

CLASSIFYING PLASMA DONATION CENTERS AS PUBLIC
ACCOMMODATIONS WITH A TEXTUAL ANALYSIS OF THE
AMERICANS WITH DISABILITIES ACT

Jessica Choate*

INTRODUCTION

Congress passed the Americans with Disabilities Act (ADA) in 1990 to ensure that society does not discriminate against people with disabilities.¹ The ADA's discrimination ban applies to many public and private entities.² This Comment addresses a particular kind of private entity— plasma donation centers.³ According to the Plasma Protein Therapeutics Association, one sick adult can require over 1,200 yearly plasma donations to treat their illness.⁴ Despite this extreme need for life-saving therapy, plasma donation centers have denied, and continue to deny, disabled people from donating their plasma.⁵ Disabled people like Ben Levorsen,⁶ Mark Gomez,⁷ Mark Silguero,⁸ Amy Wolfe,⁹ and George Matheis¹⁰ are legally entitled to donate

* George Mason University Antonin Scalia Law School, J.D. expected, 2022.

¹ See 42 U.S.C. § 12101(b)(1); see also Jeffery O. Cooper, *Interpreting the Americans with Disabilities Act: The Trials of Textualism and the Practical Limits of Practical Reason*, 74 TUL. L. REV. 1207, 1208 (2000).

² See 42 U.S.C. §§ 12181(6)-(7), 12182(a), 12184(a) (noting that the private entities that are subject to the ADA's requirements are called "public accommodations" and include entities like laundry mats, banks, museums, and auditoriums).

³ Plasma donation centers are different than blood donation centers. Plasma donation centers invite the public into their buildings for an opportunity to donate blood plasma in exchange for monetary compensation. Most plasma centers sell blood plasma to pharmaceutical companies. Plasma donation centers only take blood to separate the plasma and then return other blood components to the donor. Conversely, blood donation centers do not compensate donors. They also remove blood from the donor without separating it into its components. See Elizabeth Preston, *Why You Get Paid to Donate Plasma but Not Blood*, STAT, (Jan. 22, 2016) <https://www.statnews.com/2016/01/22/paid-plasma-not-blood/>.

⁴ *Plasma*, PLASMA PROTEIN THERAPEUTICS ASSOC., <https://www.pptaglobal.org/plasma> (last visited Nov. 8, 2021).

⁵ See, e.g., *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1230 (10th Cir. 2016).

⁶ *Id.* at 1229.

⁷ Complaint at 1, *Gomez v. CSL Plasma, Inc.*, No. 1:20-cv-02488 (N.D. Ill. Apr. 23, 2020).

⁸ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 325 (5th Cir. 2018).

⁹ *Id.*

plasma, so long as no medical or safety reasons exist to prevent their donations.¹¹

Ben Levorsen has borderline schizophrenia and has donated plasma for many years.¹² That changed when a plasma center employee discovered his diagnosis and refused to allow him to donate, even though he presented a letter from his psychiatrists stating he could give plasma.¹³ Mark Gomez, a deaf individual, required an American Sign Language (ASL) interpreter to understand a plasma donation center's intake paperwork.¹⁴ The plasma center refused to provide an interpreter, without which Mr. Gomez could not donate plasma.¹⁵ Mark Silguero walked with a cane.¹⁶ The plasma center denied him the opportunity to donate because of his walking aid.¹⁷ A plasma center refused Amy Wolfe's donation because of her service dog, following a policy to refuse donors with sufficiently severe anxiety requiring a service dog.¹⁸ Similarly, George Matheis had a service dog to help with his Post Traumatic Stress Disorder (PTSD).¹⁹ Even though the dog's presence did not create any health risks,²⁰ the center refused his donation.²¹ Discrimination against these five people, and others like them, needlessly prevents qualified people from donating plasma, serving those in need, and receiving compensation for doing so.²² Congress designed the ADA to prevent this kind of discrimination, yet it still occurs.²³

¹⁰ *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 174 (3d Cir. 2019).

¹¹ See 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, 627-28 (2017) (noting that a tension exists between the FDA's safety regulations for manufacturers like plasma centers and the antidiscrimination requirements for public accommodations). While the Supreme Court should address this regulatory tension if it takes up certiorari, this Comment focuses on the proper interpretation of "service establishment" based on the statute's language.

¹² *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016).

¹³ *Id.*

¹⁴ Complaint at 1, *Gomez v. CSL Plasma, Inc.*, No. 1:20-cv-02488 (N.D. Ill. Apr. 23, 2020).

¹⁵ *Id.*

¹⁶ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 326 (5th Cir. 2018).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 175 (3d Cir. 2019).

²⁰ See *id.*

²¹ *Id.*

²² See, e.g., *Matheis*, 936 F.3d at 174; *Silguero*, 907 F.3d at 325; *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016).

²³ See 42 U.S.C. § 12101(b).

In an attempt to vindicate their rights, these individuals sued for protection under the ADA.²⁴ If the ADA's requirements apply to plasma donation centers, people like the five individuals described above will be empowered to donate plasma without the threat of disability-based discrimination.²⁵ However, the ADA's antidiscrimination requirements only extend to certain public and private businesses, the relevant category here being "public accommodations."²⁶ Therefore, this remedy only exists if plasma centers are considered "public accommodations" under the ADA.²⁷ The ADA defines public accommodations by listing twelve categories of businesses that qualify as such.²⁸ The relevant category for plasma donation centers is the "service establishment" category, found at 42 U.S.C. § 12181(7)(F) (Service Establishment Clause), which reads:

A laundromat, dry-cleaner, bank, barbershop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other *service establishment*.²⁹

The United States courts of appeals that have considered the issue are split over the meaning of the phrase "service establishment."³⁰ The Tenth³¹ and Third³² Circuits have held that plasma centers cannot discriminate because they fit into the "service establishment" category.³³ Conversely, the Fifth Circuit has held that plasma centers are not "ser-

²⁴ *Matheis*, 936 F.3d at 175; *Silguero*, 907 F.3d at 326; *Levorsen*, 828 F.3d at 1229; Complaint at 7, *Gomez v. CSL Plasma, Inc.*, No. 1:20-cv-02488 (N.D. Ill. Apr. 23, 2020).

²⁵ See 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.").

²⁶ See 42 U.S.C. § 12181(7)(A)-(L) (defining public accommodation as a private entity that affects commerce and falls into one of twelve broad categories of businesses, including hotels, restaurants, theatres, and service establishments).

²⁷ See 42 U.S.C. § 12182(a); see also 42 U.S.C. § 12181(7)(A)-(L).

²⁸ § 12181(7)(A)-(L).

²⁹ § 12181(7)(F) (emphasis added).

³⁰ See *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 178 (3d Cir. 2019) (concluding that plasma centers are service establishments); *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 331-32 (5th Cir. 2018) (deciding that plasma centers are not service establishments); *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1234 (10th Cir. 2016) (deciding that plasma centers are service establishments).

³¹ *Levorsen*, 828 F.3d at 1234.

³² *Matheis*, 936 F.3d at 178.

³³ *Id.*; *Levorsen*, 828 F.3d at 1234.

vice establishments,” allowing centers in the Fifth Circuit to discriminate against donors based on their disabilities.³⁴ With this circuit split, whether a plasma center may discriminate based on disability depends entirely on the center’s geographic location.³⁵ This arbitrary distinction is unfair and defies the ADA’s broad purpose,³⁶ warranting resolution.

This Comment will show that when the Tenth, Fifth, and Third Circuits took up the issue of a plasma donation center’s classification under the ADA, they applied incorrect definitions of “service establishment.”³⁷ The circuits used incorrect definitions and implemented faulty reasoning because they only focused on the Service Establishment Clause, without regard to the limiting clause preceding it.³⁸ The limiting clause reads: “The following private entities are considered public accommodations for purposes of this title *if the operations of such entities affect commerce*” (Limiting Clause).³⁹ This clause has two effects on the statute. First, it creates a two-part test to classify an entity as a public accommodation covered by the ADA (Public Accommodation Test). The entity must both affect commerce⁴⁰ and fit into one of the twelve listed categories of businesses.⁴¹ Second, the Limiting Clause affects the meaning of the Service Establishment Clause. When the Tenth, Fifth, and Third Circuits ignored the Limiting Clause, they adopted incorrect definitions of “service establishment.”⁴²

³⁴ *Silguero*, 907 F.3d at 331-32.

³⁵ Circuits cover different geographical locations, so people that seek donation within the bounds of the Tenth Circuit will be covered by the ADA, and those in the Fifth Circuit will not. See *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Nov. 8, 2021) (showing, for example, the Tenth Circuit in the Western part of the United States and the Third Circuit in the East).

³⁶ See 42 U.S.C. § 12101(b)(1).

³⁷ See *Matheis*, 936 F.3d at 178; *Silguero*, 907 F.3d at 331; *Levorsen*, 828 F.3d at 1232.

³⁸ See *Matheis*, 936 F.3d at 176-78; *Silguero*, 907 F.3d at 329-30; *Levorsen*, 828 F.3d at 1230-34.

³⁹ 42 U.S.C. § 12181(7) (emphasis added).

⁴⁰ *Id.*

⁴¹ 42 U.S.C. § 12181(7)(A)-(L).

⁴² See *Matheis*, 936 F.3d at 177-78 (defining a service establishment as an entity that proves something of economic value to the public); *Silguero*, 907 F.3d at 329-32 (holding that a service establishment must not be purely “employment-like,” must not pay their customer, or if they do, must have a clear benefit to the customer); *Levorsen*, 828 F.3d at 1231 (defining a service establishment as an entity that benefits someone or something).

