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Equal Access to Donate: Plasma Donation Centers and the ADA

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EQUAL ACCESS TO DONATE: PLASMA DONATION CENTERS AND THE ADA

LUCY RICHMAN*

ABSTRACT

The Americans with Disabilities Act (ADA) prohibits discrimination against disabled persons in employment, public services, and private entities operating public accommodations. Despite clear moral and social incentives for becoming disability-friendly outside of the legal mandate, many private entities have asserted that the ADA does not apply to them. In multiple cases, plasma donation centers, one particular type of entity, have strongly disputed whether they are subject to the ADA as public accommodations. The crux of these cases has hinged on whether plasma donation centers are “service establishments” under Title III of the ADA, and three such cases have reached the federal appellate court level, resulting in a circuit split. This Note contends that the Third and Tenth Circuits reached the correct conclusion, and, using contract law, methods of statutory interpretation, and public policy rationales, argues that plasma donation centers should be considered service establishments that are required to comply with the ADA.

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I. INTRODUCTION

One in four U.S. adults, or 61 million people, live with a disability.¹ This prevalence is proportionally higher in historically and continually vulnerable groups: women, those living in poverty, elderly adults, and persons of color.² Historically, as with other marginalized groups in the country, the United States has not addressed its disabled citizens' needs. It was not until 1990—just over 30 years ago—that the Americans with Disabilities Act (ADA) was signed into law.³ The ADA finally acknowledged that “historically, society has tended to isolate and segregate

¹ Catherine A. Okoro et al., Ctr. for Disease Control and Prevention, *Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults—United States, 2016*, 67 MORBIDITY AND MORTALITY WKLY. REP. 882, 882 (2018) (statistics as of 2016).

² *Id.* at 883–84.

³ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(2), 104 Stat. 327, (1990) (current version codified at 42 U.S.C. § 12101 et seq.).

individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”⁴ While the ADA has led to clear improvements, it is still evident in everyday encounters—from a lack of elevators in older apartment buildings to excessive hurdles for educational accommodations—that disabled Americans do not enjoy equal opportunities, benefits, or access to everyday life.

The ADA prohibits discrimination against disabled persons in employment, public services, and private entities operating public accommodations.⁵ Despite clear moral and social incentives for becoming disability-friendly outside of the legal mandate, many private entities have asserted that the ADA does not apply to them.⁶ Title III of the ADA, which specifically deals with private entities operating public accommodations, provides lists of certain entities that are considered public accommodations.⁷ Naturally, the lists are not explicitly comprehensive. To address that issue, Congress included catchall phrases at the end of each enumerated group of public accommodations, such as “or other place of public gathering,” “or other service establishment,” and “or other social service center.”⁸ Cases disputing whether a given entity is in fact a public accommodation sometimes arise under those catchall phrases.⁹

In multiple cases, plasma donation centers, one particular type of entity, have strongly disputed whether they are subject to the ADA as public accommodations.¹⁰ Plasma donation is a similar process to blood donation,¹¹ and generally has similar

⁴ *Id.*

⁵ *See generally* 42 U.S.C. §§ 12101–12213.

⁶ *See, e.g.*, *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (determining whether professional golf tournament where the public can compete for a slot is a public accommodation); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005) (addressing whether foreign-flag cruise ships are places of public accommodation).

⁷ 42 U.S.C. § 12181(7).

⁸ *Id.*

⁹ *See, e.g.*, *Lancaster v. Phillips Invs., LLC*, 482 F. Supp. 2d 1362, 1367 (M.D. Ala. 2007).

¹⁰ *See* *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1230 (10th Cir. 2016); *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 327 (5th Cir. 2018); *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 175–76 (3d Cir. 2019).

¹¹ In traditional blood donation, also known as “whole blood donation,” blood is simply collected as it comes out of the donor’s body, including “red cells, white cells, and platelets, suspended in plasma.” *Whole Blood Donation*, AM. RED CROSS BLOOD SERV., <https://www.redcrossblood.org/donate-blood/how-to-donate/types-of-blood-donations/whole-blood-donation.html> (last visited Nov. 12, 2020). In contrast, during plasma donation, “blood is drawn from one arm and sent through a high-tech machine that collects your plasma and then safely and comfortably returns your red cells and platelets back to you, along with some saline.” *Plasma Donation*, AM. RED CROSS BLOOD SERV., <https://www.redcrossblood.org/donate-blood/how-to-donate/types-of-blood-donations/plasma-donation.html> (last visited Nov. 12, 2020). Essentially, traditional blood donation collects all components of the blood, whereas plasma donation only collects the plasma portion of the blood. Plasma donation also differs from traditional blood donation in that plasma donors are compensated in exchange for their

requirements for donors.¹² However, standard blood donations are commonly done through local blood drives run by non-profit organizations like the Red Cross, whereas plasma donation is a booming corporate industry. From 2008 to 2014, the plasma pharmaceutical industry grew from approximately a \$4 billion to over an \$11 billion dollar annual market.¹³ Plasma donation centers collect plasma from voluntary donors and the plasma is then used for research and development of new pharmaceutical products and treatment of various health conditions, including hemophilia, immune disorders, neurological conditions, and viruses.¹⁴ In exchange for their plasma, donors receive monetary compensation, usually in the form of a pre-paid debit card, and “can earn more than \$1,000 their first month.”¹⁵

plasma, whereas traditional blood donors comport with the common understanding of a donor as unpaid. *See infra* note 15 for further discussion.

