹ *Id.* at 329.

¹²² *Id.*

¹²³ *Id.* at 330.

¹²⁴ *Id.* at 331.

¹²⁵ *Id.* (“After all, a small restaurant enables cooks to ‘realize’ the ‘commercial value’ of their skills by providing a location for hungry people to come. A construction general contractor enables construction independent contractors to ‘realize’ the ‘commercial value’ of their machinery by connecting them with clients in need.”).

¹²⁶ *Id.*

¹²⁷ *Id.* (“Congress made specific legislative choices about how broadly Title I would apply. For instance, Title I protects only ‘employees’ and extends only to employers hiring a sufficient number of employees. Thus, courts have often determined that employees at small businesses and independent contractors are not protected by Title I of the ADA. If we interpret ‘service establishment’ in Title III so broadly that it includes employment and employment-like relationships, we risk overrunning Congress’s legislative choices in Title I.” (citations omitted)).

¹²⁸ *Id.*

¹²⁹ *Id.* at 330.

¹³⁰ *Id.*

¹³¹ *Id.*

Contrast that with plasma collection centers. After the donor expends his time and resources donating plasma, the plasma belongs to the plasma collection center. The plasma collection center does not manage or oversee the plasma on behalf of the donor. Donors are therefore unlike bank customers because they are not benefitted by the act the establishment performs.¹³²

After reaching its conclusion that plasma donation centers cannot, with a plain language application, fit within “service establishments,” the Fifth Circuit used legislative intent to bolster its position. The court noted that “[i]f Congress wanted to cover all ‘establishments’ it could have done so [by] omitting the word ‘service’” from Title III’s “service establishments.”¹³³ Accordingly, the court held that plasma donation centers need not abide by the ADA.

C. The Third Circuit: Blood Plasma Donation Centers Are ADA “Service Establishments”

The Fifth Circuit held steadfast in reaching its conclusion that collecting blood does not constitute a service, even if it required the court to do the very “interpretative gymnastics” that the Tenth Circuit in *Levorsen* refused to do.¹³⁴ In June 2019, less than one year after the Fifth Circuit’s decision in *Silguero*, the Third Circuit addressed the same divisive question: do blood plasma donation centers count as service establishments under Title III of the ADA? In *Matheis v. CSL Plasma*, the Third Circuit held that “the Tenth Circuit got it right: the ADA applies to plasma donation centers.”¹³⁵

In *Matheis*, Plaintiff George Matheis suffered sporadic panic attacks and was diagnosed with PTSD.¹³⁶ Despite his diagnosis, Matheis “routinely and safely donated plasma roughly 90 times in an 11-month period” with CSL, earning \$250-300 a month.¹³⁷ Matheis later got a service dog to help cope with his PTSD.¹³⁸ When Matheis tried to donate plasma at CSL with his service dog, CSL found Matheis ineligible.¹³⁹ CSL barred Matheis on the grounds that he required a service animal to manage his anxiety.¹⁴⁰ CSL’s concern was “not related to any health concerns that

¹³² *Id.*

¹³³ *Id.* at 329.

¹³⁴ *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1232 (10th Cir. 2016).

¹³⁵ 936 F.3d 171, 174 (3d Cir. 2019).

¹³⁶ *Id.* at 174–75. Matheis’s mental illness stems from his former service as a SWAT officer. *Id.* at 175.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*; *Matheis v. CSL Plasma, Inc.*, 346 F. Supp. 3d 723, 734 (M.D. Pa. 2018) (noting that CSL barred Matheis from donating plasma out of concern that “the stress of donating or the confined setting of the donation room [could induce] a panic attack during the donation process”).

dogs . . . pose; rather [CSL] concluded that using a service animal for anxiety means that the donor's condition is too severe to undergo safely the donation process."¹⁴¹

