RED BLOOD SELLS

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I. INTRODUCTION

A. Background

The ultimate touchstone of the Americans with Disabilities Act ("ADA") is the integration of individuals with disabilities "into the economic and social mainstream of American life."[1] To accomplish its purpose, the ADA protects individuals with disabilities from discrimination in employment (Title I of the ADA)[2], public services (Title II)[3], and public accommodations (Title III).[4] Congress distributed "public accommodations" among "12 extensive categories," which legislative history demands be "construed liberally to afford people with disabilities equal access to the wide variety of establishments available to the nondisabled."[5] Among the "12 extensive categories" is the "service establishment," another expansive term readily available to propel the ADA's purpose.[6] Despite the broad legislative language, the evolving American economic and social structures question the bounds of the ADA's language. At issue is whether the protections of Title III of the ADA encompass plasma collection centers.

The Third and the Tenth Circuit Courts of Appeals have both held that plasma collection centers are service establishments protected under Title III of the ADA.[7] First, in *Levorsen v. Octapharma Plasma, Inc.*, the Tenth Circuit reasoned that plasma collection centers fall within the plain meaning of service establishment as an enterprise that serves the public.[8] Likewise, in *Matheis v. CSL Plasma, Inc.*, the Third Circuit adopted the Tenth Circuit's reasoning and found the defendant violated Title III of the ADA by precluding the plaintiff from donating plasma without justification.[9] The Fifth Circuit, however, declined to

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1. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001).
2. 42 U.S.C. §§ 12111–12117.
3. 42 U.S.C. §§ 12131–12165.
4. 42 U.S.C. §§ 12181–12189.
5. *See PGA Tour*, 532 U.S. at 676–77.
6. *See id*.
7. Matheis v. CSL Plasma, Inc., 936 F.3d 171 (3d Cir. 2019); Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227 (10th Cir. 2016).
8. *Levorsen*, 828 F.3d at 1233–35.
9. *Matheis*, 936 F.3d at 177–79.

follow the plain reading of the ADA and held that plasma collection centers are not public accommodations under Title III of ADA.[10]

B. Silguero v. CSL Plasma, Inc.

CSL Plasma runs a system of plasma collection centers.[11] Plasma collection centers pay customers to separate plasma from their red blood cells and generate profit by selling the isolated plasma to the medical industry.[12] Before individuals sell their plasma, CSL screens all potential customers following the Food and Drug Administration (FDA) regulations.[13] After the successful screening, CSL collects the customer's plasma for a payment of up to several hundred dollars.[14] But customers who fail the screening are deferred from the center and denied compensation.[15]

Mark Silguero and Amy Wolfe are two of the more than 50 million Americans living with a disability.[16] Silguero uses a cane to walk despite his bad knees.[17] CSL deferred Silguero following its policy to refuse customers who suffer from an "unsteady gait."[18] Wolfe lives each day with anxiety.[19] To alleviate her battle, Wolfe requires a service animal.[20] CSL deferred Wolfe until she no longer uses a service animal for her anxiety.[21] Following their disability-based deferrals, Silguero and Wolfe sued CSL Plasma in district court, alleging unlawful discrimination under Title III of the ADA.[22] The district court granted summary judgment for CSL, finding the ADA did not apply since CSL is not a "public accommodation" under Title III of the ADA.[23] On appeal, the Fifth Circuit considered whether CSL is a "service establishment" under 42 U.S.C. § 12181(7)(F) and thus a "public accommodation" under Title III.[24] Affirming the district court, the Fifth Circuit concluded CSL is not a "service establishment" within the definition of "public accommodation."[25]

The Fifth Circuit agreed with both parties that CSL is an "establishment;" however, the court disagreed with the plaintiff's argument that CSL provides

10. Silguero v. CSL Plasma, Inc., 907 F.3d 323, 325 (5th Cir. 2018).
11. *See id*. at 325–27. This is a direct quote from pg. 325. I suggest *Id.* at 325.
12. *Id*. at 325–26.
13. *Id*. at 325.
14. *Matheis*, 936 F.3d at 175.
15. *Silguero*, 907 F.3d at 325.
16. *Id*.; Francis M. Schneider, *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, 600 (2017).
17. *Silguero*, 907 F.3d at 326–28. "Cane" is mentioned specifically on 325 and 326. I prefer to cite to the discussion rather than introduction. I suggest *Silguero*, 907 F.3d at 326.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*. at 326–27.
23. *Id*. at 327.
24. *Id*. at 327–32.
25. *Id*. at 332.