¹² The Red Cross requires whole blood donors to weigh at least 110 pounds, “be in good health and feeling well,” and be at least 16 years old. *Eligibility Requirements*, AM. RED CROSS BLOOD SERV., <https://www.redcrossblood.org/donate-blood/how-to-donate/eligibility-requirements.html> (last visited Nov. 12, 2020). They similarly require plasma donors to weigh at least 110 pounds and “be in good health and feeling well,” but require donors to be at least 17 years old and have type AB blood. *Id.* Private donation centers tend to have slightly more stringent requirements for plasma donors, though they do not list donors by blood type. CSL Plasma, one of the largest plasma donation companies, lists their eligibility requirements as: “Anyone in good health, between the ages of 18-65, who weighs at least 110 pounds, has no tattoos or piercings within the last 4 months, meets our eligibility and screening requirements, and has valid identification and a permanent address.” *Become a Donor*, CSL PLASMA, <https://www.cslplasma.com/become-a-donor> (last visited Feb. 6, 2022). Octapharma Plasma’s requirements are comparable:

Be in good health, meaning you feel well and can do normal everyday activities. Be between the ages of 18 and 67. Have a healthy vein in your arm for drawing blood. Weigh at least 110 pounds. Not have gotten ear piercings, body piercings, tattoos, or permanent makeup in the past 4 months.

First Time Donors, OCTAPHARMA PLASMA, <https://web.archive.org/web/20210420122340/https://octapharmaplasma.com/donor/first-time-donors> (last visited Feb. 6, 2022).

¹³ Darryl Lorenzo Wellington, *The Twisted Business of Donating Plasma*, THE ATLANTIC (May 28, 2014), <https://www.theatlantic.com/health/archive/2014/05/blood-money-the-twisted-business-of-donating-plasma/362012/?gclid=CjwKCAjw-5v7BRAmEiwAJ3DpuLX5>. As of 2017, plasma donation centers’ global sales were estimated to be over \$21 billion. Zoe Greenberg, *What is the Blood of a Poor Person Worth?*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/sunday-review/blood-plasma-industry.html>.

¹⁴ Greenberg, *supra* note 13. Plasma has been recently notable for its use in experimental treatments for patients with the Covid-19 virus. *See* Richard Harris, *Convalescent Plasma Strikes Out as COVID-19 Treatment*, N.P.R. (Mar. 10, 2021), <https://www.npr.org/sections/health-shots/2021/03/10/975365309/convalescent-plasma-strikes-out-as-covid-19-treatment>. The treatments were not widely successful, but scientists have not completely dismissed the possibility that further studies may find a sweet spot where plasma is useful to treat Covid-19 and other viruses. *Id.*

¹⁵ *Why Donate?*, CSL PLASMA, <https://www.cslplasma.com/why-donate> (last visited Mar. 8, 2022). The term “donor” connotes a person who gives something gratuitously, which would be

Plasma donation centers have a long history of skirting regulatory and moral lines, dating back to the 1950s when hemophilia treatments using plasma became mainstream.¹⁶ In the 1960s and 1970s, plasma companies collected plasma from prison populations to minimize the companies' overhead costs.¹⁷ Tragically, using those collections in hemophilia drugs resulted in "roughly 50 percent of American hemophiliacs contract[ing] HIV from bad plasma-based pharmaceuticals (a much higher infection rate than suffered by gay men at the time)."¹⁸ The 1990s were the plasma industry's low-point in the United States; collections were down, regulations were tightening, and there were rampant stories of poor industry oversight and culture.¹⁹ In the late 2000s, the Great Recession reinvigorated the plasma donation industry, with "total donations leaping from 12.5 million in 2006 to more than 23 million in 2011."²⁰

New challenges arose with the plasma donation industry's resurgence, including how to safely, uniformly, and legally screen donors. Private plasma donation centers require "good health," in line with a requirement from the Food and Drug Administration (FDA).²¹ The "good health" requirement has been used by some plasma donation centers as a justification for screening out potential donors with disabilities.²² Though these claims by the plasma donation centers are based on an

a gift transaction rather than a contractual one. *See Bundy v. Wetzel*, 184 A.3d 551, 556 (Pa. 2018). However, because plasma donors are paid for their plasma, which constitutes consideration, the transactions fall into the contractual realm and are more than a plain gift. *See infra* Part III(A) for discussion. "Donor," in the context of plasma donation centers, must therefore not be understood by its ordinary meaning but simply as a term chosen by the plasma donation centers to refer to the individuals whose plasma they collect.

¹⁶ Wellington, *supra* note 13.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ The plasma donation centers cite an FDA regulation which requires that donation centers evaluate donor eligibility. 21 C.F.R. § 630.10(a). It also establishes the guideline that donors not in good health or who have factors that could cause the donation to "adversely affect" the donor's health or the "safety, purity, or potency of the blood or blood component" are not eligible. *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1234 n.9 (10th Cir. 2016). *See supra* note 12 for specific eligibility requirements imposed by private plasma donation centers. An amicus brief filed by the United States in support of plaintiff Brent Levorsen explicitly acknowledges that "[m]any individuals with disabilities are 'in good health' and otherwise qualified to donate plasma under FDA regulations and establishments' donor eligibility criteria developed in accordance with FDA regulations." Reply Brief for the United States as Amicus Curiae Supporting Appellant and Urging Reversal at 5, *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227 (10th Cir. 2016) (No. 14-4162). Moreover, the brief notes that the fact that some people with disabilities may be disqualified under the FDA regulation "is not a reason that plasma donation centers should be exempt from ADA coverage." *Id.*

