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BLOOD FEUD: *MATHEIS* AND THE FIGHT FOR DISABILITY RIGHTS

Abstract: On August 30, 2019, the U.S. Court of Appeals for the Third Circuit in *Matheis v. CSL Plasma, Inc.* held that plasma donation centers are public accommodations under the Americans with Disabilities Act (ADA). In doing so, the court split from the Fifth Circuit Court of Appeals and joined the Tenth Circuit Court of Appeals in requiring plasma donation centers to reasonably accommodate their donors' disabilities. This Comment argues that the Third Circuit was correct in holding that plasma donation centers are service establishments under Title III of the ADA as the text and legislative history indicate the statute's broad scope. It further argues that reading a direction of compensation requirement into the definition of "service establishment" overlooks the complex nature of the American market system.

INTRODUCTION

The glaring lack of protection against disability-based discrimination in the Civil Rights Act of 1964 bore a disability rights movement.¹ As a result, in 1990, Congress passed the Americans with Disabilities Act (ADA) to combat prevalent discrimination against disabled individuals in nearly all aspects of life: employment (Title I); transportation and civic life (Title II); and economic and social life (Title III).² Title III, which covers places of public accommodation, is more comprehensive than preexisting state laws and the Civil Rights Act.³

Despite its apparent broad reach, plaintiffs have struggled to obtain remedies under Title III because courts disagree over the scope of the Act, particu-

¹ See NAT'L COUNCIL ON DISABILITY, EQUALITY OF OPPORTUNITY: THE MAKING OF THE AMERICANS WITH DISABILITIES ACT 5 (1997) (describing the efforts to establish civil rights for disabled persons after Congress enacted the Civil Rights Acts); ROBERT L. BURGDOFF JR., DISABILITY DISCRIMINATION IN EMPLOYMENT LAW 26 (1995) (discussing how the Civil Rights Act of 1964 encouraged broadening civil rights protections to cover disabled persons).

² 42 U.S.C. §§ 12111–12189; see *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (noting that one of the ADA's most unassailable assets is its breadth); *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174 (3d Cir. 2019) (defining the general scope of each ADA title). The ADA sought extensive participation and financial autonomy for individuals with disabilities. 42 U.S.C. § 12101(a)(7).

³ Brief for Current and Former Members of Congress as Amici Curiae Supporting Petitioners at 2, *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323 (5th Cir. 2018) (No. 17-41206) (noting the breadth of Title III in comparison to previous public accommodation laws). Title II of the Civil Rights Act applied only to lodging, restaurants, and entertainment venues, whereas Title III of the ADA encompasses those entities as well as retail stores, public transportation, parks, and schools. *Id.* at 5. Scholars have credited the Civil Rights Act and the Rehabilitation Act of 1973 as paving the way for the ADA. NAT'L COUNCIL ON DISABILITY, *supra* note 1, at 17.

larly the meaning of “public accommodation.”⁴ Protection against disability-based discrimination in a plasma donation center (PDC), for example, depends on whether the court hearing the claim recognizes PDCs as public accommodations under Title III.⁵

In 2019, in *Matheis v. CSL Plasma, Inc.*, the U.S. Court of Appeals for the Third Circuit considered whether the ADA covers PDCs and held that PDCs are Title III public accommodations.⁶ Part I of this Comment discusses the business practices of PDCs, examines the ADA’s legislative history, and develops *Matheis*’s factual and procedural background.⁷ Part II considers the different approaches the circuit courts have taken to construe the ADA and decide whether PDCs qualify as public accommodations.⁸ Finally, Part III argues that the Third Circuit’s holding, that PDCs are public accommodations, logically follows from the ADA’s text and legislative intent.⁹ Part III further argues that the majority approach, which rejected the restrictive direction of compensation requirement, better understands the modern market economy’s complexity.¹⁰

I. TITLE III OF THE ADA AND ITS APPLICATION TO *MATHEIS V. CSL PLASMA*

In 2019, in *Matheis v. CSL Plasma, Inc.*, the U.S. Court of Appeals for the Third Circuit addressed an issue dividing the circuits—the scope of Title III of the ADA.¹¹ Section A of this Part provides background information on PDCs.¹² Section B discusses Title III’s legislative history.¹³ Finally, Section C examines *Matheis*’s factual and procedural history.¹⁴

⁴ Compare *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (holding that ADA public accommodations must be physical places), *Ford v. Schering–Plough Corp.*, 145 F.3d 601, 612–14 (3d Cir. 1998) (same), and *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997) (same), with *Carparts Auto. Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New Eng.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding that ADA public accommodations need not be physical places). See generally Daniel Sorger, Note, *Writing the Access Code: Enforcing Commercial Web Accessibility Without Regulations Under Title III of the Americans with Disabilities Act*, 59 B.C. L. REV. 1121 (2018) (discussing cases in which the court considered whether public accommodations need to be physical places and arguing that Title III covers commercial websites). A legal remedy is the process of rectifying a harm, insult, or injustice. *Remedy*, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁵ Compare *Matheis*, 936 F.3d at 174 (holding that Title III covers PDCs), and *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016) (same), with *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 325 (5th Cir. 2018) (holding that PDCs are not public accommodations). Venue refers to the appropriate place for the legal dispute to occur. *Venue*, BLACK’S LAW DICTIONARY, *supra* note 4.

⁶ *Matheis*, 936 F.3d at 178.

⁷ See *infra* notes 11–42 and accompanying text.

⁸ See *infra* notes 43–71 and accompanying text.

⁹ See *infra* notes 72–88 and accompanying text.

¹⁰ See *infra* notes 90–94 and accompanying text.

¹¹ *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174 (3d Cir. 2019).

¹² See *infra* notes 15–23 and accompanying text.

¹³ See *infra* notes 24–32 and accompanying text.

¹⁴ See *infra* notes 33–42 and accompanying text.

A. Plasma Donation Centers

PDCs are for-profit businesses that pay individuals for their plasma and sell the extracted plasma to pharmaceutical companies.¹⁵ Those pharmaceutical companies purchase the blood product for medicinal product development at a price several times the amount compensated to donors.¹⁶ Whereas numerous countries have outlawed paying individuals for their lifeblood, the United States leads the globe in plasma exportation.¹⁷ The American plasma industry has exploded in recent years, with the number of PDCs increasing more than

¹⁵ Zoe Greenberg, *What Is the Blood of a Poor Person Worth?*, N.Y. TIMES (Feb. 1, 2019), <https://nytimes.com/2019/02/01/sunday-review/blood-plasma-industry.html> [<https://perma.cc/4UTL-549H>]. Blood is approximately 55% plasma and 45% platelets and red and white blood cells. Tim Herrera, *What Is Convalescent Blood Plasma, and Why Do We Care About It?*, N.Y. TIMES (Apr. 24, 2020), <https://nytimes.com/2020/04/24/smarter-living/coronavirus-convalescent-plasma-antibodies.html> [<https://perma.cc/6U8A-9PNM>]. Plasma contains 91–92% water. *Id.* PDC phlebotomists connect plasma donors to a machine that executes plasmapheresis, a cyclical process that removes whole blood, separates plasma from red blood cells, and returns the red blood cells to the bloodstream. *Id.* The body typically replaces its plasma supply within two days. *Id.*

¹⁶ Greenberg, *supra* note 15. Although PDCs pay donors about \$30 per donation, the donated plasma will generate about \$300 of medicinal product. *Id.* Another news source estimated the profit at \$350. H. Luke Shaefer & Analidis Ochoa, *How Blood-Plasma Companies Target the Poorest Americans*, THE ATLANTIC (Mar. 15, 2018), <https://theatlantic.com/business/archive/2018/03/plasma-donations/555599/> [<https://perma.cc/577F-NBFN>]. Plasma-derived medicines treat an array of ailments such as primary immunodeficiency and hemophilia. Greenberg, *supra* note 15. Pharmaceutical companies also use plasma to create preventive treatments for new diseases that do not yet have remedies. Herrera, *supra* note 15. Infusions of convalescent plasma, plasma containing antibodies, create “passive immunity” in the person receiving the infusion. *Id.* Immunity gained from someone else’s antibodies is “passive” because the body receiving the antibodies does not have to create them itself. *Id.* In the early days of the COVID-19 pandemic, the medical community hoped convalescent plasma could serve as a stopgap treatment until a vaccine was developed. *Id.* The Food and Drug Administration began collecting convalescent plasma in March 2020 and commenced a trial administering it to over 100,000 patients with COVID-19 from April to August 2020. Elizabeth B. Pathak, *Convalescent Plasma Is Ineffective for COVID-19*, 8268 BMJ 371 (2020); Herrera, *supra* note 15. Results from the trial, however, showed no benefit and instead demonstrated that the transfusions caused blood clotting, or thrombosis, in older adults. Pathak, *supra*.