The correct definition of “service establishment,”⁴³ when read in conjunction with the Limiting Clause,⁴⁴ is an entity that gives the community objective, non-economic benefits.⁴⁵ This Comment will show why this definition is correct, that this definition includes plasma donation centers, and that plasma centers also qualify as public accommodations. Therefore, plasma centers violate the ADA when they refuse to allow people to donate based solely on their disabilities.⁴⁶ Part I of this Comment will explain the ADA’s purpose and applicable provisions, clarify the Third,⁴⁷ Tenth,⁴⁸ and Fifth⁴⁹ Circuit’s “service establishment” interpretations, and show how the Supreme Court interprets statutes using traditional canons of statutory interpretation⁵⁰ and legislative history.⁵¹ Part II will use those statutory canons to explain why the circuits misinterpreted the “service establishment” category,⁵² apply the correct interpretation to plasma donation centers, and argue that legislative history confirms this interpretation. The Comment concludes by explaining why the Supreme Court should grant certiorari and clarify the Service Establishment Clause’s definition.

BACKGROUND

I. UNDERSTANDING THE ADA, CIRCUITS’ INTERPRETATIONS OF THE SERVICE ESTABLISHMENTS CLAUSE, AND STATUTORY INTERPRETATION METHODS

A “service establishment” is one category of public accommodation⁵³ under the ADA that courts have struggled to define.⁵⁴ The Third and Tenth Circuits define the phrase “service establishment” broadly,

⁴³ 42 U.S.C. § 12181(7)(F).

⁴⁴ § 12181(7).

⁴⁵ See *infra* Section II.A.

⁴⁶ See 42 U.S.C. § 12182(a).

⁴⁷ *Matheis*, 936 F.3d at 171.

⁴⁸ *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016).

⁴⁹ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323 (5th Cir. 2018).

⁵⁰ Statutory interpretation canons are rules used to interpret statutes. See *Canon of Construction*, BLACK’S LAW DICTIONARY (11th ed. 2019); see also *infra* Section I.C.

⁵¹ See *Legislative History*, *Id.* (“The proceedings leading to the enactment of a statute, including hearings, committee reports, and floor debates.”); see also *infra* Section I.C.4.

⁵² See *Matheis*, 936 F.3d at 178; *Silguero*, 907 F.3d at 329-31.

⁵³ 42 U.S.C. § 12181(7)(F).

⁵⁴ See *Matheis*, 936 F.3d at 176-77; *Silguero*, 907 F.3d at 328; *Levorsen*, 828 F.3d at 1232.

encompassing any business that benefits its community⁵⁵ or provides economic value.⁵⁶ The broad definition, these courts reasoned, includes plasma donation centers.⁵⁷ Conversely, the Fifth Circuit gives “service establishments” a narrow definition that does not include plasma centers.⁵⁸ When a circuit split like this exists, the Supreme Court can grant certiorari⁵⁹ and give its own reading of the statute.⁶⁰ If the Supreme Court took up this issue, it would likely follow a particular path to interpret the statute’s meaning,⁶¹ using statutory interpretation canons and legislative history. Lower courts would then be bound by the Supreme Court’s decision, thus creating a uniform body of law across jurisdictions.⁶²

A. *The ADA’s Purpose and the Tenth, Fifth, and Third Circuits’ Disagreement Over “Service Establishment’s” Definition*

In 1990, Congress passed the ADA to “address the major areas of discrimination faced everyday by people with disabilities.”⁶³ The ADA recognized that society historically discriminated and continued to discriminate against people with disabilities by isolation and segregation.⁶⁴ To eliminate this discrimination,⁶⁵ much of the ADA’s

⁵⁵ *Levorsen*, 828 F.3d at 1231-32.

⁵⁶ *Matheis*, 936 F.3d at 178.

⁵⁷ *Id.*; *Levorsen*, 828 F.3d at 1234.

⁵⁸ *See Silguero*, 907 F.3d at 329.

⁵⁹ The Supreme Court can review a case using a writ of certiorari to direct an appellate court to deliver its record. *See Certiorari*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also* Sup. Ct. R. 10(a) (listing a circuit split as a reason the court considers in reviewing a writ of certiorari).

⁶⁰ *See, e.g., Bailey v. U.S.*, 516 U.S. 137, 146 (1995) (interpreting the word “use” in a fire-arm statute).

⁶¹ *See* Abbe R. Gluck & Richard A. Posner, *Article: Statutory Interpretation On The Bench: A Survey Of Forty-Two Judges On The Federal Courts Of Appeals*, 131 HARV. L. REV. 1298, 1301 (2018) (“[M]ost Justices now unabashedly of the “text-first” persuasion, opting for dictionaries, interpretive presumptions, and, only after those materials, a much stingier approach to legislative history.”); Cooper, *supra* note 1, at 1211-12.

⁶² *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1318 (2014) (explaining that Congress can override a Supreme Court statutory interpretation decision by passing new legislation). Note that if a Congressional override is necessary, the decision must otherwise be binding.

⁶³ 42 U.S.C. § 12101(b)(4).

⁶⁴ § 12101(a)(2).

⁶⁵ § 12101(b)(1) (listing a purpose of the ADA as providing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”).

language is intentionally broad.⁶⁶ An example of this broad language comes from the ADA's definition of impermissible discrimination, which is defined as "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such . . . services."⁶⁷

Although Congress wanted to broadly address discrimination, it did not ban discrimination against disabled people entirely. Instead, Congress prohibited various private entities from discriminating against people with disabilities, some of which are the previously mentioned "public accommodations."⁶⁸ Since the ADA's passage, courts and scholars have debated which private entities to include among the twelve "public accommodation" categories.⁶⁹ This Comment focuses on a recent and unsettled debate over the meaning of the "service establishment" category as applied to plasma centers.⁷⁰ The part of the ADA discussing service establishments reads:

The following private entities are considered public accommodations for purposes of this title, if the operations of such entities affect commerce⁷¹ a laundromat, dry-cleaner, bank, barbershop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, profes-

⁶⁶ See H.R. REP. NO. 101-485, pt. 3, at 56 (1990) ("A person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition" but only "that the entity falls within the overall category"); see also 136 Cong. Rec. 11, 472 (1990) (explaining that an early draft of this clause stated, "similar service establishment," but Congress removed the word "similar" in a later draft, indicating the service establishments do not have to be similar).

⁶⁷ 42 U.S.C. § 12182(b)(2)(A)(ii). Even though Congress intended this prohibition to be broad, it did allow for an exception if the change "would fundamentally alter the nature of such . . . services," or create a "direct threat" to safety or security. See H.R. Rep. No. 101-485, pt. 3, at 62 (1990); 136 Cong. Rec. 11, 472 (1990); 42 U.S.C. § 12182(b)(2)(A)(ii); 42 U.S.C. § 12182(b)(3).

⁶⁸ 42 U.S.C. § 12182(a).

⁶⁹ See, e.g., *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 142 (2005) (deciding that a foreign cruise ship qualifies as a public accommodation); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677 (2001) (finding that a golf tour and its qualifying rounds qualify as public accommodations); see also *Schneider*, *supra* note 11, at 602, 630-31 (arguing that plasma donation centers are not public accommodations).

⁷⁰ See *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171 (3d Cir. 2019); *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323 (5th Cir. 2018); *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016).

⁷¹ 42 U.S.C. § 12181(7).

sional office of a health care provider, hospital, or other service establishment⁷²

Using different methods of statutory interpretation, lower courts disagree over whether plasma donation centers qualify as "service establishments" under Title III of the ADA, thus requiring ADA coverage.⁷³

B. *The Circuit Split Over What Constitutes a "Service Establishment"*

Three cases arising out of the Tenth, Fifth, and Third Circuits represent examples of people fighting for their rights to give plasma after being denied based solely on their disabilities.⁷⁴ Each plaintiff sued plasma centers, claiming discrimination in violation of the ADA.⁷⁵ Each plasma center then tried to avoid liability by asserting that the ADA does not bind them.⁷⁶ For the ADA to apply to plasma centers, they must qualify as "public accommodations."⁷⁷ As mentioned above, an entity can only be a "public accommodation" if it passes the Public Accommodation Test, meaning that in these instances, it must affect commerce and be a "service establishment."⁷⁸ If plasma centers meet both of these requirements, the ADA forbids the centers from discriminating against people based on their disabilities.⁷⁹ Although the Third and Tenth Circuits held that plasma centers cannot discriminate,⁸⁰ the Fifth Circuit held that they could discriminate.⁸¹ The courts reached these conflicting conclusions using different statutory interpretation methods that resulted in varying definitions of "service establishment."⁸²

⁷² § 12181(7)(F).

⁷³ See *Matheis*, 936 F.3d at 178; *Silguero*, 907 F.3d at 329-31; *Levorsen*, 828 F.3d at 1232-34.

⁷⁴ *Matheis*, 936 F.3d at 174; *Silguero*, 907 F.3d at 326; *Levorsen*, 828 F.3d at 1229.

⁷⁵ *Id.*

⁷⁶ See, e.g., *Levorsen*, 828 F.3d at 1230.

⁷⁷ See 42 U.S.C. § 12182(a).

⁷⁸ 42 U.S.C. § 12181(7)(F).

⁷⁹ See 42 U.S.C. § 12182(a) (stating, in part, that public accommodations cannot discriminate against people based on their disabilities); see also 42 U.S.C. § 12181(7)(f) (listing "service establishments" as a covered public accommodation and stating that public accommodations must affect commerce).

⁸⁰ See *Matheis*, 936 F.3d at 178; *Levorsen*, 828 F.3d at 1234.

⁸¹ *Silguero*, 907 F.3d at 331-32.

⁸² See *Matheis*, 936 F.3d at 176-77; *Silguero*, 907 F.3d at 328; *Levorsen*, 828 F.3d at 1232.