²² *See Levorsen*, 828 F.3d at 1229 n.9 (turning away a donor because of his schizophrenia despite signed note from psychiatrists indicating fitness to donate plasma regularly); Silguero

FDA regulation, affected donors who have chosen to take legal action allege discrimination under the ADA, indirectly claiming that the FDA regulation was also improperly applied by the plasma donation center.²³ Such claims provide the basis for plasma donation centers to claim that the ADA does not apply to them. Three major cases relate to the ADA and plasma donation centers: *Levorsen v. Octapharma Plasma, Inc.*;²⁴ *Silguero v. CSL Plasma, Inc.*;²⁵ and *Matheis v. CSL Plasma, Inc.*²⁶

The crux of these cases has hinged on whether plasma donation centers are “service establishments”²⁷ under Title III of the ADA, which provides an enumerated list of entities that are public accommodations and seeks to tackle discrimination against people with disabilities in those places.²⁸ The statute includes the following list: “a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.”²⁹ Plaintiffs in each case argue that plasma donation centers fall under “other service establishments,” and defendants, the plasma donation centers, contend that they do not.³⁰ The Tenth Circuit in *Levorsen* and the Third Circuit in *Matheis* found that plasma donation centers are in fact service establishments and are thus bound by the ADA, but the Fifth Circuit in *Silguero* found the opposite, creating a circuit split.³¹

v. *CSL Plasma, Inc.*, 907 F.3d 323, 326 n.3 (5th Cir. 2018) (turning away donors because of one’s limp and use of a cane and the other’s anxiety requiring a service dog).

²³ See *Levorsen*, 828 F.3d at 1234 n.9. In addition to ADA cases, there is another small, but significant, line of cases in which plaintiffs challenge discrimination by plasma donation centers based on the plaintiffs’ gender identity. See *Scott v. CSL Plasma, Inc.*, 151 F. Supp. 3d 961, 968, 970–71 (D. Minn. 2015); *Kaiser v. CSL Plasma, Inc.*, 240 F. Supp. 3d 1129, 1132, 1136–37, 1140 (W.D. Wash. 2017). In *Scott* and *Kaiser*, plaintiffs successfully argued that automatic rejection of transgender donors violated anti-discrimination statutes and such automatic rejection was not warranted under FDA regulations. While litigation arising from these situations would not fall under the ADA, they are another example of plasma donation centers failing to exercise adequate and thorough prudence, as well as simply disregarding donors’ dignity and desire to donate, in determining who is and is not a suitable donor.

²⁴ 828 F.3d 1227 (10th Cir. 2016).

²⁵ 907 F.3d 323 (5th Cir. 2018).

²⁶ *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171 (3rd Cir. 2019).

²⁷ This Note will continue to refer to “service establishments,” but hereafter will not put the phrase in quotation marks. Anytime the phrase is written it can be assumed, unless noted otherwise, that the phrase refers to service establishments as defined by the ADA.

²⁸ 42 U.S.C. § 12181(7).

²⁹ *Id.* § 12181(7)(F).

³⁰ *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1230 (10th Cir. 2016); *Silguero*, 907 F.3d at 327; *Matheis*, 936 F.3d at 175–76.

³¹ *Levorsen*, 828 F.3d at 1234; *Matheis*, 936 F.3d at 178, 182; *Silguero*, 907 F.3d at 325.

This Note argues that plasma donation centers should be considered service establishments under the ADA based on contractual principles clarifying the meaning of “service,” theories of statutory interpretation, and policy considerations. Part II of this Note traces the development of disability law as a whole, outlines the concept of consideration, and focuses particularly on the three cases that created the current circuit split: *Levorsen*, *Silguero*, and *Matheis*. Part III(A) argues that contract law conceptions of consideration necessitate finding that plasma donation centers are indeed service establishments. Part III(B) addresses statutory interpretation arguments made by the cases and contends that, whatever statutory interpretation ideology a court follows, it should still find that plasma donation centers do fall within the ADA’s “other service establishments” language. Part III(C) puts forth policy considerations that compel resolution of the issue on the side of the Third and Tenth Circuits. Finally, Part IV concludes.

II. BACKGROUND

This Part will first provide an overview of the legal and historical background that laid the foundation for the ADA and the relevant cases. It will next break down the different conceptions of consideration that courts have used in contract law cases, which will provide the necessary background for understanding why multiple formulations of consideration support the notion that plasma donation centers are service establishments. Lastly, this Part will summarize *Levorsen*, *Silguero*, and *Matheis*.

A. Disability Rights in American History

Disability has appeared in American law since before the United States’ inception. Colonial Massachusetts issued The Body of Liberties of 1641, reading, “[a]ll persons which are of the age of 21 yeares, and of right understanding and meamories . . . shall have full power and libertie to make there wills and testaments, and other lawfull alienations of their lands and estates.”³² This provision dictated that a person needed to have certain abilities—“right understanding and meamories”—to be able to engage in certain legal rights, and those without such abilities would be unable to participate.³³ In colonial America, “those afflicted with mental diseases were generally treated as if they had been thereby stripped of all human attributes, together with their rights and privileges as human beings.”³⁴ Over a century later, during the first Continental Congress in 1788, Congress began wrestling with the meaning of disability as part of an act designed to issue pensions to those rendered “invalids” during their service in the Revolutionary War.³⁵ While this particular congressional

³² THE BODY OF LIBERTIES OF 1641 § 11 (1641), *reprinted in* WILLIAM HENRY WHITMORE, CITY COUNCIL OF BOSTON, THE COLONIAL LAWS OF MASSACHUSETTS 34 (William Henry Whitmore ed., Fred B. Rothman & Co. 1995) (1889).