¹⁷ Petition for Writ of Certiorari at 10, *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323 (5th Cir. 2018) (No. 19-603); Shaefer & Ochoa, *supra* note 16. See generally Mark A. Hayden, Note, *The Burgeoning “Biorights Movement”: Its Legal Basis, What’s at Stake, and How to Respond*, 59 B.C. L. REV. 1775 (2018) (arguing against the sale of biological materials, including plasma). Countries that proscribe selling plasma believe it is unsafe, exploitive, and disincentivizes donating blood. *Lift Bans on Paying for Human-Blood Plasma*, THE ECONOMIST (May 12, 2018), economist.com/leaders/2018/05/12/lift-bans-on-paying-for-human-blood-plasma [<https://perma.cc/7HFM-DTMN>]. Most countries that allow selling plasma have restricted total allowable donations per week and per year to protect the donors’ health. Shaefer & Ochoa, *supra* note 16. For example, in Europe, people may only donate forty-five times per year. *Id.* Meanwhile, the U.S. blood industry is among the least regulated globally, allowing two donations per week and 104 donations per year. *Id.* Almost three-quarters of the world’s plasma comes from the United States. *Id.* Blood products like plasma account for 1.88% of U.S. exports, exceeding that of car parts, soybeans, and medical equipment. Greenberg, *supra* note 15; *What Does the United States Export?* (2018), OBSERVATORY ECON. COMPLEXITY, https://oec.world/en/visualize/tree_map/hs92/export/usa/all/show/2018/ [<https://perma.cc/3VWG-HVYZ>].

twofold from 2005 to 2019 and annual revenue almost fourfold over the last twenty years to exceed \$21 billion in 2017.¹⁸

Meanwhile, ethicists, sociologists, and donors have questioned whether the plasma business exploits its donors.¹⁹ Research shows that PDCs are overwhelmingly located in under-resourced neighborhoods to attract low-income people who survive off their donation payments.²⁰ Consequently, the industry's target demographic largely overlaps with disabled populations, who are disproportionately low-income.²¹

¹⁸ Greenberg, *supra* note 15; see Petition for Certiorari, *supra* note 17, at 10 (noting that, in 2018, the number of annual donations increased by 8 million). The United States is now home to over seven hundred PDCs. Petition for Certiorari, *supra* note 17, at 10.

¹⁹ Greenberg, *supra* note 15 (reporting that one donor, for example, learned about the “fast cash” opportunity from fellow homeless shelter residents); see Heather Olsen et al., *Bearing Many Burdens: Source Plasma Donation in the U.S.*, CTR. FOR HEALTHCARE RSCH. & POL'Y (Aug. 2018), <https://chrp.org/wp-content/uploads/2019/01/PDC-presentation-web-version.pdf> [<https://perma.cc/LT24-VS3N>] (noting that 13% of surveyed donors at the Cleveland location of a PDC, CSL Plasma, Inc. (CSL), reported lying about their health so they could donate). One particularly exploitive practice the industry employs is targeting recruitment toward Mexican citizens. Stefanie Dodt & Jan Lukas Strozzyk, *Pharmaceutical Companies Are Luring Mexicans Across the U.S. Border to Donate Blood Plasma*, PROPUBLICA (Oct. 4, 2019), <https://www.propublica.org/article/pharmaceutical-companies-are-luring-mexicans-across-the-u.s.-border-to-donate-blood-plasma> [<https://perma.cc/7X7W-WKFE>]. Forty-three of the 805 PDCs in the United States operate along the border of Mexico, where it has been illegal to sell plasma since 1987. *Id.* Facebook advertisements and flyers guaranteeing substantial cash rewards lure thousands of Mexican citizens into the United States per week to donate plasma at PDCs. *Id.* Though not technically illegal, PDC employees encourage donors crossing the border on temporary visas to lie to Customs and Border Protection officers about the reason for their trip. *Id.* Border PDCs are the most productive, receiving more than twice as many donations per week as PDCs operating in other parts of the country. *Id.* Border PDCs also rank highest in donor frequency. *Id.* One PDC company, Grifols, operates seventeen PDCs along the border. *Id.* Employees at five of these PDCs reported that Mexican citizens comprise between 60% and 90% of daily donations, equating to almost 10,000 Mexican citizens. *Id.*

²⁰ See Olsen et al., *supra* note 19 (analyzing forty years of data on PDC locations across the United States). A study found the combination of (1) a large low-income population, (2) areas offering mostly minimum wage jobs, and (3) municipalities with inadequate public assistance were the best aggregate predictors of where PDCs would be located. *Id.* The survey showed that one PDC, CSL, pays more for the donor's second weekly and eighth monthly donations to reward recurrent visits. *Id.* This reward scheme attracts low-income people who need the extra money from donations to survive. *Id.* The high endorsement of adverse side effects suggests that, absent the cash rewards, people would not donate so frequently. *Id.* (finding that 70% of donors suffered side effects); see Greenberg, *supra* note 15 (reporting that although members of the plasma industry maintain that frequent donations present negligible risk to donors, research shows that regular donors have fewer blood proteins, a risk factor for infections and organ disorders). The results also illustrated that 84% of donors at the Cleveland CSL were Black and 5% were white. Olsen et al., *supra* note 19. Further, 57% were unemployed and earned over one third of their monthly income from donating. *Id.* Another study similarly showed that PDCs are overrepresented in under-resourced neighborhoods. Robert C. James & Cameron A. Mustard, *Geographic Location of Commercial Plasma Donation Clinics in the United States, 1980–1995*, 94 AM. J. PUB. HEALTH 1224, 1227 (2004) (finding that PDCs were at least 500% more likely to be located in “high-risk” census tracts—i.e., economically under-resourced regions with high rates of residential mobility and drug trafficking—than chance would dictate).

²¹ See NANETTE GOODMAN ET AL., FINANCIAL INEQUALITY: DISABILITY, RACE, AND POVERTY IN AMERICA 12 (2019) (finding that the poverty rate was higher among people with a disability across

Moreover, disabled donors face uncertain legal remedies for discrimination because PDCs are not universally covered under the ADA.²² This discrepant Title III protection grows more prominent as the country’s disabled population exceeds 61 million and disability-based discrimination suits stockpile against PDCs.²³

B. Title III of the ADA

The ADA’s express purpose is to protect people with disabilities from discrimination.²⁴ Title III specifically prohibits disability-based discrimination in the receipt of services in places of public accommodation.²⁵ Rather than defining “public accommodation,” the statute provides examples of qualifying entities.²⁶ Within this extensive list is the broad phrase “other service establishment.”²⁷ Originally, the catch-all was written as “other *similar* service estab-

ances); Alana Semuels, *The Plasma Industry Way—Paying Donors—Is Debated as a Path for Blood Banks to Follow*, PITT. POST-GAZETTE (Feb. 22, 2005), <https://post-gazette.com/news/health/2005/02/22/The-plasma-industry-way-paying-your-donors-is-debated-as-a-path-for-blood-banks-to-follow/stories/200502220192> [<https://perma.cc/6YHD-38LR>] (stating that PDCs draw people suffering from poverty and mental illness). Notably, the industry’s target demographic is also largely comprised of people of color, as they are disproportionately represented within the disabled population. *Adults with Disabilities: Ethnicities and Race*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 25, 2019), <https://cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html> [<https://perma.cc/QF22-5C3A>] (finding that one in four Black Americans and three in ten American Indians/Alaskan Natives have a disability).

²² *Compare* *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174 (3d Cir. 2019) (holding that the ADA applies to PDCs), *and* *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016) (same), *with* *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 325 (5th Cir. 2018) (holding that PDCs are exempt from ADA affirmative duties).