1. The Tenth, Fifth, and Third Circuits' Approaches to Defining "Service Establishment" and Their Classifications of Plasma Donation Centers

The Tenth, Fifth, and Third Circuits' statutory interpretation approaches varied dramatically.⁸³ The Tenth Circuit deduced the meaning of "service establishment" by looking at the clause's plain meaning⁸⁴ and legislative history.⁸⁵ Finding a broad definition, the Tenth Circuit held that plasma centers are service establishments.⁸⁶ The Fifth Circuit also looked at the clause's plain meaning but finished its analysis with other statutory interpretation canons.⁸⁷ This approach resulted in a narrower definition of "service establishment" that did not include plasma centers.⁸⁸ The Third Circuit tweaked the Tenth Circuit's definition⁸⁹ and used examples to support its classification of a plasma center as a "service establishment."⁹⁰

2. The Tenth Circuit's "Service Establishment" Interpretation and Broad Definition

The Tenth Circuit started its interpretation process with a plain meaning analysis.⁹¹ In assessing the ADA's plain meaning, the court looked to *Webster's Third New International Dictionary* and determined that an establishment is "'a place of business' or 'a public or private institution'" and service is "'conduct or performance that assists or benefits something.'"⁹² Based on these definitions, the court concluded that the plain meaning of "service establishment" is "a place of business or a . . . private institution that, by its conduct or performance, assists or benefits someone or something."⁹³ This defini-

⁸³ See *Matheis*, 936 F.3d at 176-78; *Silguero*, 907 F.3d at 327-31; *Levorsen*, 828 F.3d at 1230-34.

⁸⁴ The plain meaning is the ordinary meaning of the words in a statute that is often found using dictionary definitions. See ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law: The Interpretation of Legal Texts*, 1, 69 (1st ed. 2012); see also *infra* Section I.C.I.

⁸⁵ *Levorsen*, 828 F.3d at 1233.

⁸⁶ *Id.* at 1234.

⁸⁷ *Silguero*, 907 F.3d at 327-31.

⁸⁸ *Id.* at 332.

⁸⁹ *Matheis*, 936 F.3d at 176-78.

⁹⁰ *Id.* at 177-78.

⁹¹ *Levorsen*, 828 F.3d at 1231.

⁹² *Id.* (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY 778 (2002)).

⁹³ *Id.*

tion, the court reasoned, was unambiguous.⁹⁴ Moreover, the court reasoned that because the definition was “entirely consistent with Title III’s aim,” it did not have to apply other principles of statutory interpretation.⁹⁵

According to the Tenth Circuit, legislative history also supports the definition,⁹⁶ illuminated by the clause’s plain meaning.⁹⁷ In the court’s opinion, the legislative history even trumped the use of other statutory interpretation canons.⁹⁸ The relevant history was an original draft of the Service Establishment Clause that said “other *similar* service establishments.”⁹⁹ The final version reads, “other service establishments.”¹⁰⁰ According to the court, deleting the word “similar” showed Congress’s intention to keep “service establishment’s” definition broad.¹⁰¹ So broad, the court reasoned, that Congress did not intend to limit the definition of “service establishment” by the examples immediately preceding it.¹⁰² Conversely, the Fifth Circuit,¹⁰³ and scholar, Francis M. Schneider,¹⁰⁴ argue that the example services listed in the Service Establishment Clause should limit the definition of “service establishment.”¹⁰⁵ The Tenth Circuit dismissed these concerns because of its plain meaning and legislative history analyses and decided that a service establishment is a business that benefits the community.¹⁰⁶ Applying this to plasma donation centers, the court noted that plasma centers benefit those who want to donate for altruistic reasons or for financial gain.¹⁰⁷ They also help people in their

⁹⁴ *Id.* at 1232-33.

⁹⁵ *Id.* (explaining further that even though applying *ejusdem generis* would imply that a service establishment requires compensation from customers, this would add ambiguity because the canon against adding elements into a statute that are not explicitly listed points in the other direction).

⁹⁶ *Id.* at 1233.

⁹⁷ *Levorsen*, 828 F.3d at 1231 (reasoning that the plain meaning definition is “a place of business or a . . . private institution that, by its conduct or performance, assists or benefits someone or something”).

⁹⁸ *See id.* at 1232.

⁹⁹ *Id.* at 1233 (quoting H.R. Rep. No. 101-485, pt. 4 at 56 (1990)).

¹⁰⁰ 42 U.S.C. § 12181(7)(F).

¹⁰¹ *Levorsen*, 828 F.3d at 1233.

¹⁰² *Id.*

¹⁰³ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323 (5th Cir. 2018).

¹⁰⁴ *See Schneider*, *supra* note 11, at 618-20.

¹⁰⁵ *See Silguero*, 907 F.3d at 330; *Id.* at 618; *see also infra* Section I.B.3.

¹⁰⁶ *See Levorsen*, 828 F.3d at 1234.

¹⁰⁷ *Id.*

desire to give plasma.¹⁰⁸ Therefore, plasma donation centers fit into the court's "service establishment" definition and must abide by the ADA.¹⁰⁹ Although the Tenth Circuit nearly reached the correct definition¹¹⁰ of "service establishment," its definition falters because it failed to consider the canon against surplusage.¹¹¹

The Tenth Circuit did not unanimously agree on its broad "service establishment" definition.¹¹² Judge Holmes' dissenting opinion agreed with the Fifth Circuit¹¹³ and Mr. Schneider¹¹⁴ that a narrower definition was appropriate.¹¹⁵ The dissent argued that courts should define the phrase "service establishment" considering the other businesses listed in the Service Establishment Clause.¹¹⁶ Relying on the clause's preceding examples,¹¹⁷ Judge Holmes argued that a "service establishment" is a business with expertise used to achieve the desired end "in exchange for monetary compensation."¹¹⁸ The dissent reasoned that because plasma donation centers do not receive monetary payment from donors, they are not service establishments.¹¹⁹

3. The Fifth Circuit's "Service Establishment" Interpretation and Narrow Definition

The Fifth Circuit agreed with the Judge Holmes' dissent.¹²⁰ Even though the Fifth Circuit reached a different conclusion than the Tenth Circuit, the court similarly began its analysis by determining the plain meaning of "service establishment."¹²¹ The court consulted multiple dictionaries before reaching an initial "service establishment" defini-

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ The author's proposed correct definition is, "an entity that gives the community objective, non-economic benefits."

¹¹¹ *See infra* Section II.A.

¹¹² *See Levorsen*, 828 F.3d at 1235 (Holmes, J. dissenting).

¹¹³ *Silguero*, 907 F.3d at 330.

¹¹⁴ *See Schneider*, *supra* note 11, at 618-20.

¹¹⁵ *Levorsen*, 828 F.3d at 1235 (Holmes, J. dissenting).

¹¹⁶ *Id.*

¹¹⁷ 42 U.S.C. § 12181(7)(F) ("a laundromat, dry-cleaner, bank, barbershop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital").

¹¹⁸ *Levorsen*, 828 F.3d at 1235 (Holmes, J. dissenting).

¹¹⁹ *Id.*

¹²⁰ *Silguero*, 907 F.3d at 330.

¹²¹ *Id.* at 328.

tion based solely on plain meaning.¹²² The plain meaning definition, according to the court, is “an establishment that performs some act or works for an individual who benefits from the act or work.”¹²³ Applying this meaning to plasma centers, the court reasoned that the centers do not provide a “service” because donors do not benefit from their donations, as the plain meaning definition required.¹²⁴ According to the court, a donor could only benefit from plasma donation through monetary compensation.¹²⁵ However, the court reasoned that monetary compensation is “collateral” to the act of donating and cannot be used in the analysis of whether the donation helped the donor.¹²⁶ Therefore, plasma centers do not provide a “service” under the court’s plain meaning analysis because no other potential benefits remain.¹²⁷

Instead of stopping with the plain meaning analysis as the Tenth Circuit did,¹²⁸ the Fifth Circuit applied other statutory interpretation canons to clarify the clause’s meaning.¹²⁹ The court first applied the ejusdem generis canon,¹³⁰ which instructs courts to interpret a general term in a list similarly to more specific terms preceding it.¹³¹ The Service Establishment Clause¹³² lists specific terms followed by a general word, making the ejusdem generis canon easily applicable.¹³³ According to the Fifth Circuit, the listed services¹³⁴ are similar because they

¹²² *Id.*

¹²³ *Id.* (quoting *Service*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (10th ed. 1993); *Service*, WEBSTER NEW WORLD COLLEGIATE DICTIONARY (3d ed. 1996); *Service*, OXFORD-ENGLISH DICTIONARY (2d ed. 1988); *Service*, RANDOM HOUSE DICTIONARY (2d ed. 1987)) (citing the following dictionary definitions of “service”: (1) “‘helpful act’” (2) “[An] act giving assistance or advantage to another” (3) “‘the provision for the carrying out of some work for which there is constant public demand’” and (4) “‘the organized system of apparatus . . . for supplying some accommodation required by the public.’”).

¹²⁴ *Silguero*, 907 F.3d at 329.

¹²⁵ *Id.*; *contra Levorsen*, 828 F.3d at 1234.

¹²⁶ *Silguero*, 907 F.3d at 329.

¹²⁷ *Id.*

¹²⁸ *Levorsen*, 828 F.3d at 1232 (stating that it “[begins] and [ends] with the plain meaning of the words Congress employed”).

¹²⁹ *Silguero*, 907 F.3d at 329-30.

¹³⁰ *Id.* at 330.

¹³¹ *See, e.g., Circuit City Stores v. Adams*, 532 U.S. 105, 114-15 (2001); *see also infra* Section I.C.2.

¹³² 42 U.S.C. § 12181(7)(F).

¹³³ *Silguero*, 907 F.3d at 329.

¹³⁴ 42 U.S.C. § 12181(7)(F) (“a laundromat, dry-cleaner, bank, barbershop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital”).

benefit their customers, and those customers pay for services.¹³⁵ The court further explained that if a customer does not pay for a service, he must undeniably benefit from the service.¹³⁶ For example, lawyers that give free legal aid undeniably benefit their customers with that aid.¹³⁷ However, as explained above, the court believed that a plasma center's customers, the donors, do not benefit from their donation.¹³⁸ The donors do not pay to donate but are instead paid for their donation.¹³⁹ Therefore, the court concluded that the centers are not services.¹⁴⁰

Next, the Fifth Circuit applied the rule against surplusage canon.¹⁴¹ This canon tells courts to avoid interpreting statutes in a way that makes another part of the law redundant.¹⁴² To avoid surplusage in this case, the Fifth Circuit sought a narrow definition of "service establishment" that would not render Title I of the ADA, the employment discrimination section,¹⁴³ redundant.¹⁴⁴ Employees are people that are "employed by another, usually for wages or salary."¹⁴⁵ This wage or salary requirement makes "highly relevant" whether the business pays a customer for his service.¹⁴⁶ The court reasoned that the payment to plasma donors is relevant to the "service establishment" definition because it could make the customer an employee.¹⁴⁷ According to the court, if the payment made a plasma donor an employee, there would be no need for Title I.¹⁴⁸ The ADA would

¹³⁵ See *Silguero*, 907 F.3d at 329-30.