³³ *Id.*

³⁴ ALFRED DEUTSCH, THE MENTALLY ILL IN AMERICA 41 (Columbia Univ. Press 1945) (1937).

³⁵ PAPERS OF THE CONTINENTAL CONGRESS, No. 22, at 257–59 (1788), *reprinted in* LIBRARY OF CONGRESS, JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, vol. 34, at 204 (Roscoe R. Hill ed., 1937).

act sought to benefit disabled veterans, specific wide-reaching protections for people with disabilities would not come until much later.

The nineteenth century began to offer greater opportunities to people with disabilities. The American School for the Deaf was founded in 1817,³⁶ the first college for people with disabilities was authorized by Congress in 1864,³⁷ and the National Association for the Deaf was founded in 1880.³⁸ Despite this social progress, the law was far from catching up: the late nineteenth century saw the rise of “ugly laws,” designed to keep the disabled and destitute out of the public sphere.³⁹ Chicago’s ugly law, enacted in 1881 as the first of many across the country, forbade “any person, who is diseased, maimed, mutilated or deformed in any way, so as to be an unsightly or disgusting object, to expose himself to public view.”⁴⁰ Chicago’s ugly law was not repealed until 1974.⁴¹

Social progress continued throughout the early twentieth century and, as society changed, the law likewise was in flux.⁴² In 1910, the Washington Supreme Court upheld the validity of an insanity defense to crimes; an apparent legal protection of the disabled.⁴³ However, in a blow to disability rights, the United States Supreme Court in 1927 found that compulsory sterilization of certain intellectually disabled

³⁶ *History & Cogswell Heritage House*, AM. SCH. FOR THE DEAF, <https://www.asd-1817.org/about/history--cogswell-heritage-house> (last visited Feb. 6, 2022).

³⁷ *History of Gallaudet University*, GALLAUDET UNIV., <https://www.gallaudet.edu/about/history-and-traditions> (last visited Feb. 6, 2022). At the time of its inception the school was known as the Columbia Institution for the Instruction of the Deaf and Dumb and Blind. *Id.* Appropriately, it was later renamed after Thomas Hopkins Gallaudet, founder of the American School for the Deaf, and father of the university’s first president, Edward Miner Gallaudet. *Id.*

³⁸ *About Us*, NAT’L ASS’N OF THE DEAF, <https://www.nad.org/about-us/> (last visited Feb. 6, 2022).

³⁹ See GARY L. ALBRECHT, *ENCYCLOPEDIA OF DISABILITY 1575* (2006).

⁴⁰ *Id.*

⁴¹ Lauren Young, *Decriminalizing Disability*, MD. B.J., Spring 2019, at 62, 62.

⁴² See, e.g., *About Mental Health America*, MENTAL HEALTH AM., <https://www.mhanational.org/about> (last visited Sept. 24, 2020) (Mental Health America founded 1909); Paul K. Longmore & David Goldberger, *The League of the Physically Handicapped and the Great Depression: A Case Study in the New Disability History*, 87 J. AM. HIST. 888, 888 (2000) (League of the Physically Handicapped founded 1935); *Disability Employment Awareness Month*, LIBR. OF CONG., <https://www.loc.gov/accessibility/disability-employment-awareness-month/> (last visited Sep. 25, 2020) (highlighting congressional establishment of National Employ the Physically Handicapped Week in 1945). This is not to say, however, that oppressive social measures died out or even waned. Medical practices in particular continued to impose horrific “treatments” on disabled patients, even going so far as to refuse to give care and letting a newborn die in one Chicago case. *Surgeon Lets Baby, Born to Idiocy, Die*, N.Y. TIMES, July 25, 1917, at 11.

⁴³ *State v. Strasburg*, 110 P. 1020, 1024 (Wash. 1910) (“An act done by me without my will, or in the absence of my will, is not my act.”).

persons was not a constitutional violation.⁴⁴ Later congressional statutes, including the Pratt-Smoot Act of 1931,⁴⁵ the Social Security Act of 1935,⁴⁶ the National Mental Health Act of 1946,⁴⁷ and the Hospital Survey and Construction Act of 1946,⁴⁸ all sought to increase access to opportunity and care for people with disabilities.

Amendments to the Social Security Act continued to provide greater services and protections for people with disabilities as the century went on, and other statutes and court decisions provided incremental victories for the disability rights movement.⁴⁹ The Rehabilitation Act of 1973 reflected the country's changing sentiments toward people with disabilities and provided a sweeping civil rights statement: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁵⁰ Litigation implicating the Rehabilitation Act and regulations made thereunder further enabled courts to address disability rights in years following, and the law continued to move forward. In 1988, the Fair Housing Act was amended to include anti-discrimination protections in the housing market for people with disabilities,⁵¹ and finally, in July 1990, the ADA was signed into law.⁵²

⁴⁴ *Buck v. Bell*, 274 U.S. 200, 207–08 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

⁴⁵ Pratt-Smoot Act, ch. 40, § 1, 46 Stat. 1487 (1931) (current version at 2 U.S.C. § 135(a) (2019)) (authorizing funds for Library of Congress to provide blind adults with accessible books).

⁴⁶ Social Security Act, 42 U.S.C. §§ 301–397mm.

⁴⁷ National Mental Health Act, Pub. L. No. 79-487, 60 Stat. 421 (1946).

⁴⁸ Hospital Survey and Construction Act, Pub. L. No. 79-725, 60 Stat. 1040 (1946).