²³ *Disability Impacts All of Us*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 9, 2019), <https://cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> [<https://perma.cc/97KT-QWGD>]; *see, e.g.*, *Complaint at 6*, *Illinois v. CSL Plasma, Inc.*, No. 20-cv-03535 (N.D. Ill. June 17, 2020) (challenging a PDC’s refusal to allow the plaintiff to bring her psychiatric service animal); *Complaint ¶ 3*, *Colorado Cross-Disability Coalition et al. v. CSL Plasma, Inc.*, No. 20-cv-01350 (D.C. Colo. May 13, 2020) (collecting plaintiffs who experienced discrimination at PDCs including the denial of a service dog, the exclusion of a person diagnosed with schizophrenia, the denial of a paraplegic for inability to stand on a scale, and the exclusion of a person with cerebral palsy for requiring help to get on the donor bed); *Complaint at 1–2*, *Gomez v. CSL Plasma, Inc.*, No. 20-cv-02488 (N.D. Ill. Apr. 23, 2020) (denying an ASL interpreter for a deaf man who wished to donate plasma).

²⁴ 42 U.S.C. § 12101(b); *see* 135 CONG. REC. S4979-02 (daily ed. May 9, 1989) (statement of Sen. Harkin) (conveying that the ADA’s message is that the United States will not tolerate disability-based discrimination).

²⁵ 42 U.S.C. § 12182(a). Congress intended Title III to include individuals with disabilities in all aspects of the American economy. H.R. REP. NO. 485, pt. 2, at 99 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 382.

²⁶ 42 U.S.C. § 12181(7) (including lodging, restaurants, shopping and grocery stores, public transportation, museums, parks, and schools).

²⁷ *Id.* § 12181(7)(F) (“The following private entities are considered public accommodations . . . a laundromat, . . . bank, barber shop, beauty shop, . . . office of an accountant or lawyer, . . . profession-

ishment,” but Congress removed the qualifier.²⁸ Consequently, an aggrieved plaintiff must prove that a business not specified in the statute constitutes a “service establishment,” not that it is analogous to an enumerated business.²⁹

Federal circuit courts are divided on whether PDCs, which are not among the list of public accommodations, are service establishments and thus covered under Title III of the ADA.³⁰ A slim majority of courts bind PDCs to the ADA’s

al office of a health care provider, hospital, or *other service establishment*.” (emphasis added)). The examples of public accommodations in § 12181(7) are exhaustive, but the legislature intended them to be liberally construed. 136 CONG. REC. E1913-01 (daily ed. May 22, 1990) (statement of Rep. Hoyer).

²⁸ 136 CONG. REC. E1913-01 (emphasis added). Congress employed the word “similar” in other parts of the ADA. See 42 U.S.C. § 12111(9)(B) (including “other *similar* accommodations” in the definition of reasonable accommodation alongside adjusting schedules and supplying interpreters) (emphasis added); *id.* § 12103(1)(D) (defining auxiliary aids and services as modified devices and “other *similar* services”) (emphasis added). Had Congress intended for “similar” to be implied in 42 U.S.C. § 12181(7), it would not have explicitly used the word in other sections of the ADA. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012) (defining the surplusage canon); see, e.g., 42 U.S.C. § 12111(9)(B) (“other similar accommodations”); § 12103(1)(D) (“other similar services”); see also Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2160–61 (2016) (warning against inserting limitations that the drafters did not). Moreover, implying the word “similar” where Congress expressly removed it, particularly given that the word appears elsewhere, would violate the surplusage canon, which gives effect to all words. See SCALIA & GARNER, *supra*, at 174 (defining the surplusage canon).

²⁹ 136 CONG. REC. E1913-01. U.S. Representatives have argued that removing “similar” underscores the legislative intent to construe the enumerated places of public accommodation liberally. See *id.* (noting that Congress removed the qualifier to make it easier to bring discrimination claims).

³⁰ Compare *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174 (3d Cir. 2019) (holding that the ADA applies to PDCs), and *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016) (same), with *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 325 (5th Cir. 2018) (holding that PDCs are not places of public accommodation under the ADA). In 2018, in *Silguero v. CSL Plasma, Inc.*, the U.S. Court of Appeals for the Fifth Circuit held that businesses following a profit model in which they compensate patrons in exchange for a donation of economic value are not service establishments. 907 F.3d at 325. District courts have held, however, that businesses that follow that profit model are service establishments. See *Marso v. Safespeed*, No. 19-2671, 2020 U.S. Dist. LEXIS 138042, at *32 (D. Kan. Aug. 4, 2020) (holding that a red-light enforcement company is a Title III service establishment); *Estrada v. S. St. Prop., LLC*, No. 17-cv-259, 2017 U.S. Dist. LEXIS 128256, at *7 (C.D. Cal. Aug. 11, 2017) (holding that a recycling center is a service establishment); see also Brief for Congress as Amici Curiae Supporting Petitioners, *supra* note 3, at 16 (arguing that consignment shops and auction houses are service establishments). For example, in 2020, the U.S. District Court for the District of Kansas, in *Marso v. Safespeed*, held that a red-light enforcement company was a service establishment subject to the ADA. 2020 U.S. Dist. LEXIS 138042, at *28–29. The company wrongfully billed the disabled plaintiff because his Disabled Parking Placard number matched the true violator’s license plate. *Id.* at *3. The court held that the company’s failure to develop a check against such mistakes violated Title III of the ADA and further held that the company was a service establishment because it serviced the public by providing images of alleged traffic violations. *Id.* at *28–29. The fact that the city, and not the traffic violators, paid for the red-light enforcement company’s services did not prevent the company from classifying as a service establishment. See *id.* Similarly, in 2017, in *Estrada v. South Street Property, LLC*, the U.S. District Court for the Central District of California accepted the plaintiff’s theory, based off of the Tenth Circuit’s definition of service establishment, that the recycling center was a Title III public accommodation. 2017 U.S. Dist. LEXIS 128256, at *7; see *Levorsen*, 828 F.3d at 1231 (defining service establishment as a business

requirements as service establishments because PDCs provide a service.³¹ Conversely, the minority position, which exempts PDCs from ADA regulation, asserts that PDCs do not provide a service and are too unlike the other service establishments listed in 42 U.S.C. § 12181(7)(F) to fall within the catch-all.³²

C. The Factual Background and Procedural Posture of *Matheis*

In October 2016, George Matheis, a former police officer with post-traumatic stress disorder (PTSD), attempted to donate plasma at a PDC, CSL Plasma, Inc. (CSL).³³ Matheis had consistently donated plasma at CSL without incident for the year prior to the alleged discrimination.³⁴ Matheis’s October visit conformed to each of his previous visits in all but one way—this time, his new service dog accompanied him.³⁵ Employees immediately told Matheis that CSL did not permit dogs in the facility and barred him from donating until his physician certified that he could donate safely without the service dog.³⁶

that offers a benefit to the public). Though recycling centers, like PDCs, pay their patrons for donating, the district court held that recycling centers are nonetheless service establishments. *Estrada*, 2017 U.S. Dist. LEXIS 128256, at *7. Neither the red-light enforcement company in *Marso* nor the recycling center in *Estrada* employed the profit model the Fifth Circuit required of service establishments in *Silguero*. See *Marso*, 2020 U.S. Dist. LEXIS 138042, at *32; *Estrada*, 2017 U.S. Dist. LEXIS 128256, at *7; see also *Silguero*, 907 F.3d at 325 (holding that only businesses that receive money from customers in exchange for a service qualify as service establishments).

³¹ See *Matheis*, 936 F.3d at 178 (adding that PDCs service the general public because healthcare providers ultimately use the plasma); *Levorsen*, 828 F.3d at 1231, 1234 (observing that PDCs offer the service of providing the medical staff and technology essential for realizing a patron’s desire to donate plasma).