¹³⁶ See *id.* at 330.

¹³⁷ *Id.*

¹³⁸ *Id.* at 329.

¹³⁹ *Id.* at 330-31.

¹⁴⁰ *Id.* at 329-30. One scholar takes this conclusion further, explaining that the payment from the business to the customer makes plasma donation centers manufacturers. Applying ejusdem generis, the scholar noted that no other listed services were manufacturers. According to the scholar, this lack of listed manufacturers gave evidence under the ejusdem generis canon that plasma centers are not service establishments. See *Schneider*, *supra* note 11, at 615-16, 630.

¹⁴¹ See *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 331 (5th Cir. 2018).

¹⁴² SCALIA, *supra* note 84, at 174; see also *infra* Section I.C.3.

¹⁴³ 42 U.S.C. § 12112(a).

¹⁴⁴ *Silguero*, 907 F.3d at 331.

¹⁴⁵ *Employee*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/employee> (last visited Nov. 10, 2021); see also 42 U.S.C. § 12111(4)-(5) (defining employee as "an individual employed by an employer," and employer as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year").

¹⁴⁶ *Silguero*, 907 F.3d at 331.

¹⁴⁷ *Id.* at 330-31.

¹⁴⁸ *Id.*

cover the donor referencing Title I, making Title I redundant.¹⁴⁹ Therefore, to avoid creating surplusage in the ADA, the court decided that plasma centers are not service establishments and could discriminate against donors with disabilities.¹⁵⁰ Altogether, the Fifth Circuit defined a service establishment as an entity that is not purely “employment like” and does not pay its customers unless a clear benefit to the customer exists.¹⁵¹

Although the Fifth Circuit considered the canon against surplusage,¹⁵² it did not apply the canon to the Limiting Clause.¹⁵³ Applying the canon against surplusage to the Limiting Clause supports a version of the Tenth Circuit’s broad, benefit-based, “service establishment” definition.¹⁵⁴

4. The Third Circuit’s “Service Establishment” Interpretation and Broad Definition

The Third Circuit recognized the split between the Tenth and Fifth Circuits¹⁵⁵ and agreed with the Tenth Circuit that “service establishment” should have a broad definition.¹⁵⁶ The court began its analysis with the Tenth Circuit’s plain meaning definition, and reasoned that plasma centers are service establishments under that definition.¹⁵⁷ Next, the court used specific examples to expand on the Tenth Circuit’s definition and refute the Fifth Circuit’s narrow interpretation.¹⁵⁸ The Fifth Circuit maintained that a customer’s payment to a business is highly relevant in analyzing whether the company is a service establishment.¹⁵⁹ To refute this, the Third Circuit gave the example of banks.¹⁶⁰ Banks are explicitly listed in the Service Establishment

¹⁴⁹ *Id.* at 331.

¹⁵⁰ *Id.* at 331-32.

¹⁵¹ *See id.* at 329-31.

¹⁵² *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 331 (5th Cir. 2018).

¹⁵³ 42 U.S.C. § 12181(7) (“The following private entities are considered public accommodations for purposes of this title, if the operations of such entities affect commerce”).

¹⁵⁴ *See infra* Section II.A.

¹⁵⁵ *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 176-77 (3d Cir. 2019).

¹⁵⁶ *Id.* at 177-78.

¹⁵⁷ *Id.* at 176-77 (defining “service” and “establishment” as “conduct that assists or benefits someone or something” and a “place of business,” respectively) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 778, 2075 (2002)).

¹⁵⁸ *Id.* at 177-78.

¹⁵⁹ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 331 (5th Cir. 2018).

¹⁶⁰ *Matheis*, 936 F.3d at 177.

Clause,¹⁶¹ and they do not necessarily charge customers for their services.¹⁶² They even pay customers for using their services through incentives like cash rewards.¹⁶³ According to the court, if services that do not require a customer's payment are explicitly listed in the Service Establishment Clause, then the payment cannot be highly relevant.¹⁶⁴

Moreover, the court reasoned that a customer's payment is unnecessary to define "service establishment" because a service can get value from customers in non-monetary ways.¹⁶⁵ In this case, the non-monetary value came from donors' plasma.¹⁶⁶ With those considerations in mind, the Third Circuit determined that "service establishments" do not require a customer's payment but are entities that give "something of economic value [for] the public."¹⁶⁷ Applying this definition to plasma centers, the court reasoned that centers provide economic value by extracting plasma for money.¹⁶⁸ Therefore, the court held that plasma centers are service establishments, thus subjecting them to the ADA's requirements.¹⁶⁹

Like the Tenth Circuit,¹⁷⁰ the Third Circuit did not consider the canon against surplusage. Application of the surplusage canon refutes the Third Circuit's economic-based definition and confirms a version of the Tenth Circuit's benefit-based definition.¹⁷¹

C. *The Supreme Court's Use of Statutory Interpretation Canons and Legislative History*

Although the courts of appeals took different interpretative paths, the modern Supreme Court typically interprets a statute's meaning in a specific way.¹⁷² First, the Court looks at the plain mean-

¹⁶¹ *Id.*

¹⁶² *See id.* at 177-78.

¹⁶³ *See id.* at 178.

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 178.

¹⁶⁶ *See, e.g.,* CSL Behring, *Our Company*, <https://www.cslbehring.com/our-company> (last accessed Nov. 10, 2021) (stating that the company makes \$10.3 billion in annual revenue from its plasma products).

¹⁶⁷ *Matheis*, 936 F.3d at 178.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016).

¹⁷¹ *See infra* Section II.A.

¹⁷² *See Gluck, supra* note 61, at 1301; Cooper, *supra* note 1, at 1211-12.

ing of the text.¹⁷³ Next, it analyzes other canons of statutory interpretation such as *ejusdem generis* and the canon against surplusage.¹⁷⁴ If necessary, the Court concludes its analysis with legislative history.¹⁷⁵ Although many justices do not consider legislative history, some still look to a statute's history if, after applying statutory canons, the statute is still ambiguous.¹⁷⁶ This Section will explain the relevant statutory canons necessary to understand how the Supreme Court would determine "service establishment's" definition, following this typical interpretation path.¹⁷⁷

1. Understanding a Plain Meaning Analysis

According to the Supreme Court, if a statute's plain meaning is unambiguous,¹⁷⁸ its interpretation should begin and end with its plain meaning.¹⁷⁹ A word's plain or ordinary meaning is defined as its everyday use.¹⁸⁰ Chief Justice Marshall explained that the Framers "must be understood to have employed words in their natural sense, and to have intended what they said."¹⁸¹ This same reasoning applies to statutory interpretation.¹⁸² For example, the Supreme Court has held that a tomato is a vegetable,¹⁸³ even though scientifically it is a fruit.¹⁸⁴ In

¹⁷³ See Gluck, *supra* note 61, at 1301.

¹⁷⁴ See *id.*; Cooper, *supra* note 1, at 1211-12.

¹⁷⁵ See Gluck, *supra* note 61, at 1301.

¹⁷⁶ *Id.*

¹⁷⁷ See Cooper, *supra* note 1, at 1211-12.

¹⁷⁸ A phrase is unambiguous if it has a generally accepted judicial and legislative meaning. See *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98-99 (1991) ("Where [a statute] contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators").

¹⁷⁹ See *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("As with any question of statutory interpretation, our analysis begins with the plain language of the statute. . . . It is well established that, when the statutory language is plain, we must enforce it according to its terms.") (internal citations omitted); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment) ("if the language of a statute is clear, that language must be given effect at least in the absence of a patent absurdity"); *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.").

¹⁸⁰ SCALIA, *supra* note 84, at 69.

¹⁸¹ *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824).

¹⁸² SCALIA, *supra* note 84, at 69.

¹⁸³ *Nix v. Hedden*, 149 U.S. 304, 307 (1893).

¹⁸⁴ See *Is a Tomato a Fruit or a Vegetable and Why?*, EUFIC, (Mar. 4, 2020) <https://www.eufic.org/en/healthy-living/article/is-a-tomato-a-fruit-or-a-vegetable-and-why>.

1883, Congress imposed a tariff on vegetables, but not fruits, and the Court had to determine whether the tariff applied to tomatoes.¹⁸⁵ Even though tomatoes are scientifically a fruit, society considers them a vegetable and uses them as such.¹⁸⁶ Considering this, the Court chose to follow common usage and concluded that tomatoes are a vegetable for legal purposes.¹⁸⁷ This case illustrates that when the Court can conclusively determine a word's commonly accepted definition, the Court should not look beyond the statute's text.

Nevertheless, definitions are not always so clear. Often, the Supreme Court uses dictionaries to determine a phrase's ordinary meaning, which can create ambiguity.¹⁸⁸ This ambiguity often occurs because justices rely upon different dictionaries that contain varying definitions.¹⁸⁹ When this ambiguity arises, the Court looks to other statutory interpretation tools for greater clarity.¹⁹⁰ Also, even when the language seems to have a clear meaning, the Supreme Court has emphasized that the definition still "depends on context."¹⁹¹

2. Clarifying the Statutory Interpretation Canon, *Ejusdem Generis*

If the plain meaning of a statute is ambiguous, courts will move on to other interpretation canons.¹⁹² One interpretive canon used by the Fifth Circuit¹⁹³ is the *ejusdem generis* canon.¹⁹⁴ To illustrate, the Supreme Court once used the *ejusdem generis* canon to interpret the clause, "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate com-

¹⁸⁵ *Nix*, 149 U.S. at 306.