The district court granted CSL's motion for summary judgment.¹⁴² While the district court ruled that CSL "is a public accommodation under the ADA,"¹⁴³ it ultimately found that CSL "did not unlawfully discriminate because it had a legitimate, non-discriminatory reason for refusing to allow Matheis to donate plasma, a concern that he suffered severe anxiety."¹⁴⁴ "Matheis appeal[ed] the ruling, while CSL cross-appeal[ed], contending it is not subject to the ADA at all."¹⁴⁵ The Third Circuit reviewed *de novo* the grant of summary judgment.¹⁴⁶

The Third Circuit began its analysis by recapping the Tenth and Fifth Circuits' reasoning in *Levorsen* and *Silguero*.¹⁴⁷ Finding the Fifth Circuit's analysis flawed, the Third Circuit adopted the Tenth Circuit's *Levorsen* holding.¹⁴⁸ The Third Circuit refuted all three of the Fifth Circuit's textual inferences.¹⁴⁹ First, where the Fifth Circuit found that the word "service" requires a benefit to the customer and that plasma donors do not receive such a benefit, the Third Circuit held that donors *do* in fact benefit: "the record is unequivocal that . . . donors receive money, a clear benefit, to donate plasma."¹⁵⁰ The Third Circuit did not address the Fifth Circuit's concern that, if monetary payment were construed as a benefit, then all employers would become "service establishments," blurring the line between Title III and Title I. Apparently, the Third Circuit was not concerned with addressing this slippery slope.

Second, where the Fifth Circuit concluded, under the canon of *ejusdem generis*, that plasma donation centers do not fit amidst the list of "service establishments," the Third Circuit found that plasma donation centers are similar to banks.¹⁵¹ Both plasma donation centers and banks use "the fruits of its public-facing services for subsequent profit"—a bank "invests, trades, or loans" money to third parties, and a plasma donation center sells plasma to third parties.¹⁵² This subsequent or secondary profit does not make an establishment "any less a service establishment with respect to the public."¹⁵³ And, while the Fifth Circuit would argue that the subsequent profits of investments are distinct from the subsequent profits of blood plasma, insofar as a customer has tabs on the former and not the latter, the Third Circuit does not seem

¹⁴¹ *Matheis*, 936 F.3d at 175.

¹⁴² *Matheis*, 346 F. Supp. 3d at 737–38.

¹⁴³ *Id.*

¹⁴⁴ *Matheis*, 936 F.3d at 176.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 176–77.

¹⁴⁸ *Id.* at 177.

¹⁴⁹ *Id.* at 177–78.

¹⁵⁰ *Id.* at 177.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

to find this minutia to be worthy grounds upon which to draw a distinction.¹⁵⁴ The Third Circuit was unpersuaded by the Fifth Circuit’s *ejusdem generis* argument and accordingly held that blood plasma donation centers fit within the listed service establishments.

Third, where the Fifth Circuit gave weight to the “direction of monetary compensation” to distinguish a plasma donation center from a service establishment, the Third Circuit found this distinction unconvincing.¹⁵⁵ That is, the Third Circuit did not find it alarming that customers *receive* money rather than *spend* it on a service. This is because, as the Third Circuit interprets it, blood plasma donors essentially *are* spending money insofar as they pay for the blood collection service with valuable blood plasma. The Third Circuit noted that “[t]he value received by the service provider and given by the customer is often money, but it need not be. Money is one proxy for economic value, and economic value is fungible.”¹⁵⁶

Importantly, other service establishments allow customers to pay for services with “prox[ies] for economic value”—things other than money.¹⁵⁷ Namely, pawnshops and recycling centers—both of which constitute ADA service establishments—provide customers a service for which customers pay with economic value proxies: one’s possessions and one’s waste.¹⁵⁸ “These examples underscore a simple fact: providing services means providing something of economic value to the public; it does not matter whether it is paid for with money or something else of value.”¹⁵⁹ In short, just because the customer-donor does not pay for her benefit with money does not then mean that the customer-donor does not receive a service. The Third Circuit concluded that there is no reason to “arbitrarily narrow the scope of ‘service establishments’ to entities that receive compensation from customers in the form of money.”¹⁶⁰ Plasma donation’s inverted “direction of monetary compensation” is in good company.