⁴⁹ *See, e.g.*, Pub. L. No. 85-926, 72 Stat. 1777 (1958) (authorizing grants to "encourage expansion of teaching in the education of mentally retarded children"); *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) (affirming a defendant's right to have a competency hearing before trial); Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (creating Medicare and Medicaid).

⁵⁰ Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 392 (1973) (current version at 29 U.S.C. § 701 et seq.); *accord* *Chandler v. City of Dallas*, 2 F.3d 1385, 1388 (5th Cir. 1993) ("prohibit[ing] discrimination against otherwise qualified individuals with handicaps in programs that receive federal financial assistance"). For a critique of § 504, see Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability, 42 VILL. L. REV. 409, 419–23 (1997).

⁵¹ Fair Housing Act Amendments of 1988, Pub. L. No. 100-430, 102 Stat. 1620 (1988) (current version at 42 U.S.C. §§ 3601–3631).

⁵² Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (current version at 42 U.S.C. §§ 12101–12213).

Robert Burgdorf, who drafted the ADA bill that would be introduced to Congress in 1988, described it as “a response to an appalling problem.”⁵³ Burgdorf, himself disabled from childhood polio, saw through personal experience and his work as a disability rights lawyer that, despite legal strides in the disability rights movement, people with disabilities still were routinely discriminated against.⁵⁴ The ADA was far-reaching in its civil rights protections, stating that its purpose was “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁵⁵ Title I dealt with employment, Title II dealt with public services, Title III dealt with public accommodations and services operated by private entities, Title IV dealt with telecommunications, and Title V dealt with other miscellaneous provisions.⁵⁶

A report issued by the National Council on Disability, an independent federal agency, found that sixteen years after the ADA’s implementation, “most people with disabilities perceive improvements in their quality of life and many attribute those improvements to the ADA.”⁵⁷ Simultaneously, however, the report noted “growing backlash” against the ADA and the disability rights movement, and that “people with disabilities reported the ADA has not been fully enforced; the barriers they face remain primarily attitudinal.”⁵⁸ The ADA’s continued shortcomings are reflected in the debate over access to plasma donation centers: though a relatively small sector, the growing number of cases relating to disability and plasma donation centers within the last ten years reflects the backlash noted in the Council’s report.⁵⁹ The legal system should use this litigation as an opportunity to reaffirm the ADA’s importance, breadth, and goals to ensure enforcement in years to come.

⁵³ Robert L. Burgdorf, Jr., *Why I Wrote the Americans with Disabilities Act*, WASH. POST (July 24, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/>.

⁵⁴ *Id.*

⁵⁵ 42 U.S.C. § 12101(b)(1). This provision remains unchanged from the original 1990 text.

⁵⁶ Americans with Disabilities Act, 104 Stat. at 327–28. In the current version, chapter 126 of the U.S. Code, there are only four subchapters (i.e., titles): I. Employment; II. Public Services, III. Public Accommodations and Services Operated by Private Entities, and IV. Miscellaneous Provisions.

⁵⁷ NAT’L COUNCIL ON DISABILITY, *THE IMPACT OF THE AMERICANS WITH DISABILITIES ACT: ASSESSING THE PROGRESS TOWARD ACHIEVING THE GOALS OF THE ADA 11* (2007).

⁵⁸ *Id.* at 10. The ADA Amendments Act of 2008 recognized and attempted to rectify the original Act’s weaknesses, including a direction to courts that the ADA must be read broadly, *see infra* note 171 and accompanying text, but discrimination and malevolence still remain in spite of the continually strengthening legal protection; *accord* Irin Carmon, *Donald Trump’s Worst Offense? Mocking Disabled Reporter, Poll Finds*, CBS NEWS (Aug. 11, 2016, 3:24 AM), <https://www.nbcnews.com/politics/2016-election/trump-s-worst-offense-mocking-disabled-reporter-poll-finds-n627736> (discussing Donald Trump’s mocking of a disabled reporter, clearly connoting a negative attitude toward people with disabilities, and positive yet paternalistic attitudes about disability rights evident in voter response).

⁵⁹ *See* cases cited *supra* notes 22–26; *see also* NAT’L COUNCIL ON DISABILITY, *supra* note 57.

B. *Contractual Consideration*

Contract law principles are essential to understanding the debate over whether plasma donation centers are “service establishments” under Title III of the ADA. Most important is contract law’s conception of consideration; an essential element of any contract.⁶⁰ The Restatement of Contracts, Second defines consideration, writing:

(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for this promise and is given by the promisee in exchange for that promise. (3) The performance may consist of (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation. (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.⁶¹

Essentially, each party must be mutually induced to give something to the other—they engage in a bargain.

In the plasma donation center cases, most of the enumerated public accommodations in the provision at issue create contractual relationships with the members of the public who take advantage of them.⁶² For example, when a person, whether disabled or not, visits a beauty shop (one of the enumerated examples in the list of service establishments),⁶³ they enter into a contract. Essentially, they agree that “I will give you cash if you cut my hair.” The shop is induced by the promise of cash and the customer is induced by the promise of a haircut.⁶⁴ This exemplifies the mutual inducement referred to in the Restatement section quoted above.⁶⁵

A bargained-for exchange does not need to be an equal (or even near equal) exchange to constitute consideration, and anything of value can suffice, which means

⁶⁰ Marx v. FDP, LP, 474 S.W.3d 368, 378 (Tex. App. 2015) (“A contract without consideration is unenforceable.”).

⁶¹ RESTATEMENT (SECOND) OF CONTS. § 71 (AM. L. INST. 1981); *see also* Steinberg v. Chicago Med. Sch., 371 N.E.2d 634, 639 (Ill. 1977) (“Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract.”).