¹⁸⁶ *Id.* at 307.

¹⁸⁷ *Id.*

¹⁸⁸ See James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 495 (2013).

¹⁸⁹ *Id.* at 489 (stating that Justice Scalia often used Webster's Second New International and the American Heritage Dictionary, Thomas often used Black's Law Dictionary, and Alito relied mostly on Webster's Third International and the Random House Dictionary).

¹⁹⁰ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 (2019) (Gorsuch, J., concurring) ("We 'begin our interpretation of the regulation with its text' and, if the text is unclear, we 'turn to other canons of interpretation' and tie-breaking rules to resolve the ambiguity.") (quoting *Green v. Brennan*, 578 U.S. 547, 553-54 (2016)).

¹⁹¹ See *Bailey v. U.S.*, 516 U.S. 137, 145 (1995).

¹⁹² See *Gluck*, *supra* note 61, at 1301.

¹⁹³ *Silguero*, 907 F.3d at 330.

¹⁹⁴ *Id.* See *supra* Section I.B.3 (explaining *ejusdem generis*'s meaning).

merce.”¹⁹⁵ The Court determined that the specific terms “seamen” and “railroad employees” limited the meaning of the general phrase “or any other class of workers engaged in foreign or interstate commerce.”¹⁹⁶ Instead of applying to all workers dealing in interstate or foreign commerce, the general phrase only included seamen or railroad-type employees.¹⁹⁷ This example shows the Court’s willingness to look outside of a word’s plain meaning if the context suggests a more limited definition.

Notably, the ejusdem generis canon is not necessarily conclusive.¹⁹⁸ The Court may use its discretion to disregard ejusdem generis if other considerations give a reason not to apply the canon.¹⁹⁹ One such reason is when Congress uses phrases referencing commerce.²⁰⁰ When Congress intends to invoke its Commerce Clause powers to the full extent, it uses the phrase “affecting commerce.”²⁰¹ However, when Congress uses words like “in commerce” or “engaged in commerce,” it shows a more limited congressional authority.²⁰² Therefore, a broader interpretation from Congress’s use of the phrase “affecting commerce” could supersede a limited definition resulting from the ejusdem generis canon.²⁰³

Courts also examine the context within which a statute’s phrase appears when determining whether to apply the ejusdem canon.²⁰⁴ In *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, the Court considered the meaning of the phrase “all other law” in a statute that

¹⁹⁵ *Circuit City Stores v. Adams*, 532 U.S. 105, 113-15 (2001).

¹⁹⁶ *Id.* at 114-15.

¹⁹⁷ *Id.* at 115.

¹⁹⁸ See, e.g., *id.* (“Canons of construction need not be conclusive”).

¹⁹⁹ See *id.* (“Canons of construction . . . are often countered, of course, by some maxim pointing in a different direction.”).

²⁰⁰ *Id.* at 115-16.

²⁰¹ Compare *Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)) (stating that “affecting commerce” shows Congress’s intent to use the full extent of their commerce clause powers); with *U.S. v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 280 (1975) (stating that the phrase “engaged in commerce” means “a limited assertion of federal jurisdiction”).

²⁰² See *Circuit City Stores*, 532 U.S. at 115-16.

²⁰³ See *id.* at 115-16.

²⁰⁴ See *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991) (“The [ejusdem generis] canon does not control, however, when the whole context dictates a different conclusion”); *State v. Eckhardt*, 133 S.W. 321, 322 (1910) (explaining that this canon does not control when looking at the statute as a whole because Congress did not intend the limited definition).

read, “the antitrust laws and all other law.”²⁰⁵ The Court recognized that under *eiusdem generis*, the Court could limit the phrase “all other law” to “antitrust laws or similar statutes.”²⁰⁶ However, the Court refused to limit the phrase after looking at the context in which the statute controls.²⁰⁷ The Court reasoned that because “all other law” includes state and municipal law, it could not be limited to antitrust law.²⁰⁸ In his statutory interpretation book, Justice Scalia explained that this canon “is not a rule of law but one of various factors to be considered in the interpretation of a text.”²⁰⁹ Therefore, although the canon can aid in interpretation, it does not always trump the meaning that results from other interpretative considerations or context.²¹⁰

3. Explanation of the Canon Against Surplusage

The canon against surplusage instructs courts to avoid interpreting a statute’s meaning in a way that would render any word or phrase redundant.²¹¹ The Supreme Court has repeatedly noted the importance of this canon to interpret a statute’s meaning appropriately.²¹² In one case, the Court interpreted the meaning of “use” in the phrase “uses or carries a firearm.”²¹³ If “use” meant “the action of a defendant who puts a gun into place,” the word “carry” would become redundant.²¹⁴ If the Court applied the redundant meaning, it would effectively delete the redundant word because the word no longer adds anything to the statute. Deleting a word in a statute is akin to

²⁰⁵ *Norfolk & W. R. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 127-28 (1991).

²⁰⁶ *Id.* at 129.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ SCALIA, *supra* note 84, at 212.

²¹⁰ See *Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001); *id.* at 138 (Souter, J., dissenting) (“[E]jusdem generis is a fallback, and if there [is] good reasoning not to apply it, it is put aside”); *Norfolk & W. R. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 129 (1991); SCALIA, *supra* note 84, at 212.

²¹¹ SCALIA, *supra* note 84, at 174.

²¹² See *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) (“We must give effect to every word that Congress used in the statute.”); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute, we are obliged to give effect, if possible, to every word Congress used.”); *U.S. v. Spelar*, 338 U.S. 217, 225 (1949) (Jackson, J., concurring) (“We should pay Congress the respect of not assuming lightly that it indulges in inconsistencies of speech which make the English language almost meaningless.”); *U.S. v. Butler*, 297 U.S. 1, 65 (1936) (“These words cannot be meaningless, else they would not have been used.”); *Platt v. Union Pac. R. Co.*, 99 U.S. 48, 58 (1879) (“[A] legislature is presumed to have used no superfluous words.”).

²¹³ *Bailey v. U.S.*, 516 U.S. 137, 138-39 (1995).

²¹⁴ *Id.* at 145.

rewriting the statute, which is outside of the court's power.²¹⁵ The Court avoids this overreach by interpreting statutes to avoid surplusage.²¹⁶ In the firearm case, the Court accomplished that goal by interpreting "use" to mean any time the firearm is used but not carried.²¹⁷ This case is an excellent example of the Court adjusting the meaning of a phrase to ensure an outcome without surplusage.²¹⁸

The Supreme Court alludes to an exception when Congress intends the words to be repetitive.²¹⁹ In his statutory interpretation book, Justice Scalia explained this exception, saying that the canon against surplusage does not apply when Congress uses repetitive synonyms.²²⁰ Justice Scalia gave some instances of repetitive words where Congress may not intend each to have a distinct meaning, like "execute and perform," or "peace and quiet."²²¹ Further, in a dissenting opinion, Justice Scalia once reasoned that the listed words, "falsely made, forged, altered, or counterfeited," were so similar that Congress did not intend each to have a distinct meaning.²²² Aside from this "obvious synonym" exception, courts generally accept the rule against surplusage.²²³

4. The Supreme Court's Use of Legislative History in Statutory Interpretation

If a statute is still ambiguous after the textual analysis above, some courts will look to the legislative history.²²⁴ The Supreme Court uses legislative history sparingly,²²⁵ but individual Justices may still use it when statutes are ambiguous after the Court applies statutory inter-

²¹⁵ See U.S. CONST. art. I § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States") (emphasis added). The Constitution gives the legislature the supreme law-making power, thus not allowing agencies or judges to change laws, unless they are unconstitutional, or make laws.

²¹⁶ See, e.g., *Bailey*, 516 U.S. at 146 (using the canon against surplusage to avoid redundancy).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ SCALIA, *supra* note 84, at 177-78.

²²¹ *Id.* at 177.

²²² *Moskal v. U.S.*, 498 U.S. 103, 120-21 (1990) (Scalia, J., dissenting).

²²³ See *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute.").

²²⁴ See, e.g., *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011).

²²⁵ See, e.g., *NLRB v. SW Gen. Inc.*, 137 S. Ct. 929, 942 (2017) ("What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators.")

pretation canons.²²⁶ However, the Court consistently refuses to use legislative history if it creates extra ambiguity in the statute.²²⁷ For example, in *Milner v. Dep't of the Navy*, the Court debated the Freedom of Information Act exception's meaning by first assessing its plain meaning, and then by considering its legislative history.²²⁸ The Court recognized that some justices use legislative history to illuminate the meaning of ambiguous text when that history clearly shows Congress's intent.²²⁹ However, in the *Milner* case, the legislative history was more ambiguous than the statute's plain meaning.²³⁰ Therefore, the majority relied on the statute's plain meaning alone.²³¹ Implicit in this distinction is that when legislative history is unambiguous, it can help decipher an ambiguous statute.²³² Overall, when a court faces a statutory interpretation question, it first looks to plain meaning, then to other statutory canons, and finally, if necessary, at legislative history.²³³ Courts should also use this interpretation path when analyzing the Service Establishment Clause.²³⁴

²²⁶ See *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783 (2018) (Sotomayor, J., concurring) ("Legislative history can be particularly helpful when a statute is ambiguous or deals with especially complex matters."); Stephen Breyer, *On The Uses Of Legislative History In Interpreting Statutes*, 65 S. CAL. L. REV. 845, 853-854 (1992) ("Sometimes [a court] can simply look to the surrounding language in the statute or to the entire statutory scheme and ask, 'Given this statutory background, what would a reasonable human being intend this specific language to accomplish?' Often this question has only one good answer, but sometimes the surrounding statutory language . . . cannot answer the question. In such situations, legislative history may provide a clear and helpful resolution.").

²²⁷ See, e.g., *Milner*, 562 U.S. at 574 ("When presented, on the one hand, with clear statutory language and, on the other, with dueling committee reports, we must choose the language."); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950) (deciding that using legislative history was improper when it conflicted with the statute's language).

²²⁸ See *Milner*, 562 U.S. at 564, 569, 573-74.