The Third Circuit held that “a plasma donation center is a service establishment under the ADA” because it “offers a service to the public, the extracting of plasma for money, with the plasma then used by the center in its business of supplying a vital product to healthcare providers.”¹⁶¹

¹⁵⁴ Though the Third Circuit does not address this point, the Third Circuit likely would find it a means of narrowing that which need not be narrowed.

¹⁵⁵ *Id.* at 177–78.

¹⁵⁶ *Id.* at 178.

¹⁵⁷ *See id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

IV. PLASMA COLLECTION IS A “SERVICE”: WHY THE FIFTH CIRCUIT GOT IT WRONG

The Fifth Circuit incorrectly held that blood plasma donation centers are not Title III “service establishments.”¹⁶² Specifically, the Fifth Circuit did not adequately consider the DOJ’s interpretation. Nor did the Fifth Circuit adequately address Silguero’s statutory purpose argument. Finally, there is a multitude of policy reasons for courts to interpret plasma collection as a service. Accordingly, the Fifth Circuit’s conclusion is unpersuasive.

A. The DOJ Agrees with the Tenth and Third Circuits

In an amicus curiae brief to the *Silguero* court, the DOJ argued that a plasma donation center “is a ‘service establishment’ . . . under Title III of the ADA.”¹⁶³ While the DOJ’s interpretation is not binding, it does warrant deference.¹⁶⁴

1. The DOJ’s Interpretation

Like the Tenth Circuit in *Levorsen*, the DOJ started and ended its interpretation with the plain meaning of “service establishment.”¹⁶⁵ The DOJ argued that “[d]ictionary definitions of ‘service’ easily encompass the act of taking people’s blood plasma to use for medicines and treatments.”¹⁶⁶ The DOJ stated:

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.¹⁶⁷

According to the DOJ, the *Silguero* district court erred in “incorrectly appl[ying] principles of statutory construction” in a way that improperly narrowed “the meaning of service establishment.”¹⁶⁸ Specifically, the district court construed a “service establishment” as a place that necessarily provides goods or services in

¹⁶² See *supra* Section III.B for a discussion of the statute’s ambiguity.

¹⁶³ Brief for the United States as Amicus Curiae Supporting Neither Party, at 5 [*hereinafter* *Brief for the U.S. as Amicus Curiae*]; *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323 (5th Cir. 2018) (No. 17-41206), 2018 WL 889624, at *8.

¹⁶⁴ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 327 n.9 (5th Cir. 2018).

¹⁶⁵ *Brief for the U.S. as Amicus Curiae*, *supra* note 163, at *10–12.

¹⁶⁶ *Id.* at *11.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at *14.

exchange for compensation, such that plasma donation centers fall outside service establishments’ scope (because plasma donation centers operate “in reverse,” “compensat[ing] donors for donating their plasma”).¹⁶⁹ The DOJ noted, however, that “[n]othing in the statutory text imposes ‘[this] direction-of-compensation requirement,’ and while many commercial service establishments require payment for services rendered, others do not.”¹⁷⁰

The common trait between the listed service establishments, then, is “not the receipt of compensation for services but, rather, that each commercial establishment provides services by supplying expertise or equipment or both.”¹⁷¹ Plasma donation centers, like hospitals and barber shops, provide customers with specialized equipment.¹⁷² Where barbers provide customers with expertise by way of scissors and razors, a plasma donation center provides donors with “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.”¹⁷³ Accordingly, plasma collection is a service.

The DOJ found further support for its conclusion in the facts that (1) “[m]any state laws expressly define procurement of blood plasma as a service,”¹⁷⁴ (2) plasma donation centers refer to *themselves* as service providers,¹⁷⁵ and (3) “[c]onstruing ‘service establishment’ to include a plasma donation center . . . is consistent with the ADA’s purpose.”¹⁷⁶

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (citations omitted). Here the DOJ, like the Tenth Circuit in *Matheis*, notes that banks and recycling centers, both of which fall under Title III service establishments, do not operate with the enumerated service establishments’ “purported common trait” of a direction of compensation. *Id.* at *14–15.