³² *Silguero*, 907 F.3d at 330. In *Silguero*, the Fifth Circuit noted that draining “life-sustaining fluid” was not a service. *Id.* at 329. Rather than PDCs providing a service to donors, the court reasoned, the donors perform a service to PDCs and are compensated for the “inconvenience of donating.” *Id.* at 325. In this way, PDCs employ donors, foreclosing a Title III claim. See *id.* at 331 (observing that Title I of the ADA, which focuses on discrimination in an employment relationship, is the appropriate avenue for legal relief for donors “employed” by PDCs).

³³ *Matheis*, 936 F.3d at 174. After his involvement in a lethal shooting in the line of duty in 2000, Matheis developed PTSD and retired in 2007. *Id.*

³⁴ *Id.* at 175. In an eleven-month span, Matheis had donated plasma about ninety times at CSL to supplement his income. *Id.* Plasma donors like Matheis can earn up to several hundred dollars every month for donating their plasma. *Id.*

³⁵ *Id.* Matheis’s daughter gave him the dog because she was moving out of his home and wanted to ensure a form of companionship for her father in her absence. See *id.* (noting that Matheis’s daughter bought him a dog not because his PTSD had worsened but rather to help him adjust to living alone). That Matheis used the dog to cope with his PTSD suggests Odin was a psychiatric service dog. See *id.*; *Can a Service Dog Help with Your Anxiety?*, HEALTHLINE (Apr. 28, 2016), <https://healthline.com/health/service-dog-for-anxiety> [<https://perma.cc/29M8-T3S7>]. Psychiatric service dogs are a subclass of service animals, which are only doctor-recommended for “debilitating” psychiatric conditions. *Can a Service Dog Help with Your Anxiety?*, *supra*.

³⁶ *Matheis*, 936 F.3d at 175. Matheis offered to leave his dog in the car while he donated, but the manager refused to allow him to participate until the facility received a letter from Matheis’s physician. *Id.* Notably, if classified as a public accommodation, CSL could only ask a disabled individual to remove a service animal if the animal was not trained or if the owner did not effectively restrain it. See

Matheis sued CSL in the U.S. District Court for the Middle District of Pennsylvania, alleging that CSL violated Title III of the ADA by refusing to accommodate his disability.³⁷ To successfully state a claim under Title III, Matheis had to show that CSL was a public accommodation, as defined by the ADA.³⁸ CSL moved for summary judgment, arguing that its facility was not an ADA public accommodation.³⁹ The district court disagreed, finding that PDCs are ADA public accommodations, but granted CSL's motion for summary judgment on other grounds.⁴⁰ Matheis appealed the decision to the U.S. Court

28 C.F.R. § 36.302(c)(2) (2016) (delineating the instances in which it is appropriate for public accommodations to preclude a service dog's entry on the premises). Even if the entity lawfully bars an animal, the entity must allow the individual an opportunity to participate without the service animal. *Id.* § 36.302(c)(3). Further, public accommodations may not require the documentation CSL did here. *See id.* § 36.302(c)(6) (outlining the few allowable inquiries about the animal owner's disability and specifically prohibiting public accommodations from demanding any documentary proof whatsoever). Nevertheless, CSL's policy provided that people who use a psychiatric service animal or are prescribed at least two anti-anxiety medications per day are unsafe to donate. *Matheis*, 936 F.3d at 174. This policy violates the ADA if the fear for the safety of staff and donors was based on "presumptions, generalization, misperceptions, . . . ignorance, . . . or pernicious mythologies." 135 CONG. REC. S4979-02 (daily ed. May 9, 1989) (statement of Sen. Harkin).

³⁷ *Matheis*, 936 F.3d at 175.

³⁸ *Id.* Matheis also had to demonstrate that he was disabled and that CSL's policy was unreasonable disability-based discrimination. *Id.* The parties agreed that Matheis was disabled, as PTSD qualifies as a disability under the ADA. *Id.* Therefore, the appeal focused on the other two elements of the prima facie case: whether CSL was a public accommodation and whether CSL's policy was unreasonable discrimination. *Id.* Public accommodations must modify policies to allow individuals with disabilities to use service animals. 28 C.F.R. § 36.302(c); ADA Accessibility Guidelines for Building and Facilities, 56 Fed. Reg. 35,544, 35,565 (July 26, 1991) (providing an overview of the ADA); *see* 42 U.S.C. § 12182(b)(1)(2)(A) (defining discrimination as a public accommodation's failure to formulate a practical accommodation to facilitate participation by disabled individuals). Specifically, the service establishment must accommodate a disabled person's use of a service animal unless the establishment can prove that (1) the requested modification would "fundamentally alter" the public accommodation, or (2) the individual's participation would pose a "direct threat" to the safety and well-being of others and the establishment could not alleviate that threat through a change in policy. 42 U.S.C. §§ 12182(b)(2)(A)(ii), 12182(b)(3).

³⁹ *Matheis v. CSL Plasma, Inc.*, 346 F. Supp. 3d 723, 726 (M.D. Pa. 2018), *rev'd in part* 936 F.3d 171 (3d Cir. 2019). CSL argued in the alternative that its policy of excluding individuals who manage their anxiety with service animals was reasonable. *Id.* at 725. Individuals who experience severe anxiety, CSL maintained, could harm themselves or CSL staff if the donation process caused a panic attack. *Id.* at 734. CSL specifically feared donors ripping out their needles and stabbing staff members with it. *Id.* Such an event could harm both donors and staff. *Id.*

⁴⁰ *Id.* at 737–38. The court looked to the only circuit-level case that had decided the issue of whether PDCs are ADA service establishments. *Matheis*, 346 F. Supp. 3d at 733; *see Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1244 (10th Cir. 2016) (serving as the only federal court of appeals case to have decided whether PDCs are ADA service establishments at the time the district court decided *Matheis*). Justice Holmes of the Tenth Circuit argued in his dissenting opinion that PDCs more closely resemble manufacturers than service establishments because they manufacture plasma for profit. *Levorsen*, 828 F.3d at 1244 (Holmes, J., dissenting). Judge Holmes relied on language in Federal Drug Administration statutes to support his contention that PDCs are manufacturers. *Id.* (citing 21 C.F.R. § 640.71(a) (2021) (referencing the "manufacturing" of blood plasma through donation)). *Contra id.* 1234 n.8 (majority op.) (noting that there is no authority prohibiting an entity from being both a manufacturer and a service establishment). The district court grappled with whether

of Appeals for the Third Circuit.⁴¹ The Third Circuit affirmed the lower court’s holding that CSL is a public accommodation because PDCs offer the service of enabling plasma donation.⁴²

II. FEDERAL CIRCUIT SPLIT ON WHETHER TITLE III APPLIES TO PDCS

Courts are divided on whether PDCs are service establishments under Title III of the ADA.⁴³ Section A of this Part explains the Tenth Circuit’s views on the definition of “service establishment,” including whether it encompasses PDCs, and compares them to those of Judge Holmes in his dissent.⁴⁴ Section B describes the Fifth Circuit’s position, which excludes PDCs from ADA protection.⁴⁵ Finally, Section C explains the Third Circuit’s decision to join the Tenth Circuit in concluding that PDCs are public accommodations.⁴⁶

A. The Tenth Circuit’s Fractured Opinion Delineated Both Sides of the Service Establishment Argument

In 2016, in *Levorsen v. Octapharma Plasma, Inc.*, the U.S. Court of Appeals for the Tenth Circuit addressed whether Title III of the ADA applied to PDCs in a case of first impression at the federal appellate level.⁴⁷ Starting with the plain language of “service establishment,” the court combined each word’s dictionary definition to elucidate the term’s meaning: a business that offers a

PDCs are service establishments covered under Title III or manufacturing plants not subject to the ADA. *Matheis*, 346 F. Supp. 3d at 733. The court ultimately held that the ADA covered CSL as a service establishment because, although contrary to a traditional service model in which patrons exchange cash for goods or services, CSL’s business model aligned more closely with ADA-covered public accommodations than with manufacturing plants. *Id.* Though CSL was a public accommodation, the court held that CSL did not discriminate because its rationale for denying *Matheis* was reasonable. *Id.* at 737. Thus, *Matheis* failed to meet the final requirement of a Title III claim. *Id.*

⁴¹ *Matheis*, 936 F.3d at 176. CSL cross-appealed, challenging the holding that the ADA applies to PDCs. *Id.*

⁴² *Id.* at 178. The Third Circuit reversed the district court’s finding that CSL had a valid justification for denial of services because the PDC based its policy off stereotypes about people with mental illness rather than real risk. *Id.* at 180. As such, the Third Circuit reversed and remanded the district court’s decision to grant CSL’s motion for summary judgment. *Id.* at 182.