"services."[26] After referencing several dictionaries, the appellate court concluded a "service establishment" is "an establishment that performs some act or work for an individual who benefits from the act or work."[27] Guided by its definition, the circuit court provided three "textual clues" that led the court to its conclusion.[28] First, the court concluded CSL does not offer customers the benefits the term "service" "implies."[29] Second, the court notes none of the enumerated establishments preceding "the catchall phrase" "service establishment" provide a service without a "detectable benefit to the customer."[30] Finally, the third clue the court mentions is the ADA structure's indication that "an establishment typically does not pay a customer for a 'service' it provides."[31] Unconvinced by CSL's "useful[ness]" to the customer, the Fifth Circuit maintained its reasoning and found CSL Plasma is not a "public accommodation" and therefore not accountable to the protections of the ADA.[32]

C. Roadmap

This essay will argue that the Fifth Circuit incorrectly narrowed the term "service" to conclude that plasma collection centers are not "service establishments" under the ADA. First, the Fifth Circuit diverged from Congress' intent when the court invoked ejusdem generis to limit the breadth of the term "service." Second, even if the court were to rely on ejusdem generis, the Fifth Circuit incorrectly differentiated a plasma center's benefits from the benefits provided by the enumerated "service establishments." Third, the Fifth Circuit's refusal to allow money as the received benefit from a service establishment is without basis.

II. ANALYSIS

A. The Fifth Circuit's Reliance on "Ejusdem Generis" Conflicts with Congress' Intent

The Fifth Circuit used ejusdem generis to restrict the reach of the term "service" to only those "services" the court finds available in the statute's enumerated establishments.[33] But utilizing ejusdem generis also necessitates the court defy Congress' intent for the ADA's breadth.[34] Ejusdem generis is an interpretive maxim used to read a catchall phrase in light of the preceding list.[35] And as the Fifth Circuit admits, canons of interpretation are used to ensure "words are not

26. *Id*. at 327–29.
27. *Id*. at 328.
28. *Id*. at 329–32.
29. *Id*. at 329.
30. *Id*. at 329–30.
31. *Id*. at 329.
32. *Id*. at 329–32.
33. *Id*. at 329–30.
34. Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227, 1232 (10th Cir. 2016).
35. *See id*.

stretched past the limits of Congress' inten[t]," not as tools to bypass their intent.[36] Yet, Congress did not intend for Section 12181(7)(F)'s enumerated list to be exhaustive; instead, the list serves as a "mere illustration" of the "wide variety of establishments available to the non-disabled."[37]

To illustrate their intent, Congress released a House Report revealing that they removed "similar" from "other similar places" because it is not necessary "to show that a jewelry store is like a clothing store."[38] Demonstrating the enumerated list thus serves to display the ADA's vast landscape. Additionally, the variance between the enumerated establishments perfectly shows the ADA's purpose: "to integrate [persons with disabilities] into the economic and social mainstream of American life."[39] Accordingly, even if the ADA's application to plasma collection centers is unexpected, the fact that the ADA "can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[40] Therefore, the Fifth Circuit should have referenced the readily available statutory history rather than narrow the statute's reach below Congress' intent with a nonapplicable ejusdem generis lens.

B. Even if Ejusdem Generis Is Available, the Court's Proposed Common Theme Is Incorrect

Even if the Fifth Circuit rightly turned to ejusdem generis for clarification, the common theme needed for ejusdem generis to serve a purpose is not present in the statute. The court distinguishes the enumerated establishments from plasma collections centers because the former provides a beneficial "service," unlike the latter.[41] To illustrate the detectable benefits the court believes ejusdem generis reveals, the court writes: "Dry-cleaners press customers' shirts. Lawyers file clients' pleadings. Hospitals mend patients' broken bones."[42] These illustrations help the court to proclaim ADA establishments must provide detectable benefits beyond the receipt of cash.[43] The court, however, seems to fall victim to confirmation bias, resulting from their instinctual reliance on ejusdem generis.[44]

One can easily imagine circumstances where a business provides a beneficial service beyond the Fifth Circuit's imagination. For example, in *Matheis v. CSL Plasma*, the Third Circuit reached this very conclusion after noting "any emphasis on the direction of monetary compensation is . . . unhelpful."[45] There, the court reminds that a bank, an enumerated entity, provides cash benefits in the form of interest and uses "the fruits of its public-facing services for subsequent

36. *Silguero*, 907 F.3d at 329.
37. *See Levorsen*, 828 F.3d at 1230; PGA Tour, Inc. v. Martin, 532 U.S. 661, 677 (2001).
38. *Silguero*, 907 F.3d at 329 n.14 (citing H.R. Rep. No. 101–485, pt. 3, at 54 (1990)).
39. *PGA Tour*, 532 U.S. at 675.
40. *Id.* at 689 (quoting Pa. Dept. of Corr. v. Yeskey, 524 U.S. 118, 212 (1952)).
41. *Silguero*, 907 F.3d at 328–30.
42. *Id*. at 330–31.
43. *Id*. at 330–32.
44. *Id*. at 329–31.
45. Matheis v. CSL Plasma, Inc., 936 F.3d 171, 177–78 (3d Cir. 2019).

profit."[46] Accordingly, much like a bank, a plasma center's "service" need only provide "something of economic value" to fit under Title III.[47] And cash is about as economically valuable a thing any entity could offer, albeit not all that creative.