¹⁷¹ *Id.* at *15.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at *12. The DOJ suggests that the way state law treats “blood plasma procurement supports the conclusion that the term ‘service’ in Title III is naturally read to include plasma collection.” *Id.* The DOJ cites Mississippi (a Fifth Circuit state, thus in tension with *Silguero*’s holding), Alabama, California, Kansas, Nebraska, Utah, and Vermont. *Id.* at *12–13.

¹⁷⁵ *Id.* at *13. The DOJ notes that “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.” *Id.* The Department of Justice cites a blood plasma donation center called “BioLife Plasma Services,” which states on its website that “part of its ‘vision’ is that ‘[e]very donor is recognized for his or her contribution and given exceptional service.’” *Id.* The Department also notes a second organization, “Immunotek,” which states that it facilitates opening, managing, and operating “plasma donor centers as a service.” *Id.* at *13–14.

¹⁷⁶ *Id.* at *16. Specifically, the DOJ cites Congress’s equal-access initiative, as set forth in *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), and Congress’s intentional choice to change the language of the ADA “to make it easier for individuals to establish that an entity is covered by Title III.” *Id.* (citations omitted). See also *supra* Section III.A (discussing

2. *The DOJ's Deference*

Interestingly, while the DOJ filed its amicus curiae brief prior to the Third Circuit decision in *Matheis*, and while the Third Circuit reached the same conclusion as the DOJ, the Third Circuit did not rely on—or even explicitly cite to—the DOJ’s brief. Still, the DOJ’s interpretation is important and warrants deference. The question is what sort of deference the DOJ deserves.

Three types of deference could apply to the DOJ’s interpretation. The first, “*Chevron* deference,” applies when Congress delegates authority to an administrative agency to interpret an ambiguous statute through regulation.¹⁷⁷ When *Chevron* deference applies, an agency’s interpretation is often controlling; “a reviewing court . . . [must] accept the agency’s position if Congress has not previously spoken to the point at issue and the agency’s interpretation is reasonable.”¹⁷⁸ That said, *Chevron* deference does not apply when agencies “assert their statutory interpretations solely through litigation briefs.”¹⁷⁹ The second type of deference, “*Auer* deference,” applies when an agency reasonably interprets its own “genuinely ambiguous” regulation, so long as the court finds the interpretation “of the sort that Congress would want to receive deference.”¹⁸⁰ To determine if an agency interpretation is of such a sort, the court will consider whether the interpretation is of authoritative quality, is based on “substantive expertise,” and is of “fair and considered judgment.”¹⁸¹ When it applies, *Auer* deference is, like *Chevron* deference, controlling.¹⁸² Under the third type of deference, “*Skidmore*

Congress’s changes to the statutory language in 42 U.S.C. § 12181(7)(F)). The DOJ concludes that the Fifth Circuit’s interpretation “defeat[s] Title III’s purpose by denying people with disabilities equal access to a service that is available to people without disabilities.” *Brief for the U.S. as Amicus Curiae*, *supra* note 163, at *16.

¹⁷⁷ See *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001) (“[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority.”).

¹⁷⁸ *Id.* at 229.

¹⁷⁹ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 327 n.9 (5th Cir. 2018); see *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (noting that, unlike an interpretation arrived at by formal adjudication or notice-and-comment rulemaking, “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference”).

¹⁸⁰ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415–18, 2424 (2019).

¹⁸¹ See *id.* at 2416–18 (describing these three attributes as “especially important markers for identifying when *Auer* deference is and is not appropriate”).