⁴³ Compare *Matheis v. CSL Plasma, Inc.*, 936 F.3d at 171, 174 (3d Cir. 2019) (holding that the ADA applies to PDCs), and *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 127, 1229 (10th Cir. 2016) (same), with *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 325 (5th Cir. 2018) (holding that PDCs are not places of public accommodation under the ADA).

⁴⁴ See *infra* notes 47–59 and accompanying text.

⁴⁵ See *infra* notes 60–64 and accompanying text.

⁴⁶ See *infra* notes 65–71 and accompanying text.

⁴⁷ *Levorsen*, 828 F.3d at 1229. The PDC deferred the plaintiff for his diagnosis of borderline schizophrenia. *Id.* The center still refused him even after he produced a letter from his psychiatrists certifying his suitability for donating. *Id.* The plaintiff then brought suit in the U.S. District Court for the District of Utah against the PDC under Title III of the ADA. *Id.*

benefit to the public.⁴⁸ The PDC argued that two canons of statutory interpretation should apply: *eiusdem generis* and *noscitur a sociis*.⁴⁹ *Eiusdem generis* requires a general term succeeding a specific term to be read in association with the specific term, and *noscitur a sociis* necessitates that a court interpret a word in the context of the preceding and following words or sentences.⁵⁰ Those canons, the PDC maintained, limited service establishments to businesses that provide services to customers for a fee because all entities listed in 42 U.S.C. § 12181(7)(F) employ that particular direction of compensation.⁵¹

The Tenth Circuit disagreed and declared that there was no reason to discard the ordinary meaning, which yielded a far-reaching classification consistent with the ADA's intended breadth.⁵² It reasoned that PDCs provide a

⁴⁸ *Id.* at 1231 (first citing *Establishment*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 778 (2002 ed.); and then citing *Service*, *id.* at 2075). Specifically, the court defined "service" as behavior that helps someone and "establishment" as a business venue. *Id.* Combining those definitions, the court defined "service establishment" as a business that, through its operation, benefits people. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (first citing *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991); and then citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)); see *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (reasoning that the surplusage canon required application of *noscitur a sociis* because if general terms were not limited by preceding specific terms, the specific terms would be "superfluous"); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (applying *noscitur a sociis*). But see *United States v. Stevens*, 559 U.S. 460, 474–75 (2010) (giving the phrase "wounded or killed" its ordinary meaning based on a dictionary definition because the plain language was unambiguous); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2006) (remarking that "woodenly [applied] limiting principles" are not appropriate every time a statute names specific examples in conjunction with a broad category); *Norfolk*, 499 U.S. at 129 (rejecting the application of *eiusdem generis*); *Harrison v. PPG Indus.*, 446 U.S. 578, 589 n.6 (1980) (rebuffing the notion that courts must employ *eiusdem generis* when a broad reading would cause the specific examples to be gratuitous); *Gooch v. United States*, 297 U.S. 124, 128 (1936) (rejecting *eiusdem generis* when its application frustrates the legislation's clear objective).

⁵¹ *Levorsen*, 828 F.3d at 1232; see 42 U.S.C. § 12181(7)(F) (including establishments such as laundromats and barbershops that patrons typically pay rather than receive compensation from).

⁵² *Levorsen*, 828 F.3d at 1232 (citing *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 676–77 (2001)); see *Hamilton Creek Metro. Dist. v. Bondholders Colo. Bondshares (In re Hamilton Creek Metro. Dist.)*, 143 F.3d 1381, 1385 (10th Cir. 1998) (stating that congressional intent can be gleaned through the "ordinary meaning" of the word, which can be defined using a dictionary); H.R. REP. NO. 101-485, pt. 2, at 100 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 383 (stipulating that the judiciary should construe "other service establishment" broadly, in keeping with the ADA's goal to allow disabled individuals equal access to all aspects of American life). The court noted that if it were to look beyond the plain meaning, the PDC's limited interpretation still would not follow because judges must not read a textual element into a statute. *Levorsen*, 828 F.3d at 1232; see *CBS v. Primetime 24 J.V.*, 245 F.3d 1217, 1226 (11th Cir. 2001) (noting that statutory interpretation can "look beyond the plain language" if obvious evidence of contrary congressional purpose exists). Where *eiusdem generis* reads "similar" into the statute, legislative history negates that interpretation, the Tenth Circuit observed, because Congress removed the limiting qualifier "similar" from § 12181(7)(F). *Levorsen*, 828 F.3d at 1233 (citing 136 CONG. REC. E1913-01 (daily ed. May 22, 1990) (statement of Rep. Hoyer)).

service by supplying the staff and equipment necessary for donating plasma.⁵³ Consequently, the Tenth Circuit held that Title III applies to PDCs.⁵⁴

Judge Jerome Holmes dissented, arguing that the majority should have used canons of statutory interpretation in interpreting the plain language of “service establishment.”⁵⁵ Applying *ejusdem generis* and *noscitur a sociis*, he concluded that service establishments provide a service for a fee—the common trait of the enumerated entities in § 12181(7)(F).⁵⁶ PDCs fail to satisfy this criterion, he argued, because the direction of compensation is inverse.⁵⁷ In other words, donors do not pay PDCs for a service; rather, PDCs pay donors for their plasma.⁵⁸ Judge Holmes therefore concluded that PDCs should not qualify as public accommodations.⁵⁹

⁵³ *Levorsen*, 828 F.3d at 1234.

⁵⁴ *Id.* The Tenth Circuit reversed the district court’s decision and remanded the case. *Id.* at 1235. On remand, the parties settled. Francis M. Schneider, Comment, *Manufacturing Public Accommodation Under Title III of the ADA: The Tenth Circuit’s Expansive Interpretation of “Service Establishment” to Include Manufacturers*, 56 WASHBURN L. J. 599, 599 n.2 (2017).

⁵⁵ *Levorsen*, 828 F.3d at 1237–38 (Holmes, J., dissenting) (first citing *McDonnell*, 136 S. Ct. at 2359; then citing *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001); then citing *United States v. Brune*, 767 F.3d 1009, 1022–23 (10th Cir. 2014); then citing *CBS v. Primetime 24 J.V.*, 245 F.3d 1217, 1225 (11th Cir. 2001); and then citing *First Nat’l Bank v. Woods (In re Woods)*, 743 F.3d 689, 694 (10th Cir. 2014)). *Contra id.* at 1231 n.4 (majority opinion) (citing *Brune*, 767 F.3d at 1022) (adopting the limited *ejusdem generis* interpretation only because the common definition was so broad that it restricted free speech); *id.* at 1232 n.5 (citing *CBS*, 245 F.3d at 1225 n.6) (elaborating that the Eleventh Circuit stated that the plain language often obviates the need for interpretive canons); *id.* at 1233 n.6 (citing *Chickasaw Nation*, 534 U.S. at 94) (noting that the Supreme Court did not use interpretive canons because doing so would have yielded a reading at odds with the legislative purpose). The requisite liberal interpretation of the ADA does not, Judge Holmes argued, mandate an interpretation of § 12181(7) beyond the plain meaning of the words. *Id.* at 1238 (Holmes, J., dissenting) (citing *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981)).

⁵⁶ *Id.* at 1241 (Holmes, J., dissenting). Judge Holmes asserted that the majority’s combination of the dictionary definitions of “service” and “establishment” to discern the meaning of “service establishment” was erroneous because judges must construe a statutory term in its statutory context rather than by its component words. *Id.* (citing *Yates v. United States*, 574 U.S. 528, 538 (2015) (plurality opinion) (rejecting the dictionary definitions of “tangible” and “object” to construe the term “tangible object”)). Another commonality Judge Holmes discovered among the listed entities in § 12181(7) is that the services achieve the customers’ objective. *Id.* He argued that PDCs, on the other hand, provide services for the centers’ desired outcome, not the patrons’. *Id.* at 1243. PDCs’ desired outcome is to sell plasma to pharmaceutical companies. *Id.* at 1236. Other critics of the Tenth Circuit’s holding stated that PDCs do not serve the public because their sole purchasers are pharmaceutical companies. Schneider, *supra* note 54, at 624. Supporters of the Tenth Circuit’s holding, however, contend that pharmaceutical companies create medicines that benefit the general public. See *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 178 (3d Cir. 2019) (observing that PDCs benefit the public by providing plasma-derived therapies to the healthcare industry).