⁶² 42 U.S.C. § 12181(7)(F).

⁶³ *Id.*

⁶⁴ Though in this example the hairdresser would presumably not receive the cash until they perform their end of the bargain—cutting the customer’s hair—consideration is still present based on § 75, which states, “[A] promise which is bargained for is consideration if, but only if, the promised performance would be consideration.” RESTATEMENT (SECOND) OF CONTS. § 75 (AM. L. INST. 1981). The cash payment or the act of cutting hair would be consideration if performed, and, because mutually induced and thus bargained for, consideration is still present in this case. *See infra* note 65 for clarification on reciprocal inducement.

⁶⁵ Comment (b) to § 71 states “In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration.” RESTATEMENT (SECOND) OF CONTS. § 71 cmt. b, (AM. L. INST. 1981).

there does not need to be any exchange of money for consideration to be present.⁶⁶ Continuing with the above hypothetical, this means that, theoretically, the customer and the hairdresser could have exchanged a haircut for a batch of cookies or a night of babysitting, for example.⁶⁷

Another conception of consideration is the benefit/detriment approach. According to Comment b to Restatement § 79:

Historically, the common law action of debt was said to require a *quid pro quo*, and that requirement may have led to statements that consideration must be a *benefit* to the promisor. But contracts were enforced in the common-law action of *assumpsit* without any such requirement; . . . the emphasis was rather on *harm* to the promisee.⁶⁸

The mutual inducement conception is prominent, but many jurisdictions still incorporate the benefit/detriment approach alongside it.⁶⁹ Ohio, for one, defines consideration as a “bargained for legal benefit and/or detriment.”⁷⁰ The Michigan Supreme Court has required “a bargained-for exchange” including “a benefit on one side, or a detriment suffered, or service done on the other.”⁷¹ As those definitions show, the mutual inducement and the benefit/detriment approaches to consideration can exist harmoniously. Generally, where there is consideration, it is the result of mutual inducement (the bargain) and likely results in a benefit and/or detriment to the parties. Important to this Note is that the current approach emphasizes either a benefit *or* a detriment—either one can be equally satisfactory so long as there is mutual inducement.

⁶⁶ *See id.* § 79.

⁶⁷ *Cf.* Soars v. Easter Seals Midwest, 563 S.W.3d 111, 116 (Mo. 2018) (en banc) (“When determining the existence of consideration, the Court does not evaluate the adequacy of the consideration.”).

⁶⁸ RESTATEMENT (SECOND) OF CONTS. § 79 cmt. b, (AM. L. INST. 1981) (emphasis added).

⁶⁹ *See, e.g.*, Steinberg v. Chi. Med. Sch., 371 N.E.2d 634, 639 (Ill. 1977) (“Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract.”); Smith v. Barnhart, 576 S.W.3d 407, 420 (Tex. App. 2019) (“Consideration is a bargained-for exchange of promises. It consists of benefits and detriments to the contracting parties.”) (alteration in original) (citation omitted); Res. Mgmt. Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1036 (Utah 1985) (“Promises made by a party pursuant to a bilateral contract to do an act or to forbear from doing an act that would be detrimental to the promisor or beneficial to the promisee may constitute the consideration for the other’s promise.”); H.P. Hood & Sons v. Heins, 205 A.2d 561, 565 (Vt. 1964) (quoting 1 WILLISTON, CONTRACTS § 103 (3d ed.)) (“Mutual promises, in each of which the promisor undertakes some act or forbearance that will be or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, are sufficient consideration for one another.”); Dan Ryan Builders, Inc. v. Nelson, 737 S.E.2d 550, 556 (W. Va. 2012) (noting “[a] benefit to the promisor or a detriment to the promisee is sufficient consideration for a contract”).

⁷⁰ Williams v. Ormsby, 966 N.E.2d 255, 258 (Ohio 2012).

⁷¹ Gen. Motors Corp. v. Dept. of Treasury, Revenue Div., 644 N.W.2d 734, 738 (Mich. 2002) (citation omitted).

C. *The Circuit Split: Where the Courts Stand*

Finally, and perhaps most importantly, there are the cases that developed the jurisprudence around whether plasma donation centers are subject to Title III of the ADA. This Part provides a brief overview of the stories that gave rise to each case and outlines each court's reasoning, which will be considered more in-depth in Part III(B).

1. *Levorsen v. Octapharma Plasma, Inc.*

The first case at issue, *Levorsen v. Octapharma Plasma, Inc.*, was initially decided in the United States District Court for the District of Utah in 2014 where the court found that plasma donation centers were not public accommodations under Title III because they neither fell under the enumerated "professional office of a health care provider" nor the catch-all phrase "other service establishments."⁷² Plaintiff Brent Levorsen had donated plasma routinely for many years before being turned away when an employee learned that Mr. Levorsen had borderline schizophrenia.⁷³ Mr. Levorsen then provided the plasma donation center with documentation from multiple psychiatrists indicating that he was suitable to donate plasma regularly, but the plasma donation center held its ground.⁷⁴ At that point, Mr. Levorsen filed suit under the ADA, raising the issue of whether plasma donation centers are "service establishments" as defined in § 12181(7)(F).⁷⁵

Of particular note in the district court's reasoning is the theory that plasma donation centers do not fall under "other service establishments" because, unlike the enumerated examples, they do not provide a service to the public in exchange for a monetary fee.⁷⁶ On appeal, the Tenth Circuit bluntly rejected the district court's reasoning, stating, "[A] PDC is a 'service establishment' for two exceedingly simple reasons: It's an establishment. And it provides a service."⁷⁷ Though not mentioned in the district court's opinion, The Tenth Circuit also rejected the defendant plasma donation center's use of two canons of statutory interpretation, *eiusdem generis* and *noscitur a sociis*.⁷⁸ Furthermore, the circuit court rejected using canons of statutory

⁷² *Levorsen v. Octapharma Plasma, Inc.*, No. 2:14-cv-325, 2014 WL 6751172, at *13–16 (D. Utah, Dec. 1, 2014) (referring to language contained in 42 U.S.C. § 12181(7)(F)).