¹⁸² See *id.* at 2418 (“When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean.”); *id.* at 2416 (describing the “controlling weight” of *Auer* deference).

deference” (i.e., “*some* deference”¹⁸³), an agency’s interpretation is not controlling but, rather, receives deference according to its power to persuade the court.¹⁸⁴

Because the DOJ is one of the agencies in charge of ADA enforcement,¹⁸⁵ the DOJ’s interpretation could, on its face, be eligible for the top-tier, controlling forms of deference. However, because the DOJ’s interpretation appeared exclusively in its amicus curiae brief, the DOJ is not entitled to *Chevron* deference.¹⁸⁶ Nor does *Auer* deference apply; the DOJ is not interpreting an ambiguity within its own regulation but, rather, an ambiguity within a statute (the ADA). Thus, the DOJ is left with *Skidmore* deference, granted to it from the court according to the DOJ’s power to persuade.¹⁸⁷

Under *Skidmore* deference, “an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.”¹⁸⁸ “The weight accorded to an administrative judgment [under *Skidmore*] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹⁸⁹ In short, according to *Skidmore*, courts should accept an agency’s interpretation when it is thorough, well-reasoned, and consistent with earlier interpretations.¹⁹⁰

¹⁸³ *Christensen*, 529 U.S. at 587 (citing *Reno v. Koray*, 515 U.S. 50, 61 (1995) (emphasis added)).

¹⁸⁴ *See Mead Corp.*, 533 U.S. at 221 (noting that where an agency’s interpretation is in the form of a ruling letter, it has “no claim to judicial deference under *Chevron* . . . but . . . under *Skidmore* the ruling is eligible to claim respect according to its persuasiveness”).

¹⁸⁵ *Id.* at 226–27; see Francis M. Schneider, *Manufacturing Public Accommodations Under Title III of the ADA: The Tenth Circuit’s Expansive Interpretation of “Service Establishment” to Include Manufacturers*, 56 WASHBURN L. J. 599, 607 (2017) (“Both the Supreme Court and circuit courts have historically deferred to the DOJ’s ADA Title III Technical Assistance Manual to understand the meaning of an undefined word or phrase under Title III.”); see also *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (“As the agency directed by Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b), the [Department of Justice’s] views are entitled to deference.”).

¹⁸⁶ *Silguero v. CSL Plasma*, 907 F.3d 323, 327 n.9 (5th Cir. 2018). Had the DOJ’s interpretation of the ADA’s “service establishments” terminology appeared in a regulation, it is possible that the court would have found *Chevron* deference applicable to interpret the ADA (assuming the court also found that Congress implicitly delegated authority to the DOJ).

¹⁸⁷ *Id.*

¹⁸⁸ *Mead Corp.*, 533 U.S. at 234 (citations omitted).

¹⁸⁹ *Id.* at 228 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

¹⁹⁰ *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 595 (Stevens, J., dissenting) (“Because there is no reason to believe that the Department’s opinion was anything but

The Fifth Circuit did not give adequate *Skidmore* deference to the DOJ's interpretation. As noted in Section II.B, the Fifth Circuit adopted an interpretation of "service establishment" inconsistent with the DOJ's view. The court gave little explanation as to why it deviated from the DOJ. Although the court acknowledged that the DOJ's interpretation is entitled to *Skidmore* deference, the court explained *Skidmore* deference as deference "only to the extent that [the government's] interpretations have the power to persuade."¹⁹¹ While this statement is correct, the court said nothing of the *factors that compose* such persuasiveness (or lack of persuasiveness) as set out in *Skidmore*—namely, the agency opinion's thoroughness, reasonableness, and consistency.¹⁹² The court's only explanation of why it found the DOJ's interpretation insufficient was that the court was "unpersuaded by the DOJ's interpretation"¹⁹³ Given that the DOJ's interpretation was thorough, well-reasoned, and consistent with its earlier interpretations,¹⁹⁴ the Fifth Circuit's conclusory explanation is inadequate under *Skidmore*.¹⁹⁵ Of course, the court could have given the DOJ's interpretation proper deference and *still* have found it unpersuasive, but without an explanation to such a finding, there is, for now, no reason to think that the DOJ got it wrong.