⁵⁷ *Levorsen*, 828 F.3d at 1242–43 (Holmes, J., dissenting).

⁵⁸ *Id.*

⁵⁹ *Id.* at 1235.

B. The Fifth Circuit Followed Judge Holmes's Dissent, Holding PDCs Exempt from ADA Affirmative Duties

In 2018, in *Silguero v. CSL Plasma, Inc.*, the U.S. Court of Appeals for the Fifth Circuit declined to follow the Tenth Circuit and held that PDCs are not public accommodations under Title III of the ADA.⁶⁰ The court employed *ejusdem generis* to discern that the patron-to-business direction of compensation shared by § 12181(7)(F) entities is relevant to determining if a business is a service establishment.⁶¹ Specifically, the direction of compensation signals who provides the service.⁶² PDCs' business-to-patron direction of compensation suggests that donors provide a service to PDCs, precluding the businesses'

⁶⁰ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 325 (5th Cir. 2018). Notably, at least one federal district court in Texas followed the Tenth Circuit's rationale in *Levorsen* before the Fifth Circuit decided *Silguero*. See *Montgomery v. Biolife-Shire*, No. 18-cv-2057, 2018 WL 4776729, at *6 (N.D. Tex. Sept. 20, 2018) (citing *Levorsen*, 828 F.3d at 1234) (accepting that PDCs are Title III service establishments for the purposes of screening the plaintiff's claim). In *Silguero v. CSL Plasma, Inc.*, plaintiffs Mark Silguero and Amy Wolfe sued the same PDC as Matheis: CSL. See *Matheis*, 936 F.3d at 174; *Silguero*, 907 F.3d at 325. Silguero walked with a cane, and Wolfe had a service animal to help manage her anxiety. *Silguero*, 907 F.3d at 325. CSL denied both plaintiffs the opportunity to donate because of their disabilities—Silguero for his unstable gait and Wolfe for her service animal. *Id.* at 326. The policy that excluded Wolfe was the same policy that CSL cited to defer Matheis. See *Matheis*, 936 F.3d at 174 (determining the legality of CSL's policy to exclude donors whose anxiety was severe enough to require the assistance of a service animal); *Silguero*, 907 F.3d at 326 (avoiding analysis of the same policy because the court held that CSL was not a public accommodation, thus precluding a defense by the PDC that the policy was reasonable). Although CSL maintained that it deferred Silguero because he threatened employees, Silguero alleged that CSL's explanation was simply a pretext for its discriminatory behavior because he never made the supposed threats. *Silguero*, 907 F.3d at 326. Silguero and Wolfe filed suit in the U.S. District Court for the Southern District of Texas, alleging a Title III violation. *Id.* CSL filed a motion for summary judgment, arguing that the ADA did not apply to its facility. *Id.* at 327. The district court ultimately granted CSL's motion. *Id.* The Fifth Circuit affirmed the district court's grant of summary judgment. *Silguero v. CSL Plasma, Inc.*, No. 16-cv-361, 2017 U.S. Dist. LEXIS 223103, at *18 (S.D. Tex. Nov. 2, 2017), *aff'd in part*, 907 F.3d 323 (5th Cir. 2018).

⁶¹ *Silguero*, 907 F.3d at 330–32. The Fifth Circuit cited several cases to support its reliance on canons of statutory interpretation, yet the cases the Fifth Circuit cited almost exclusively rejected these canons in favor of legislative intent. See *id.* (first citing *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147–50 (2007) (focusing on the legislative history and intent, rather than examining the statute's text, to determine the law's purpose); then citing *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (noting that congressional intent can defeat the force of canons and rejecting canons that would produce an interpretation at odds with legislative intent); and then citing *Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991) (rejecting the application of *ejusdem generis*). According to *Silguero*, the direction of payment is a pertinent measurement of whether an individual is a customer entitled to Title III protection or an employee governed by Title I. *Id.* at 331. The Fifth Circuit inferred that construing Title III to protect those who benefit from imbursement nulls the legislative purpose of crafting a separate title for employment. *Id.* (noting the absurdity in interpreting one title to annihilate the other).

⁶² *Id.* at 329–30. Those receiving compensation provide the service. *Id.* at 330–31.

status as service establishments.⁶³ Thus, the Fifth Circuit held that the ADA does not apply to PDCs.⁶⁴

C. The Third Circuit Joined the Tenth Circuit in Holding that PDCs Are Public Accommodations Under Title III of the ADA

In 2019, the U.S. Court of Appeals for the Third Circuit, in *Matheis v. CSL Plasma, Inc.*, joined the circuit split over whether PDCs are public accommodations.⁶⁵ Ultimately, the court joined the Tenth Circuit in holding that PDCs are Title III service establishments.⁶⁶ The court implicitly rejected the use of *ejusdem generis* and *noscitur a sociis* in favor of a plain meaning analysis.⁶⁷ In doing so, the Third Circuit adopted the Tenth Circuit’s definition of service establishment as an enterprise that serves the public.⁶⁸ The Third Circuit reasoned that PDCs offer the public the services of facilitating the donation of plasma for money and furnishing an essential product to healthcare workers and patients.⁶⁹ The court noted that the direction of compensation is an impractical marker because both customers and service establishments receive economic value from the exchange, regardless of which party, if any,

⁶³ *Id.* at 329–30. PDCs are not service establishments, the Fifth Circuit held, because rather than providing a service, they receive one from donors. *Id.* The absence of customer-derived benefit also impeded PDCs’ status as service establishments. *Id.* at 329. The Fifth Circuit reasoned that § 12181(7)(F) requires a customer-derived benefit. *Id.* (discerning a pattern in the statute’s listed businesses that ought to be imputed onto the catch-all phrase); see 42 U.S.C. § 12181(7)(F) (including dry-cleaners, lawyers’ offices, and hospitals, all of which benefit their customers). The court concluded that PDCs do not provide a service because the money is secondary to the donation, donating blood is uncomfortable and medically risky, and donors cannot choose the ultimate recipient of the blood. *Silguero*, 907 F.3d at 329.

⁶⁴ *Silguero*, 907 F.3d at 332.

⁶⁵ *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 176–77 (3d Cir. 2019); see *Silguero*, 907 F.3d at 325 (holding that PDCs are not public accommodations); *Levorsen*, 828 F.3d at 1229 (holding that Title III covers PDCs).

⁶⁶ *Matheis*, 936 F.3d at 177; see *Levorsen*, 828 F.3d at 1229 (holding that PDCs are public accommodations).

⁶⁷ See *Matheis*, 936 F.3d at 177 (following the Tenth Circuit’s opinion, which declined to apply these canons); *Levorsen*, 828 F.3d at 1229 (adopting a plain language approach). The Third Circuit did not touch the issue of applicable canons, perhaps because holding that the limiting canons do not apply here would conflict with the court’s earlier jurisprudence applying *noscitur a sociis* to the same statute, § 12181(7). See *Matheis*, 936 F.3d at 177 (failing to explicitly reject *ejusdem generis* or *noscitur a sociis* or invoke the plain meaning canon but instead merely stating that it followed the Tenth Circuit’s reasoning, which discarded *ejusdem generis* and *noscitur a sociis* in favor of a plain language interpretation); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998) (holding *noscitur a sociis* limits ADA public accommodations to physical structures).

⁶⁸ See *Matheis*, 936 F.3d at 177 (aligning with the Tenth Circuit’s analysis); *Levorsen*, 828 F.3d at 1229 (employing the plain language canon to define service establishment as a business that offers the public a service).