⁷³ *Id.* The district court noted that Mr. Levorsen also suffers from post-traumatic stress disorder, attention deficit hyperactivity disorder, and insomnia and does, in fact, qualify as a person with a disability under § 12102(2)(A) of the ADA. *Id.* at *2. However, Mr. Levorsen's deferral from plasma donation (plasma donation centers refer to their rejection of a donor as a "deferral," which may be temporary or permanent) was based solely upon the donation center employee's concern that, because of his schizophrenia, Mr. Levorsen might "pull the needle collecting blood out of his arm and hurt him-self and/or others." *Id.*

⁷⁴ *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016).

⁷⁵ *Id.*

⁷⁶ *Levorsen*, 2014 WL 6751172, at *11.

⁷⁷ *Levorsen*, 828 F.3d at 1229.

⁷⁸ *Id.* at 1231–32. This portion of the defendant's argument, and the Court's subsequent rejection, are based on the Brief of Defendant-Appellee Octapharma Plasma, Inc.; the District Court's decision did not address principles of statutory interpretation. Brief for Defendant-

interpretation altogether, because it found that the ordinary meaning of service establishment “yield[ed] neither ambiguity nor an irrational result.”⁷⁹ The court ultimately rejected the notion that compensation must be accepted for an entity to be a service establishment under § 12181(7)(F) and held that plasma donation centers are service establishments and thus subject to the ADA.⁸⁰

2. *Silguero v. CSL Plasma, Inc.*

In 2018, the Fifth Circuit took on the same question as the Tenth, asking whether plasma donation centers are “service establishments” under the ADA. The *Silguero* case stemmed from two plaintiffs’ experiences. Mark Silguero, who had successfully donated plasma multiple times before, was subsequently rejected when his bad knees worsened and he arrived to donate plasma with the assistance of a cane.⁸¹ Amy Wolfe suffered from anxiety and used a service dog to manage her condition and, as a result, was turned away when she tried to donate plasma.⁸² This rejection was in line with the plasma donation center’s policy “that a person is ineligible to donate if they suffer from anxiety requiring the use of a service dog.”⁸³

The district court embraced the reasoning asserted by the defendant/dissent in *Levorsen*, and the Fifth Circuit adopted that same reasoning in its opinion:

First, the word ‘service’ implies that the customer is benefitted by the act, and no such benefit occurs here. Second, the list preceding the catchall term ‘other service establishment’ does not include any establishments that provide a ‘service’ without a detectable benefit to the customer. Finally, third, the structure of the ADA indicates that an establishment typically does not pay a customer for a ‘service’ it provides.⁸⁴

Ultimately the Fifth Circuit took the opposite stance of the Tenth, holding that plasma donation centers are not service establishments, which created a circuit split.⁸⁵

Appellee at 23, *Levorsen*, 828 F.3d 1227 (No. 14-4162). These canons were also invoked in the dissenting opinion to this case. *Levorsen*, 828 F.3d at 1237 (Holmes, J., dissenting).

⁷⁹ *Levorsen*, 828 F.3d at 1232.

⁸⁰ *Id.* at 1232, 1234.

⁸¹ *Silguero v. CSL Plasma, Inc.* No. 2:16-CV-361, 2017 WL 6761818, at *3–4 (S.D. Tex., Nov. 2, 2017). Mr. Silguero was ultimately denied because his bad knees and use of a cane indicated to the Medical Staff Associate that “he could not safely transfer to and from the donation bed.” *Id.*

⁸² *Id.* at *4–5.

⁸³ *Id.*

⁸⁴ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 329 (5th Cir. 2018).

⁸⁵ *Id.* at 325. The Court also addressed the question of whether plasma donation centers are considered “public facilities” under a Texas state law, which the circuit court certified to the Supreme Court of Texas and subsequently found in the affirmative. After the Fifth Circuit’s second decision the plaintiffs filed a writ of certiorari to the Supreme Court of the United States asking the Court to resolve the circuit split and determine whether plasma donation centers are “place[s] of public accommodation” subject to the requirements of Title III of the Americans

3. *Matheis v. CSL Plasma, Inc.*

In 2019 the question arose once again, and this time, the Third Circuit held that plasma donation centers are “service establishments” under the ADA.⁸⁶ In this case, plaintiff George Matheis served as a SWAT officer with his police department and, as a result of past trauma from his service, was diagnosed with PTSD.⁸⁷ After donating plasma many times, Mr. Matheis adopted a service dog, Odin, to help him cope with anxiety.⁸⁸ The first time Mr. Matheis brought Odin to the plasma donation center with him, he was immediately turned away, learning that the donation center permitted service animals “for the blind but not for anxiety.”⁸⁹ Even when Mr. Matheis offered to leave Odin in the car and proceed with the donation alone he was rejected: he needed a letter from his physician saying he could safely donate without Odin. This indicated that the donation center’s concern was about Mr. Matheis’ condition and not about health concerns related to having a dog present.⁹⁰