B. Addressing Silguero's Statutory Purpose Argument

As discussed in Sections III.A and III.C, the Third and Tenth Circuits both accounted for the ADA's statutory purpose and reached holdings consistent with it. Where both the Third and Tenth Circuit opinions discuss the ADA's statutory purpose, the Fifth Circuit opinion is eerily quiet. Undoubtedly, the court is not required to consider a statute's purpose in the court's statutory interpretation analysis.¹⁹⁶ But where a plaintiff's argument directly implicates a statute's policy, a court must address the argument made, insofar as a judge has a general duty to

thoroughly considered and consistently observed, it unquestionably merits our respect.") (citing *Skidmore*, 323 U.S. at 140); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011) (holding that where agency views are "reasonable," "consistent with the Act," and "reflect careful consideration," "they consequently add force to [the court's] conclusion").

¹⁹¹ *Silguero*, 907 F.3d at 327–28 n.9 (internal quotation marks omitted).

¹⁹² See *Mead Corp.*, 533 U.S. at 228 (citing *Skidmore*, 323 U.S. at 140).

¹⁹³ *Silguero*, 907 F.3d at 328 n.9.

¹⁹⁴ See *supra* Section III.A.

¹⁹⁵ In his petition for *certiorari*, Silguero did not raise an abuse of discretion claim for the Supreme Court to review the Fifth Circuit's *Skidmore* deference. But it was at least possible for Silguero to make such an argument. See *Mead Corp.*, 533 U.S. at 235 ("[W]here the regulatory scheme is highly detailed, and [the agency] can bring the benefit of specialized experience to bear on [the] case," "[t]here is room at least to raise a *Skidmore* claim . . .").

¹⁹⁶ See, e.g., *Zuni Public School Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007) ("Under this Court's precedents, if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis.").

“decide the matters that come before the court.”¹⁹⁷ To do this, the court should either explicitly state its intention to disregard the statute’s purpose or show how the statutory purpose is furthered by the court’s interpretation.

Indeed, in *Silguero*, the plaintiff raised an argument implicating the ADA’s purpose. *Silguero* argued that the court should not apply *ejusdem generis* because “the term ‘public accommodation’ is to be liberally construed,” in accordance with *PGA Tour, Inc. v. Martin*,¹⁹⁸ a Supreme Court case interpreting the ADA’s statutory purpose.¹⁹⁹ Yet, the court did not adequately address this argument. Rather than stating that the court would not entertain the ADA’s purpose—a response well within the judiciary’s discretion—the court instead attempted to show how its interpretation was compatible with the ADA’s purpose, without actually showing how its interpretation was compatible with that purpose.²⁰⁰ The Fifth Circuit refuted *Silguero*’s argument simply by stating that “even when a statute is to be construed liberally, it is still not untethered from its text. Canons of interpretation help ensure that words are not stretched past the limits Congress intended.”²⁰¹

This rebuttal is inadequate. The Supreme Court has held that the “liberal construction” (for which the plaintiff in *Silguero* argued) is a means “to afford people with disabilities ‘equal access’ to the wide variety of establishments available to the nondisabled.”²⁰² To adequately address *Silguero*’s argument, the Fifth Circuit needed to show *why* providing equal access to people with disabilities (via construing plasma donation centers as service establishments) required the court to “untether” the statute from its text or “stretch” the statutory language past what Congress intended.²⁰³ Or, put another way, the Fifth Circuit needed to show *how* a narrow construction of “service establishment” furthers the ADA’s purpose. The Fifth Circuit’s answer to *Silguero*’s argument is unpersuasive insofar as it sidesteps the precise argument that *Silguero* makes—one that implicates the ADA’s purpose. The court inadequately attempted to address this argument, suggesting that the ADA’s policy, in fact, supports the Fifth Circuit’s holding but failing to explain why or how. The Fifth Circuit’s argument would have been more persuasive had it explicitly and altogether disregarded the ADA’s purpose in its interpretation of the statute’s language.