⁶⁹ *Matheis*, 936 F.3d at 178. The court noted that a mutually beneficial exchange is an “irreducible feature of a market system.” *Id.*

receives monetary compensation.⁷⁰ Therefore, the Third Circuit held that PDCs are service establishments.⁷¹

III. THE THIRD CIRCUIT CORRECTLY HELD THAT PDCS QUALIFY AS PUBLIC ACCOMMODATIONS

The term “service establishment” is purposefully broad and incorporates an extensive variety of entities that benefit the public, monetary or otherwise.⁷² The ADA’s text implies a broad interpretation, so a narrow one would denigrate legislative intent.⁷³ Future courts answering this question should follow the U.S. Court of Appeals for the Third Circuit’s 2019 decision in *Matheis v. CSL Plasma, Inc.* and hold that the ADA covers PDCs.⁷⁴ Section A of this Part explains why *ejusdem generis* should be discarded in favor of a whole-text interpretation of § 12181(7)(F).⁷⁵ Section B outlines the flaws in the Fifth Circuit’s direction of compensation argument.⁷⁶

⁷⁰ *Id.* at 177–78. Banks, for example, do not fall within the typical fee-for-service model of the other enumerated entities in § 12181(7)(F). *Id.* at 178; *see* 42 U.S.C. § 12181(7)(F) (including dry-cleaners and beauty shops that follow the traditional patron-to-business direction of compensation but also encompassing banks, which provide interest and other monetary benefits to their clients). Pawnshops and recycling centers are other service establishments that suggest the direction of compensation is not dispositive. *Matheis*, 936 F.3d at 177–78 (citing *Matheis v. CSL Plasma, Inc.*, 346 F. Supp. 3d 723, 734 n.9 (M.D. Pa. 2018), *rev’d in part* 936 F.3d 171 (3d Cir. 2019)). The Third Circuit also asserted that plasma donors benefit from receiving money and are thus serviced by PDCs. *Matheis*, 936 F.3d at 177.

⁷¹ *Matheis*, 936 F.3d at 182.

⁷² *See* 136 CONG. REC. E1913-01 (daily ed. May 22, 1990) (statement of Rep. Hoyer) (indicating that the purpose of Title III is to encompass any service establishment); Brief for Congress as Amici Curiae Supporting Petitioners, *supra* note 3, at 10–11 (explaining how the ADA covers hospitals, which must provide services to some patients free of charge, and also banks, which pay clients in interest).

⁷³ *See* 136 CONG. REC. E1913-01 (daily ed. May 22, 1990) (statement of Rep. Hoyer) (specifying that § 12181(7)(F)’s objective is to cover any service establishment); Brief for Congress as Amici Curiae Supporting Petitioners, *supra* note 3, at 7–8 (arguing that, because the public accommodation categories cover a wide array of institutions and many businesses could qualify as public accommodations under multiple subsections, Congress intended for the ADA to be broad); SCALIA & GARNER, *supra* note 28, at 101 (supposing that the purpose of using broad terms is to yield broad coverage); *see also* Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (“[T]he fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.’” (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985))).

⁷⁴ *See infra* notes 77–94 and accompanying text (arguing that the text and legislative history of the ADA supports protecting plasma donors against disability-based discrimination); *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174–78 (3d Cir. 2019) (holding that Title III applies to PDCs).

⁷⁵ *See infra* notes 77–88 and accompanying text. The whole-text canon requires the interpreter to resolve ambiguity by examining the context that the statute’s interconnected parts provide. SCALIA & GARNER, *supra* note 28, at 167.

⁷⁶ *See infra* notes 89–94 and accompanying text.

A. The Restrictive Canons Should Be Abandoned in Favor of a Whole-Text Reading

Ejusdem generis requires interpreting a general term using its preceding enumerated examples.⁷⁷ Employing this sixteenth century canon, the Fifth Circuit and Judge Holmes of the Tenth Circuit construed a direction of compensation requirement for service establishments.⁷⁸ This reading, however, emboldens exclusionary conditions that interfere with the ADA’s purpose.⁷⁹ Indeed, courts have historically rebuffed applying *ejusdem generis* to limit the protections afforded in public accommodations statutes.⁸⁰ Further, the Supreme Court stipulated that Congress’s motive for including the specific examples can repudiate the canon’s assumption that Congress meant to limit a general term by its preceding list.⁸¹ Title III’s specific examples include businesses that historically discriminated against disabled patrons, as well as those recognized in state public accommodation laws.⁸² This origin renders it implausible that Congress meant for broad blanket terms to tacitly constrain the law as Judge Holmes and the Fifth Circuit contend.⁸³

⁷⁷ *Norfolk & W. Ry. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 129 (1991); see SCALIA & GARNER, *supra* note 28, at 204 (describing the rationale behind *ejusdem generis*). *Ejusdem generis* is a more specific version of *noscitur a sociis* that requires interpreting a word in the context of its surrounding words. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961); SCALIA & GARNER, *supra* note 28, at 205.

⁷⁸ See *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 330 (5th Cir. 2018) (using *ejusdem generis* to define the term “service establishment” as a business that benefits and receives compensation from its patrons); *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1238 (10th Cir. 2016) (Holmes, J., dissenting) (arguing that an *ejusdem generis* analysis leads to the conclusion that PDCs are not service establishments because the other enumerated entities all provide services in exchange for payment); SCALIA & GARNER, *supra* note 28, at 200 (noting that *ejusdem generis* dates back to 1596 English law).

⁷⁹ Brief for Congress as Amici Curiae Supporting Petitioners, *supra* note 3, at 21 (arguing that the application of *ejusdem generis* conflicts with the ADA’s goals); see 42 U.S.C. § 12101(a)(1), (7) (declaring that the ADA’s goals were fiscal independence for people with disabilities and the “right to fully participate in all aspects of society”); *id.* § 12101(a)(5) (deriding conditions that tend to exclude people with disabilities).

⁸⁰ Brief for Congress as Amici Curiae Supporting Petitioners, *supra* note 3, at 21–22 (noting that modern state courts discount *ejusdem generis* when interpreting public accommodation laws because limiting the scope of protection opposes legislative intent).

⁸¹ *Id.* at 22 (first citing *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 44 n.5 (1983); then citing *Norfolk*, 499 U.S. at 129; and then citing *Circuit City Stores, Inc. v. Adams* 532 U.S. 105, 140 (2001) (Souter, J., dissenting)).

⁸² *Id.* at 5–6.

⁸³ See *Silguero*, 907 F.3d at 330 (employing *ejusdem generis* to define “service establishment” as a business that receives reimbursement from its patrons); *Levorsen*, 828 F.3d at 1238 (Holmes, J., dissenting) (arguing that the Tenth Circuit should have applied *ejusdem generis* due to the clear similarities shared by the statutorily enumerated entities, such as patron-to-business payment); Brief for Congress as Amici Curiae Supporting Petitioners, *supra* note 3, at 5–6, 22 (noting that Congress took a “belt and suspenders” approach to listing Title III entities to bolster the ADA’s protection). The *ejusdem generis* analysis is somewhat arbitrary. See SCALIA & GARNER, *supra* note 28, at 207 (explaining a common critique of *ejusdem generis* is that it does not stipulate the level of detail required

Instead of *ejusdem generis* or *noscitur a sociis*, future courts deciding Title III matters should employ the whole-text canon.⁸⁴ A whole-text interpretation considers an ambiguous section within the context of that section's associated parts and the statute as a cohesive whole.⁸⁵ Context demonstrates, through the stark dissimilarity of § 12181(7)(F)'s enumerated examples and the variation between the twelve public accommodation categories in Title III, Congress did not intend to limit the meaning of service establishment.⁸⁶ Because Congress derived the Title III entities from historic instances of discrimination and the plasma industry was a small fraction of its current size when Congress enacted the ADA, the absence of PDCs, or businesses like them, in the enumerated examples is not dispositive.⁸⁷ Finally, including PDCs under the pub-

to define the indefinite trait shared by the listed items and thus grants broad discretion to courts in doing so). Whereas the Fifth Circuit's application of *ejusdem generis* yielded a direction of compensation requirement, another application may have included PDCs because they are a physical place. *Silguero*, 907 F.3d at 329–30; see *Ford v. Schering–Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998) (applying a related limiting canon, *noscitur a sociis*, to limit Title III to physical places). Ultimately, allowing judges to define the common trait as “broadly or narrowly” as they please yields almost as much discretion to the court as it would have to define the catch-all term in the absence of preceding terms. See SCALIA & GARNER, *supra* note 28, at 207 (describing the danger inherent in *ejusdem generis*'s lack of guidance regarding the requisite specificity for defining the indefinite trait shared by the enumerated entities).