²²⁹ *Id.* at 572.

²³⁰ *Id.* at 574.

²³¹ *Id.*

²³² *Id.* at 572 ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text.").

²³³ See *Gluck*, *supra* note 61, at 1301.

²³⁴ 42 U.S.C. § 12181(7)(F).

ANALYSIS

I. THE CIRCUIT COURTS MISINTERPRETED THE SERVICE ESTABLISHMENT CLAUSE BECAUSE THEY FAILED TO RECOGNIZE THE SURPLUSAGE CREATED BY THEIR INTERPRETATIONS, AND WHY THE SUPREME COURT SHOULD RESOLVE THIS DISPUTE

Applying the above statutory interpretation canons to the Service Establishment Clause²³⁵ and the Limiting Clause,²³⁶ a different definition results than that of the circuit courts. Although ambiguity remains after assessing the Service Establishment Clause's plain meaning, applying the canon against surplusage gives a new, but coherent and unambiguous, "service establishment" definition. Legislative history also supports a broad definition. Under this broad "service establishment" definition, plasma centers qualify as public accommodations and should be bound by the ADA. The Supreme Court should grant certiorari when this question next arises to implement this definition²³⁷ uniformly across jurisdictions.

Following the Supreme Court's path for interpreting statutes,²³⁸ the first step to determine "service establishment's" definition is a plain meaning analysis.²³⁹ The Third,²⁴⁰ Fifth,²⁴¹ and Tenth²⁴² Circuits arrived at different definitions of "service establishment" after their plain meaning analyses.²⁴³ These decisions show that courts can reach different reasonable interpretations of the Service Establishment Clause's plain meaning, making it appropriate to move on to other canons.²⁴⁴ Additionally, even if "service establishment" had an unam-

²³⁵ *Id.*

²³⁶ 42 U.S.C. § 12181(7).

²³⁷ The author's proposed correct definition is, "an entity that gives the community objective, non-economic benefits."

²³⁸ See Gluck, *supra* note 61, at 1301.

²³⁹ *Id.*

²⁴⁰ See *Matheis*, 936 F.3d at 178.

²⁴¹ See *Silguero*, 907 F.3d at 329, 331-32.

²⁴² See *Levorsen*, 828 F.3d at 1234.

²⁴³ *Matheis*, 936 F.3d at 178 (defining a service establishment as an entity that proves something of economic value to the public); *Silguero*, 907 F.3d at 330-32 (holding that a service establishment must not be purely "employment-like," must not pay their customer, or if they do, must have a clear benefit to the customer); *Levorsen*, 828 F.3d at 1231 (defining a service establishment as an entity that benefits its community).

²⁴⁴ See Gluck, *supra* note 61, at 1301.

biguous meaning,²⁴⁵ the Supreme Court still looks at surrounding provisions to ensure that the meaning is congruous with that text.²⁴⁶ The same analysis should occur here.

A. *Applying the Ejusdem Generis Canon and the Canon Against Surplusage to Avoid the Unnecessary Rewriting of the Statute*

The provisions surrounding the Service Establishment Clause²⁴⁷ make a broad definition of “service establishment” appropriate. To reach this conclusion, both ejusdem generis and the canon against surplusage must be applied to the Service Establishment Clause. The text of the Service Establishment Clause and the Limiting Clause preceding it read:

The following private entities are considered public accommodations for purposes of this title, *if the operations of such entities affect commerce . . .*²⁴⁸ a laundromat, dry-cleaner, bank, barbershop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or *other service establishment . . .*²⁴⁹

Scholars and courts reached narrow definitions of “service establishment” by applying ejusdem generis to the Service Establishment Clause²⁵⁰ without considering the Limiting Clause²⁵¹ preceding it.²⁵² One scholar argued that ejusdem generis excludes plasma donation

²⁴⁵ See *Schneider*, *supra* note 11, at 615-16 (arguing that the plain meaning unambiguously defines “service establishment” narrowly to exclude entities like plasma centers).

²⁴⁶ See *Circuit City Stores v. Adams*, 532 U.S. 105, 137-38 (2001) (Souter, J., dissenting).

²⁴⁷ 42 U.S.C. § 12181(7)(F).

²⁴⁸ 42 U.S.C. § 12181(7) (emphasis added) (“Limiting Clause”).

²⁴⁹ 42 U.S.C. § 12181(F)(7) (emphasis added) (“Service Establishment Clause”).

²⁵⁰ *Id.*

²⁵¹ 42 U.S.C. § 12181(7).

²⁵² See *Silguero*, 907 F.3d at 329-31; *Schneider*, *supra* note 11, at 625-30 (arguing that the payment makes plasma centers a manufacturer, and because no other manufacturers are listed in the Service Establishment Clause, ejusdem generis and the FDA’s manufacturing regulations demand that plasma centers not be included as service establishments). While it is true that the FDA’s manufacturing regulations classify plasma centers as manufactures, the centers can also be classified as service establishments. See *Schneider*, *supra* note 11, at 612-13. This does create a tension between the FDA’s regulations and the service establishment clause, making important a grant of certiorari by the Supreme Court. See *infra* Section II.D.

centers because plasma centers are manufacturers and the other listed services are not manufacturers.²⁵³ The Fifth Circuit concluded similarly, arguing that unlike the listed services, plasma centers do not provide a benefit to the donor and do not require the donor to pay for their service.²⁵⁴ However, when other considerations point in a different direction, courts should dismiss ejusdem generis's implications.²⁵⁵

1. Considerations that require the dismissal of ejusdem generis's implications when applied to the Service Establishment Clause

Two such considerations exist in this case. First, the Limiting Clause's phrase "affect commerce"²⁵⁶ signals Congress's intention to use the extent of its Commerce Clause powers.²⁵⁷ According to the Supreme Court, Congress's Commerce Clause power includes manufacturers.²⁵⁸ Therefore, even if plasma centers are manufacturers, the Limiting Clause provides reason to set aside the scholar's assumptions²⁵⁹ drawn from the ejusdem generis canon. Second, applying the canon against surplusage also gives reason to ignore the inferences drawn from the ejusdem generis canon. The canon against surplusage instructs courts not to interpret statutes to make another provision redundant.²⁶⁰ As explained further by Justice Scalia in his book on statutory interpretation, the surplusage canon ensures that each part of a statute is useful.²⁶¹ When the payment is a part of the "service establishment" definition, as the Fifth Circuit²⁶² desired, the Limiting

²⁵³ *Schneider*, *supra* note 11, at 615-16.

²⁵⁴ *Silguero*, 907 F.3d at 329-31.

²⁵⁵ See *Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001); see also *id.* at 138 (Souter, J., dissenting); SCALIA, *supra* note 84, at 207 (stating that courts have "broad latitude in determining how much or how little is embraced by the general term").

²⁵⁶ 42 U.S.C. § 12181(7).

²⁵⁷ *Circuit City Stores*, 532 U.S. at 115 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)); see also Robert L. Burgdorf Jr., *Equal Members of the Community: The Public Accommodations Provisions of the Americans with Disabilities Act*, 64 TEMP. L. REV. 551, 559 (1991).

²⁵⁸ See *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942).

²⁵⁹ *Schneider*, *supra* note 11, at 615-16.

²⁶⁰ See SCALIA, *supra* note 84, at 176.

²⁶¹ *Id.* (saying that the canon against surplusage prevents an "interpretation that renders [a clause of a statute] pointless").

²⁶² *Silguero*, 907 F.3d at 330-31.

Clause becomes redundant.²⁶³ This violates the rule against surplusage.

To understand this surplusage, first recall the Public Accommodations Test.²⁶⁴ This test, derived from the text of the Service Establishment Clause and the Limiting Clause,²⁶⁵ makes classifying an entity as a public accommodation a two-part test: (1) the entity must be a service establishment, and (2) it must affect commerce. The first part of this test comes from the Service Establishment Clause, and the second part comes from the Limiting Clause. Therefore, for these clauses to both remain useful, or to avoid surplusage, their definitions must be distinct. To explain, next recall the firearm example from *Bailey v. United States*.²⁶⁶ There, the Supreme Court analyzed the meaning of the phrase “uses or carries a firearm.”²⁶⁷ The Court limited the definition of “use” to mean any use other than carrying the firearm.²⁶⁸ This definition ensured that the words “use” and “carry” each played a role in the statute.²⁶⁹ Similarly, both the Service Establishment Clause²⁷⁰ and the Limiting Clause²⁷¹ must play a role in the ADA to avoid surplusage. Namely, the Service Establishment Clause must play the role of identifying the entity as a service establishment, and the Limiting Clause ensures that the entity affects commerce.

The Fifth Circuit’s definition²⁷² creates unwanted surplusage because it eliminates the role of the Limiting Clause. The definition that the Fifth Circuit²⁷³ and scholar Mr. Schneider²⁷⁴ desired includes consideration of the customer’s payment for a service, but the service charge is also what makes the listed entities affect commerce. Therefore, under its definition, once an entity becomes a service establishment, no further evaluation is required to establish that it also affects commerce. This violates the rule against surplusage.

²⁶³ 42 U.S.C. § 12181(7).

²⁶⁴ See *id.*; 42 U.S.C. § 12181(7)(F).

²⁶⁵ 42 U.S.C. § 12181(7) (stating “if the operations of such entities affect commerce.”).

²⁶⁶ 516 U.S. 137, 138 (1995).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 146.

²⁶⁹ *Id.*

²⁷⁰ 42 U.S.C. § 12181(7)(F).

²⁷¹ § 12181(7).

²⁷² *Silguero*, 907 F.3d at 330-32.

²⁷³ *Id.*

²⁷⁴ Schneider, *supra* note 11, at 615-16.