¹⁹⁷ MODEL CODE OF JUD. CONDUCT R. 2.7 CMT. (AM. BAR ASS’N 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_7responsibilitytodecide/commentonrule2_7/ [<https://perma.cc/29DE-9JE9>].

¹⁹⁸ 532 U.S. 661 (2001).

¹⁹⁹ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 329 (5th Cir. 2018).

²⁰⁰ *See id.*

²⁰¹ *Id.* (internal citations omitted)

²⁰² *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676–77 (2001).

²⁰³ *See Silguero*, 907 F.3d at 329.

C. Promoting Anti-Stigma Policy

This Note would be remiss to conclude without addressing compelling policy reasons that support that courts should *not* narrowly construe the ADA, as the Fifth Circuit did. If the ADA applies to blood plasma donation centers, these establishments become unable to make broad-sweeping generalizations about those who suffer from mental illness. Preventing blood plasma donation centers from stigmatizing people with mental illness is a desirable end that courts should encourage.

Stigmatizing attitudes about mental illness—like the idea that people with mental illness are “categorically unsafe” to donate²⁰⁴—are, unfortunately, pervasive. Indeed, “[s]tudies suggest that the majority of citizens in the United States and many Western European nations have stigmatizing attitudes about mental illness.”²⁰⁵ While there are many shapes that these stigmas take, a relevant one is that “persons with severe mental illness should be feared and, therefore, be kept out of most communities.”²⁰⁶ This stigma is bolstered by media portrayals of people with mental illness as “homicidal maniacs who need to be feared.”²⁰⁷ Those who believe this stigma may move past a mere “cognitive and affective response” and react with discriminatory conduct.²⁰⁸ Specifically, a society that stigmatizes people with mental illness may respond with “social avoidance, where the public strives to not interact with people with mental illness altogether.”²⁰⁹

Indeed, blood plasma donation centers’ policies against people with mental illness can be understood in just this way: a form of discrimination against people with mental illness, stemming from the prejudice that people with mental illness ought to be feared. While perhaps not intentional, a company policy that finds people with mental illness “categorically unsafe” to donate plasma is a policy that, if not itself motivated by the stigma that people with mental illness need to be feared, is at least consistent with, and in furtherance of, such a stigma. As mentioned earlier, there is no evidence to support the claim that those with mental illness will necessarily “put staff, other donors, or themselves at risk when donating plasma.”²¹⁰

Attitudes of stigma against people with mental illness are not only misleading but also harmful. As one article describes:

Many people with serious mental illness are challenged doubly. On one hand, they struggle with the symptoms and disabilities that result from the disease. On the other, they are challenged by the stereotypes and prejudice that result from misconceptions about mental illness. As a result of both,

²⁰⁴ *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174 (3d Cir. 2019).

²⁰⁵ Patrick W. Corrigan & Amy C. Watson, *Understanding the Impact of Stigma on People with Mental Illness*, 1 *WORLD PSYCHIATRY* 16, 16 (2002) (citations omitted).

²⁰⁶ *Id.* at 17.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 16.

²⁰⁹ *Id.* at 17.

²¹⁰ *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 181 (3d Cir. 2019).

people with mental illness are robbed of the opportunities that define a quality life: good jobs, safe housing, satisfactory health care, and affiliation with a diverse group of people.²¹¹

The impact of public stigma on people with mental illness cannot be understated.

In addition to the challenges that come from public stigma, some individuals with mental illness may internalize public stigma and transform it into “self-stigma.”²¹² Though not all individuals with mental illness internalize social stigma in a negative or harmful way,²¹³ those who do may “experience diminished self-esteem/self-efficacy.”²¹⁴ Because of the social stigma surrounding mental illness, such individuals may “believe that they are less valued because of their psychiatric disorder” or may suffer a lack of “confidence in [their] future[s].”²¹⁵ Public stigma “essentially propels those with mental illnesses to adopt an idea of themselves that reflects a ‘stereotyped image of insanity,’ which has the effect of ‘limiting self-control.’ This damaged self-understanding perpetuates deviant behavior and prevents them from recovering, producing a self-fulfilling prophecy.”²¹⁶ In short, individuals with mental illness become locked into—and trapped by—public stigma.