⁸⁴ See *Norfolk*, 499 U.S. at 129 (stating that *ejusdem generis* does not apply “when the whole context dictates a different conclusion”); SCALIA & GARNER, *supra* note 28, at 213 (noting that *ejusdem generis* is but one consideration in interpretation); see also *id.* at 167 (instructing judicial interpreters using the whole-text canon to construe the meaning of an ambiguous term by examining all sections collectively and each in its association to the others). Notably, rather than considering the whole-text canon, the courts that have held that PDCs are service establishments employed a plain meaning analysis. See *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 177 (3d Cir. 2019) (adopting the Tenth Circuit's plain meaning analysis); *Levorsen*, 828 F.3d at 1229 (using the ordinary meaning of service establishment).

⁸⁵ SCALIA & GARNER, *supra* note 28, at 167.

⁸⁶ See 42 U.S.C. § 12181(7)(F) (encompassing several dissimilar businesses such as banks, beauty shops, and dry-cleaners); *id.* at § 12181(7) (including twelve categories under the public accommodation umbrella: lodging, restaurants, entertainment venues, places of public gathering, sales establishments, service establishments, public transportation stations, places of public display, places of recreation, schools, social service center establishments, and recreation centers); Brief for Congress as Amici Curiae Supporting Petitioners, *supra* note 3, at 9 (calling attention to the stark difference between a laundromat and a bank); SCALIA & GARNER, *supra* note 28, at 209 (noting that *ejusdem generis* is inappropriate when the enumerated items are “so heterogeneous as to disclose no common genus”); see also *id.* at 167 (noting that the whole-text canon resolves ambiguity by comparing the section in question with others in the statute and by defining one term by the “obvious intent” of another).

⁸⁷ Petition for Certiorari, *supra* note 17, at 10 (detailing the size and revenue of the plasma industry in 2017, two years before the Third Circuit decided *Matheis*); Greenberg, *supra* note 15 (specifying the plasma industry's immense growth since 2000); see SCALIA & GARNER, *supra* note 28, at 101 (explaining that the general-term canon anticipates the invention of entities that fall under the same genus).

lic accommodation umbrella, as the Third Circuit did, settles the ambiguity in a manner that accomplishes the statute’s express purpose.⁸⁸

B. Requiring a Specific Direction of Compensation Fails to Consider the Intricacies of the American Economy

The Third Circuit wisely refused to foist a direction of compensation qualification onto service establishments.⁸⁹ Conditioning the service establishment classification on the direction of compensation fails to reflect the American economy’s complexity.⁹⁰ The line between customer and service provider becomes increasingly blurred when one accounts for the ongoing exchange of economic values between these parties.⁹¹ Payment schemes do not alter the nature of the provided service nor should they determine a business’s classification as a public accommodation.⁹² A direction of compensation re-

⁸⁸ See SCALIA & GARNER, *supra* note 28, at 56 (noting that courts should resolve ambiguity in a manner that realizes legislative purpose rather than in one that obstructs it).

⁸⁹ See *Matheis*, 936 F.3d at 174 (explaining that direction of compensation is an unworkable marker because exchanges between customers and service establishments are mutually beneficial).

⁹⁰ See *id.* (concluding that the direction of compensation is not instructive of whether a business entity constitutes a Title III service establishment). *But cf.* *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 331 (5th Cir. 2018) (declaring that direction of compensation is relevant, although not dispositive, of a business’s classification as a service establishment). Customers can both receive services from and render services to a business. See *Exchange and Trade*, LIBR. OF ECON. & LIBERTY, econlib.org/library/Topics/College/exchangetrade.html [<https://perma.cc/VL4X-D2PE>] (describing exchange as mutually beneficial). Likewise, businesses can both receive compensation from and provide monetary incentives to customers. See *id.* (noting that exchange merely means the trade of one benefit for another). For example, customers who scan their Amazon app at Whole Foods receive discounts in exchange for their purchase data. Hayley Peterson, *Whole Foods Shoppers Blast Amazon’s Prime Member Discounts as the Company Announces It’s Slashing Prices*, BUS. INSIDER (Apr. 6, 2019), [businessinsider.com/whole-foods-shoppers-blast-amazons-prime-member-discounts-2019-4](https://www.businessinsider.com/whole-foods-shoppers-blast-amazons-prime-member-discounts-2019-4) [<https://perma.cc/X2PL-D9NC>]. More germane here, many blood donation centers offer gift cards, t-shirts, or even COVID-19 antibody testing to incentivize donation. *COVID-19 Antibody Test for Blood Platelet and Plasma Donations*, AM. RED CROSS (July 15, 2020), <https://www.redcrossblood.org/local-homepage/news/article/covid-19-antibody-test-for-blood—platelet-and-plasma-donations.html> [<https://perma.cc/U58R-VU5L>]; *Cardinals Blood Drive*, MLB, <https://mlb.com/cardinals/community/blood-drive> [<https://perma.cc/A36C-6CQS>] (offering t-shirts and gift cards).

⁹¹ See *Matheis*, 936 F.3d at 178 (noting that mutually beneficial exchanges are characteristic of a market system). Considering continued technological innovations that monetize customer data, this line is likely to become even more indeterminate. See Stacy-Ann Elvy, *Commodifying Consumer Data in the Era of the Internet of Things*, 59 B.C. L. REV. 423, 427 (2018) (describing the relationship between increased access to consumer data and the rise of the digital revolution).

⁹² See Brief for Congress as Amici Curiae Supporting Petitioners, *supra* note 3, at 10 (maintaining that although the businesses listed in the statute vary in numerous ways, including their disparate business models, they all nonetheless offer a service). Significantly, some of the businesses enumerated in the statute could not satisfy a direction of compensation requirement. *Id.* (describing how various § 12181(7)(F) entities diverge from the alleged common direction of compensation); see 42 U.S.C. § 12181(7)(F). Banks, for example, pay customers through interest on savings. *Matheis*, 936 F.3d at 177. Additionally, lawyers may work pro bono, and hospitals must provide some services for free. Brief for Congress as Amici Curiae Supporting Petitioners, *supra* note 3, at 10.

quirement would prevent courts from expanding ADA protections and null previous inclusion of non-enumerated entities.⁹³ Considering the rarity and inconsequence of a strict customer-to-business direction of compensation, imposing that element on service establishments would demolish the protection afforded by the ADA.⁹⁴

CONCLUSION

Courts across the country have addressed whether Title III of the ADA, particularly the term “service establishment,” applies to PDCs. Applying *ejusdem generis*, the Fifth Circuit held that PDCs are not service establishments, thereby precluding legal protection against discrimination that occurs there. Conversely, the Third and Tenth Circuits have held that PDCs are service establishments and therefore have an affirmative duty to reasonably accommodate an individual’s disability. Thus, there is a slim majority of circuits that support an expansive definition of service establishment. Future courts deciding whether PDCs are service establishments should discard ancient interpretive canons for a whole-text analysis. The whole-text canon yields a broader interpretation of “service establishment” that is in line with the ADA’s purpose. Lastly, rejecting the arbitrary and atextual direction of compensation constraint reflects the increasing complexity of the American market economy.

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⁹³ See *Matheis*, 936 F.3d at 178 (holding that PDCs are service establishments); *Levorsen*, 828 F.3d at 1229 (same); cf. *Silguero*, 907 F.3d at 332 (holding that PDCs are not public accommodations because they fail to satisfy the direction of compensation other entities in the statute employ). Universal adoption of this requirement would, for example, null protection against discriminatory PDC practices in the Third Circuit. See *Matheis*, 936 F.3d at 178 (concluding that the ADA covers PDCs in the Third Circuit). The condition has already prevented the expansion of Title III in the Fifth Circuit. See *Silguero*, 907 F.3d at 332.

⁹⁴ See *supra* notes 90–93 and accompanying text (arguing that a direction of compensation requirement is unworkable due to the mutually beneficial nature of trade).