2. Understanding the surplusage violation created by the Fifth Circuit's definition

To understand this violation, it must first be understood what makes an entity affect commerce. The Supreme Court decided that Congress's commerce power extends to instrumentalities of commerce, channels of commerce, and things that substantially affect commerce.²⁷⁵ Local activities substantially affect commerce when they "might, through repetition elsewhere, substantially affect any sort of interstate commerce."²⁷⁶ For example, the Supreme Court once decided that growing wheat for personal use, although a local activity, still substantially affected interstate commerce.²⁷⁷ The substantial effect existed because of the potential for all farmers to grow their own wheat.²⁷⁸ By growing their own wheat, farmers would no longer participate in the wheat market, affecting trade prices.²⁷⁹ This potential effect satisfied the "substantially affecting interstate commerce" requirement.²⁸⁰

Applying this understanding of "affecting commerce" to the ADA,²⁸¹ the listed service establishments are local entities like laundromats, dry-cleaners, banks, barbershops, lawyers, and other local activities.²⁸² Typically, these businesses' interactions occur locally because people tend to use laundromats, dry-cleaners, and the other listed businesses near their house, or at least in their state. Therefore, because these businesses are local activities, similar to personal wheat farming,²⁸³ a service establishment "affects commerce" as the Limiting Clause²⁸⁴ requires, when they "substantially affect commerce."²⁸⁵ For the listed service establishments, the substantial effect comes from the existence of a service charge. For example, if laundromats stopped having service charges, the demand for laundromat services would reach a point the market could not sustain, thus substantially affecting

²⁷⁵ U.S. v. Lopez, 514 U.S. 549, 558-59 (1995).

²⁷⁶ *Id.* at 567.

²⁷⁷ Wickard v. Filburn, 317 U.S. 111, 128-29 (1942).

²⁷⁸ *Id.* at 128.

²⁷⁹ *Id.* at 129.

²⁸⁰ *Id.*

²⁸¹ See 42 U.S.C. § 12181(7).

²⁸² See § 12181(7)(F).

²⁸³ Wickard, 317 U.S. at 125-29.

²⁸⁴ § 12181(7).

²⁸⁵ U.S. v. Lopez, 514 U.S. 549, 559 (1995).

interstate commerce.²⁸⁶ Therefore, if the “service establishment” definition contains the analysis of a service charge, then once a court determines that an entity is a service establishment, the “affecting commerce” prong is already satisfied. Resultantly, a “service establishment” definition that includes the service charge analysis takes over the Limiting Clause’s²⁸⁷ role. To ensure separate roles for the Limiting Clause²⁸⁸ and the Service Establishment Clause,²⁸⁹ as the canon against surplusage requires,²⁹⁰ courts should define “service establishment” more broadly than the Limiting Clause’s “affect commerce” mandate.²⁹¹ With a broad definition, the Limiting Clause still plays a role in the statute. This makes the Fifth Circuit’s definition²⁹² that includes the service charge analysis unworkable; the “service establishment” definition must not include the service charge analysis.

3. The canon against surplusage also makes the Third and Tenth Circuits’ definitions unworkable

The canon against surplusage also makes the Third Circuit’s definition unworkable. The Third Circuit defined “service establishment” as a business entity that gives the public some economic value.²⁹³ This economic-focused definition could, as the Fifth Circuit feared,²⁹⁴ make Title I of the ADA redundant. Title I bans employers from discriminating against people with disabilities,²⁹⁵ employers being entities that provide people with wages or a salary.²⁹⁶ Wages and salaries are something of economic value. Therefore, under the Third Circuit’s definition, all employers would also qualify as service establishments. This makes Title I redundant and violates the canon against surplusage.

²⁸⁶ See Jason Fernando, *Law of Supply and Demand*, (Nov. 29, 2020) www.investopedia.com/terms/l/law-of-supply-demand.asp.

²⁸⁷ § 12181(7).

²⁸⁸ *Id.*

²⁸⁹ § 12181(7)(F).

²⁹⁰ See SCALIA, *supra* note 84, at 174.

²⁹¹ § 12181(7).

²⁹² *Silguero*, 907 F.3d at 329-32 (defining “service establishment” with consideration of the service charge).

²⁹³ *Matheis*, 936 F.3d at 178.

²⁹⁴ *Silguero*, 907 F.3d at 330-32.

²⁹⁵ 42 U.S.C. § 12112(a).

²⁹⁶ *Employee*, MERRIAM-WEBSTER, *supra* note 145; see also 42 U.S.C. § 12111(4)-(5) (defining employee as “an individual employed by an employer,” and employer as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year”).

The Tenth Circuit's definition²⁹⁷ also does not satisfy the canon against surplusage. The Tenth Circuit defined service establishment as any establishment that provides a benefit to the community.²⁹⁸ Under this definition, the "service establishment" and "affect commerce" analyses are distinct, thus avoiding the first surplusage issue. The definition avoids surplusage because even if the only thing connecting a business to interstate commerce is the substantial effect caused by its service charge, the "affecting commerce" clause remains useful. To analyze, a court would first decide whether an entity benefits the community. Then, the court would decide whether that entity affects commerce.²⁹⁹ This two-part analysis satisfies the canon against surplusage because each clause has a different role in the analysis. However, this definition violates the canon against surplusage when applied to the Fifth Circuit's concern³⁰⁰ about making Title I³⁰¹ redundant. The word "benefit" is broad, so it could include an economic benefit. Therefore, this definition succumbs to the same issue that arose with the Third Circuit's definition.³⁰² As explained above, the Title I employment section³⁰³ becomes redundant when courts define "service establishment" to include economic benefit.

4. The correct definition that avoids the surplusage issues

To avoid both surplusage issues, "service establishment" should have the following definition: A service establishment is any business that gives the public an objective, non-economic benefit (non-economic definition). This definition avoids the first surplusage issue because the affecting commerce analysis³⁰⁴ remains distinct because non-economic benefits do not involve commerce. Second, Title I³⁰⁵ maintains its role in the ADA for any entities that only give economic benefits, including the many employers that benefit the public by providing wages. The new definition also satisfies the *ejusdem generis*

²⁹⁷ *Levorsen*, 828 F.3d at 1231.

²⁹⁸ *Id.*

²⁹⁹ 42 U.S.C. § 12181(7).

³⁰⁰ *Silguero*, 907 F.3d at 331-32.

³⁰¹ 42 U.S.C. § 12112(a).

³⁰² *Matheis*, 936 F.3d at 178.

³⁰³ 42 U.S.C. § 12112(a).

³⁰⁴ 42 U.S.C. § 12181(7).

³⁰⁵ § 12112(a).

canon because all listed entities³⁰⁶ benefit the community in a non-economic way.³⁰⁷

Scholars have expressed two concerns about such a broad, benefit-dependent definition.³⁰⁸ First, they worry that courts could not easily administer a benefit-dependent definition of “service establishment” because benefits are based on “an individual’s subjective belief.”³⁰⁹ The “non-economic definition,” however, only includes objective benefits. Courts are well equipped to make objective determinations, as they do in many areas of the law.³¹⁰ Therefore, the “non-economic” definition does not suffer from an administrative issue. Second, scholars have noted a conflict between the ADA’s requirements and the Food and Drug Administration’s (FDA’s) regulatory requirements for manufacturers.³¹¹ Even if this conflict exists, it does not overcome the mandates of the text.³¹² However, the Supreme Court could address this concern once it grants certiorari.

B. *Legislative History Supports the Broad “Non-Economic Definition”*

Although analysis of the text alone results in the broad “non-economic definition” of “service establishment,” legislative history also supports this interpretation. The Committee on Education and Labor said that Congress wanted the ADA to broadly address concerns about people with disabilities’ ability to contribute productively to society.³¹³ Donating plasma is one way that disabled people can con-

³⁰⁶ § 12181(7)(F) (listing the following terms before “service establishment”: “laundromat, dry-cleaner, bank, barbershop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital”). To give a few examples, the laundromat and dry cleaners give their clients clean clothes, the bank and insurance company provide security, and the barbershop improves appearance.

³⁰⁷ See *Matheis*, 936 F.3d at 177; *Levorsen*, 828 F.3d at 1232.

³⁰⁸ See *Schneider*, *supra* note 11, at 622-23.

³⁰⁹ *Id.*

³¹⁰ See, e.g., *Terry v. Ohio*, 392 U.S. 1, 21-22, 30 (1968) (deciding that a police officer’s decision to stop and frisk two people was reasonable based on an *objective* analysis of the facts.).

³¹¹ See *Schneider*, *supra* note 11, at 628; see also *Levorsen*, 828 F.3d at 1244 (Holmes, J. dissenting).

³¹² See U.S. CONST. art. I § 1.

³¹³ H.R. REP. NO. 101-485 pt. 2, at 99 (1990) (explaining that the purpose of the statute was “to bring individuals with disabilities into the economic and social mainstream of American life . . . in a clear, balanced, and reasonable manner.”).

tribute to society by saving their neighbors' lives.³¹⁴ A scholar also explained that Congress enacted the ADA to fill broad gaps left by the Civil Rights Act, including that of service establishments.³¹⁵ Finally, as the Tenth Circuit explained, an early draft of the ADA also confirms that Congress intended a broad definition of "service establishment."³¹⁶ In the original draft, the Service Establishment Clause said "other *similar* service establishments,"³¹⁷ unlike the final version that reads, "other service establishments."³¹⁸ This shows that Congress intended a broader definition of "service establishments" because the final draft does not explicitly require similarity to the listed examples.³¹⁹ Although legislative history alone would not support a broad definition of "service establishment," when considered in conjunction with the ADA's text, the legislative history adds support to the broad "non-economic definition." The ADA's legislative history is, as the Supreme Court recently quipped, "extra icing on a cake already frosted."³²⁰

C. *Plasma Centers Affect Commerce and Are Service Establishments Under the "Non-Economic Definition"*

Plasma donation centers are subject to the ADA's nondiscrimination requirements because they qualify as service establishments under the "non-economic definition," and they satisfy the Limiting Clause's "affect commerce" requirement.³²¹ Plasma donation centers give communities two objective, non-economic benefits. The first benefit is free health screening. Before giving plasma, all donors must undergo a "pre-donation physical" that "tests for viruses such as HIV and Hepatitis and [evaluates] protein and hemoglobin levels."³²² The health-knowledge accessible from the "pre-donation physical" could

³¹⁴ See, e.g., CSL Plasma, *Donation Benefits*, <https://www.cslplasma.com/why-donate> (last visited Nov. 10, 2021).