As upsetting as these realities are, public stigma can be changed. The public stigma surrounding mental illness is “diminished when members of the general public meet persons with mental illness” who defy one’s prejudices.²¹⁷ “Research has shown an inverse relationship between having contact with a person with mental illness and endorsing psychiatric stigma. Hence, opportunities for the public to meet persons with severe mental illness may discount stigma.”²¹⁸

By this logic, social stigma may be dismantled, in part, by not categorically barring people with mental illness from donating blood plasma. The interaction between the donor and the collector is meaningful in that, within it, there is the potential for the collector to rethink his or her prejudices against people with mental illness.²¹⁹ But if individuals with mental illness are not given a chance to defy one’s expectations and instead are labeled as “categorically unsafe,” shut out of the opportunity from the gate, members of the public may carry on under the harmful misconception that people with mental illness should be avoided.²²⁰ Accordingly, by

²¹¹ Corrigan & Watson, *supra* note 205, at 16.

²¹² *Id.* at 17–18.

²¹³ *Id.* at 18.

²¹⁴ *Id.*

²¹⁵ *Id.* at 17.

²¹⁶ Sareen K. Armani, *Coexisting Definitions of Mental Illness: Legal, Medical, and Layperson Understandings Paving a Path for Jury Bias*, 26 S. CAL. REV. L. & SOC. JUST. 213, 221 (2017).

²¹⁷ Corrigan & Watson, *supra* note 205, at 17 (noting two other ways the stigma can be changed: protest and education).

²¹⁸ *Id.* (citations omitted).

²¹⁹ *See id.*

²²⁰ *See id.*

barring individuals with mental illness access to donate blood plasma, blood plasma donation centers perpetuate harms done to people with mental illnesses.²²¹

Categorizing blood collection as a service will render unlawful the discrimination against people with mental illness who wish to donate blood plasma. And where such discrimination is unlawful, people with mental illness will be shown the respect and dignity that they deserve. By following the precedent set by the Tenth and Third Circuits, future courts can likewise chip away at the public stigma against people with mental illness. Just as individuals with mental illness are not “homicidal maniacs who need to be feared,”²²² so too, are they not “categorically unsafe” to donate. This opportunity to promote anti-stigma policy supports interpreting plasma collection as a “service.”

V. CONCLUSION

The ADA’s ambiguous language leaves open the question of whether blood plasma donation centers constitute Title III “service establishments.” So far, three Circuit courts have contributed to this conversation, with the Tenth and Third Circuits ruling that plasma donation centers are “service establishments,” and the Fifth Circuit holding the opposite. There is substantial reason to think that the Fifth Circuit’s interpretation misses the mark. In addition to the fact that the Fifth Circuit uses arbitrary and technical limiting principles to place blood plasma donation centers outside of the ADA’s scope (a flaw suggested by the Third Circuit opinion), the Fifth Circuit’s opinion is also unpersuasive insofar as it: deviates from, and pays no deference to, the DOJ’s amicus brief; fails to adequately address the plaintiff’s policy argument; and furthers the public stigma against people with mental illness. While the judicial interpretation of the ADA may have failed in the past to protect those with mental illness, courts now have an opportunity to change course. While ultimately the Supreme Court should grant certiorari and overturn the Fifth Circuit holding,²²³ until then, courts should follow the Tenth and Third Circuits’ precedent. Future courts should find, under this precedent, that plasma donation centers are service establishments.

²²¹ *See id.*

²²² *Id.* at 17.

²²³ *See* *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323 (5th Cir.), *cert. denied*, 140 S. Ct. 1107 (2020).