The Fifth Circuit, nonetheless, tries to depart from the Third Circuit because any interest a customer receives results from the bank's money management while plasma results from the donor's time and resources.[48] This distinction is almost incoherent. For example, the same thought exercise can remind banks that their profits result from customers leveraging their labor to receive a salary for banks to store. Moreover, plasma collection centers maintain their place in the market at the expense of marketing, hospital relations, licensing, and countless other day-to-day costs any business requires. As such, plasma donors directly benefit from the readily available plasma market maintained by companies like CSL. Additionally, a pawnshop uses an eerily similar business structure.[49] For example, whether a customer needs to sell their plasma or their grandmother's jewelry, plasma centers and pawnshops will appraise, buy, and resell both due to their respective positions on their markets. And a disability should not dictate an individual's access to either market. Because the Fifth Circuit failed to construe Title III liberally, the court incorrectly reasoned ejusdem generis provided a common theme not found in a plasma collection center.

C. The Fifth Circuit Is Unnecessarily Concerned with Blurring the Distinction Between Title I and Title III

The Fifth Circuit wrongly asserts that if Title III applies to CSL's "service," then the court risks "overrunning Congress's legislative choices in Title I."[50] In doing so, the Fifth Circuit holds monetary payment cannot be the only "detectable benefit" provided by a "service establishment."[51] The court confidently concludes their decision will prevent independent contractors and small business employees, excluded from Title I, from gaining a backdoor into Title III.[52] This concern, however, serves no legal or practical service. For example, the Supreme Court has already refused to restrict Title III to an "express 'clients or customers' limitation."[53] There, in *PGA Tour*, the Supreme Court held Title III protected a professional golfer's right to play on the tour, despite the argument that he was an employee and not a customer.[54] Yet, despite the jurisprudence, the Fifth Circuit fails to address *PGA Tour* in its concern for Title I.[55] Instead, the Fifth

46. *Id*.
47. *Id*.
48. *Silguero*, 907 F.3d at 330–31.
49. *Matheis*, 936 F.3d at 178.
50. *Silguero*, 907 F.3d at 331.
51. *Id*. at 330–33.
52. *Id*.
53. PGA Tour, Inc. v. Martin, 532 U.S. 661, 679 (2001).
54. *Id*.
55. *Silguero*, 907 F.3d at 331.

Circuit hyper-focused on the receipt of payment and ignored the Title III protections from the tangible and intangible barriers that "prevent a disabled person from entering an accommodation's facilities and accessing its goods, services, and privileges."[56]

Moreover, the Fifth Circuit's concern is readily resolved without the need for an intense ontological battle. A hungry child with five dollars saved up is easily distinguished from the worker scooping the kid's ice cream. And the plasma donor is equally distinguishable from the plasma collection center's employee. The Fifth Circuit did not need to justify its prior, unrelated reasoning with its concern for Title I's purpose. If anything, this part of the Fifth Circuit's decision insinuates a lack of confidence in its prior reasoning. The Fifth Circuit's concern for weakening Title I is therefore not only unnecessary but also serves to further limit the scope of the term "service" under Title III despite Congress' intent to construe its breadth liberally.[57]

III. CONCLUSION

The Fifth Circuit held that plasma collection centers do not provide a "service" as required by Title II of the ADA.[58] In doing so, the Fifth Circuit provided the go-ahead for plasma collection centers to discriminate on the basis of disability without legal repercussions. The Fifth Circuit ignored legislative intent and relied on ejusdem generis to limit Title III.[59] Its ruling flies in the face of Congress's intent to protect individuals from disability discrimination across the vast landscape of service establishments.[60] Moreover, the Fifth Circuit incorrectly interpreted the "services" provided by the enumerated entities, which further emphasizes why the court should not have utilized ejusdem generis. Then the court put the final nail in the coffin by hammering its reasoning with a slippery-slope concern for Title II of the ADA.[61] But the court does not base its concern on jurisprudence or reality. Congress enacted the ADA with enough strength to protect individuals in plasma collection centers. Unfortunately, the Fifth Circuit bled out Title III until it weakened into the court's desired form.

56. 42 U.S.C. § 12182.
57. *PGA Tour*, 532 U.S. at 675–77.
58. *Silguero*, 907 F.3d at 329–31.
59. *See id*.
60. *See PGA Tour*, 532 U.S. at 674–75.
61. *See Silguero*, 907 F.3d at 331.