³¹⁵ Burgdorf Jr., *supra* note 257, at 556-57.

³¹⁶ *Levorsen*, 828 F.3d at 1233 (quoting H.R. REP. NO. 101-485, pt. 4, at 56); 42 U.S.C. § 12181(7)(F).

³¹⁷ *Id.* at 1233 (quoting H.R. REP. NO. 101-485, pt. 4, at 56).

³¹⁸ 42 U.S.C. § 12181(7)(F).

³¹⁹ *Levorsen*, 828 F.3d at 1233.

³²⁰ *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (quoting *Yates v. United States*, 574 U.S. 528, 557 (2015) (Kagan, J., dissenting)).

³²¹ 42 U.S.C. § 12181(7).

³²² DonatingPlasma.org, *Donor Frequently Asked Questions*, (last accessed Nov. 10, 2021) <https://www.donatingplasma.org/donation/donor-faq>.

either enable a donor to pursue further medical care or give peace-of-mind that the donor is in good health. Additionally, even if plasma centers do not properly screen prospective donors, the centers still benefit the public by providing them with the opportunity to serve.³²³ Humans have a fundamental need to belong and often fulfill that need by making an impact on the world.³²⁴ Plasma donation impacts the world by providing the necessary ingredient to manufacture lifesaving drugs.³²⁵ Without these drugs, sick people would not receive their life-saving treatments.³²⁶ Scholars have explained that connecting to society in this manner has “psychological and mental-well-being” benefits.³²⁷ Both medical and service benefits are objective and non-economic. Therefore, plasma donation centers meet the “non-economic definition” of service establishment.

Plasma centers must also affect commerce to qualify as a public accommodation under the ADA.³²⁸ Plasma centers affect commerce under the “channel of commerce”³²⁹ prong of the affecting commerce analysis.³³⁰ Channels of commerce “include railroads, highways, [and] city streets.”³³¹ Plasma centers use channels of commerce because they

³²³ *Matheis*, 936 F.3d at 177.

³²⁴ See Shirley Le Penne, *Longing to Belong: Needing to be Needed in a World in Need*, 54 Soc’y 535, 535 (Dec. 2017); see also Joseph D. Greenhalgh, Note, *I Didn’t Volunteer for This: A Solution for Protecting Volunteers from Discrimination in Massachusetts*, 39 W. NEW ENG. L. REV. 177, 202 (2017) (explaining the mental health and social benefits derived from volunteering and giving back to society); see also Mark Horoszowski, *Volunteering Makes You Happier – Here’s Why*, *Moving Worlds*, <https://blog.movingworlds.org/volunteering-makes-you-happier> (Feb. 12, 2014).

³²⁵ CSL Plasma, *Who We Are*, <https://www.cslplasma.com/about-csl-plasma> (last accessed Nov. 10, 2021) (explaining that CSL plasma manufactures lifesaving products from donated plasma).

³²⁶ See, e.g., CSL Plasma, *Donation Benefits*, <https://www.cslplasma.com/why-donate> (last visited Nov. 10, 2021) (explaining that “plasma [donations] can save and improve lives” because the company manufactures plasma to produce products that treat “bleeding disorders including hemophilia and von Willebrand disease, primary immune deficiencies, hereditary angioedema, inherited respiratory disease, and neurological disorders”).

³²⁷ Greenhalgh, *supra* note 324, at 204 n. 237.

³²⁸ 42 U.S.C. § 12181(7) (“The following private entities are considered public accommodations for purposes of this title, *if the operations of such entities affect commerce.*”) (emphasis added).

³²⁹ *U.S. v. Lopez*, 514 U.S. 549, 558 (1995).

³³⁰ The “affecting commerce” prong can be analyzed without focusing on the service charge because of the broad “non-economic definition.” If the “service establishment” definition required a service charge, then all entities without a service charge would be excluded from the service establishment category. Then, the service charge would always be what made the entity affect commerce, and there would be no distinct “affect commerce” analysis.

³³¹ 29 C.F.R. § 776.29.

ship plasma across state lines to manufacture their end products.³³² For example, the center called CSL Plasma only has three manufacturing locations in the U.S., but over 270 donation centers in many more states.³³³ The centers must use channels of commerce to get the plasma from place to place.³³⁴ Therefore, the centers' operations affect commerce, thus fulfilling the Limiting Clause's³³⁵ requirements. Plasma centers benefit their communities with health screenings and service opportunities, and they affect commerce. Accordingly, the centers are "public accommodations" under the ADA and must abide by the ADA's requirements.³³⁶

D. *The Supreme Court Should Grant Certiorari on the Service Establishment Question*

The Supreme Court should grant certiorari to establish a single "service establishment" definition for two reasons. First, the Court should clarify the inconsistency created by the circuit split.³³⁷ As a result of the circuit split, the ADA protects some disabled people that want to donate plasma, but not others.³³⁸ This discrepancy in coverage only depends on the disabled person's location when they attempt donation.³³⁹ The Supreme Court should address this confusion and enable people with disabilities to access as many benefits in society as possible.³⁴⁰ Second, the Supreme Court should grant certiorari to address scholars' concerns over the tension between the ADA's regulations and the FDA's regulations.³⁴¹ The FDA and ADA could give an entity that is both a manufacturer and a service establishment con-

³³² See, e.g., CSL Behring, *Worldwide Locations*, <https://www.cslbehring.com/our-company/worldwide-locations> (last accessed Nov. 10, 2021); CSL Plasma, *Find a Donation Center*, <https://www.cslplasma.com/find-a-donation-center> (last accessed Nov. 10, 2021).

³³³ *Id.*

³³⁴ See *id.*

³³⁵ 42 U.S.C. § 12181(7).

³³⁶ See *id.*

³³⁷ See *Silguero*, 907 F.3d at 331-32; *Levorsen*, 828 F.3d at 1234.

³³⁸ See *id.*

³³⁹ Circuits cover different geographical locations, so the ADA will protect people who seek donation within the Tenth Circuit's bounds, but not those in the Fifth Circuit. See *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, *supra* note 35; *Silguero*, 907 F.3d at 331-32; *Levorsen*, 828 F.3d at 1234.

³⁴⁰ Plasma donation gives disabled people an avenue to serve others in society, which is proven to have health benefits. See *Greenhalgh*, *supra* note 324, at 202; see also *Horoszowski*, *supra* note 324.

³⁴¹ See *Schneider*, *supra* note 11, at 628-30.

flicting mandates.³⁴² Therefore, the Court should clarify the definition of “service establishment” and that definition’s impact on the FDA’s regulations. Although the Supreme Court denied certiorari of the Fifth Circuit’s decision, that petition only focused on the arguments made by the Third, Tenth, and Fifth Circuits and did not address the surplusage issue.³⁴³ The Court should take up this question when it next arises to interpret the Service Establishment Clause in a manner consistent with its plain language.

CONCLUSION

Plasma donation centers are public accommodations subject to the ADA’s requirements. To reach this conclusion, plasma donation centers must be public accommodations.³⁴⁴ A textual analysis of the ADA shows that an entity must fulfill two requirements to be classified as a public accommodation.³⁴⁵ First, the entity must fall into one of twelve listed public accommodation categories, the relevant category in this case being “service establishments.”³⁴⁶ Next, the Limiting Clause requires that the entity “affect commerce.”³⁴⁷ Textual analysis also shows that the definition of “service establishment” must be broad enough so that the “affecting commerce” clause maintains its role in the statute.³⁴⁸

The three courts of appeals that have addressed the “service establishment” question defined “service establishment” in ways that violate the rule against surplusage. The Fifth Circuit’s narrow “service establishment” definition focused on the business’s fee.³⁴⁹ Importantly, this fee makes the listed service establishments affect commerce. Therefore, under its definition, once an entity is classified as a service establishment, no additional analysis is required to determine whether it affects commerce. This makes the Limiting Clause redundant, thus violating the rule against surplusage. The Third and Tenth

³⁴² *Id.* at 628 (explaining that the FDA and ADA have different requirements that could contradict each other).

³⁴³ Petition for Writ of Certiorari at 15-18, 22-28, *Silguero v. CSL Plasma, Inc.*, 140 S. Ct. 1107 (No. 19-603).

³⁴⁴ See 42 U.S.C. § 12182(a).

³⁴⁵ See 42 U.S.C. § 12181(7); 42 U.S.C. § 12181(7)(F).

³⁴⁶ 42 U.S.C. § 12181(7)(F).

³⁴⁷ § 12181(7).

³⁴⁸ See SCALIA, *supra* note 84 at 174 (referencing the canon against surplusage).

³⁴⁹ See *Silguero*, 907 F.3d at 329-32.

Circuits defined "service establishment" more broadly but still have surplusage issues.³⁵⁰

Slightly modifying the Third Circuit's definition resolves the surplusage issue. This new definition avoids surplusage by defining "service establishment" as an entity that gives the public objective, non-economic benefits. The available legislative history³⁵¹ confirms this broad, "non-economic definition." Under the "non-economic definition," plasma centers qualify as service establishments. The Supreme Court should grant certiorari to unify the law with one "service establishment" definition and resolve the tension between ADA and FDA regulations. This uniform definition will ensure that plasma centers cannot discriminate against disabled people based solely on their disabilities.³⁵²

³⁵⁰ See *Matheis*, 936 F.3d at 177-78; *Levorsen*, 828 F.3d at 1233-234.

³⁵¹ See, e.g., H.R. REP. NO. 101-485, pt. 2, at 34 (1990).

³⁵² The ADA has a "direct threat" exception to the public accommodation requirements. See 42 U.S.C. § 12182(b)(3) ("Nothing in this title shall require an entity to permit an individual to participate in or benefit from the . . . services . . . where such individual poses a direct threat to the health or safety of others."). Therefore, equal access does not mean that the centers would be required to accept any individual, regardless of a risk for potentially dangerous plasma. Health and safety concerns would still be taken into consideration under the "direct threat" framework.