Following that incident, Mr. Matheis filed suit alleging discrimination prohibited by the ADA, where yet another district court again had to consider the question of whether plasma donation centers are public accommodations subject to the ADA.⁹¹ The district court examined the Tenth Circuit’s and the district court in Texas’ decisions (the Fifth Circuit had not yet decided its case at this point), and ultimately sided with the Tenth Circuit.⁹²

On appeal to the Third Circuit, the circuit court affirmed the district court’s holding that plasma donation centers are service establishments that are subject to Title III of the ADA.⁹³ The circuit court focused its analysis on examining analogous types of entities to undermine the arguments made by the Fifth Circuit and the defendant in

with Disabilities Act.” Petition for Writ of Certiorari, *Silguero v. CSL Plasma, Inc.*, No. 19-603, 2019 WL 5869797, at *i (2019). The Court denied certiorari. *Silguero v. CSL Plasma, Inc.*, 140 S. Ct. 1107, 1108 (2020).

⁸⁶ *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 182 (3d Cir. 2019).

⁸⁷ *Id.* at 175.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Matheis v. CSL Plasma, Inc.*, 346 F. Supp. 3d 723, 727–30 (M.D. Pa. 2018). The district court also held that, though plasma donation centers are public accommodations subject to the ADA, the defendant here was nonetheless justified in turning away Mr. Matheis because of a “legitimate, non-discriminatory reason” relating to other federal regulations. This holding was beyond the scope of the Tenth Circuit’s opinion and thus that court did not address the issue. Likewise, the question of whether a plasma donation center that is subject to the ADA (as this Note contends they are) may turn a donor away because of their disability, but on different legal grounds, is beyond the scope of this Note and will not be addressed in depth.

⁹³ *Matheis*, 936 F.3d at 178. The circuit court also reversed the district court on the question of whether the defendant violated the ADA by turning Mr. Matheis away, holding that the defendant’s discrimination was not justified. *Id.* at 182.

Matheis. It considered a bank and a pawnshop and found that those entities, both of which have been acknowledged as service establishments under the ADA, are distinguishable from the defendant's position that service establishments require customers to pay money for services and that the services must be offered in order to benefit the public.⁹⁴ The court determined that plasma donation centers do in fact offer a service to the public and that whether donors pay for or receive pay for that service is irrelevant, and thus plasma donation centers are service establishments.⁹⁵

III. ANALYSIS

Through application of contract law to the facts of the cases, analysis of the courts' decisions, and policy considerations, it is evident that plasma donation centers must be considered service establishments under the ADA. This Part will first apply the contractual idea of consideration, previously discussed in Part II(B), to the facts of each case to show how the plasma donation centers' positions in the cases are untenable. It will then review and explain the courts' analyses of each case in-depth, focusing on the canons of statutory interpretation used by each court, and will evaluate the courts' adherence to traditional principles of statutory interpretation and the merits of their contentions. Following an evaluation of the courts' statutory interpretation procedures and arguments, this Part will propose an alternative statutory interpretation structure and evaluate each case under that model. Finally, this Part explains why holding that plasma donation centers are subject to Title III of the ADA is in line with public policy considerations and will support the common good.

A. *Contract Law: Plasma Donation Centers Provide a Service*

This Part seeks to intervene in the existing conversation around whether plasma donation centers are service establishments under the ADA and add a previously unconsidered argument: the contractual concept of consideration supports finding that plasma donation centers are indeed service establishments under Title III of the ADA. Neither *Levorsen*, *Silguero*, nor *Matheis* explicitly addressed contract law, though their discussions of compensation, services, and benefits fits directly into a contract law discourse. For future litigation, including a potential circuit split resolution by the Supreme Court, contract law analysis may prove influential.

1. Plasma Donation as a Contractual Transaction

Plasma donation centers enter into contracts with their donors: donors offer their plasma in exchange for compensation, and plasma donation centers accept when they approve a donor to donate and collect the plasma. In each of those interactions, consideration is exchanged: plasma for money, money for plasma.⁹⁶ Together, offer,

⁹⁴ *Id.* at 177.

⁹⁵ *Id.* at 178.

⁹⁶ This embodies Oliver Wendell Holmes' concept of reciprocal inducement as the basis of contractual consideration: "it is the essence of a consideration that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement" OLIVER WENDELL HOLMES, *THE COMMON LAW* 293-94 (1881).

acceptance, and consideration form the contract between plasma donor and plasma donation center.⁹⁷

Though the courts themselves did not address whether plasma donation centers and plasma donors have a contractual relationship, the *Silguero* court raised a concern that supports finding a contractual relationship. One reason the court put forth for not finding plasma donation centers to be service establishments, almost as an aside, was fear of overstepping Congress' intent as to Title I of the ADA, which deals with discrimination in employment.⁹⁸ In doing so, the court alluded to their view that plasma donors could potentially be employees of the plasma donation centers. While this is not the case, employment relationships are contractual relationships, and the court's concern that the donor-donation center relationship was so similar as to interfere with Title I indicates that the relationship is nonetheless contractual.

Digging into why the donor/donation center relationship should not be an employment relationship further supports finding a contractual relationship. Title I defines "employee" as "an individual employed by an employer," which, alone, is not instructive.⁹⁹ However, case law demonstrates that courts have viewed the relationships between donors and plasma donation centers as sales transactions, rather than employment.¹⁰⁰ The court in *Green v. Commissioner* wrote, "[e]xcept for the unusual nature of the product involved, the contact between the petitioner and the lab was the usual sale of a product by a manufacturer to a distributor."¹⁰¹ The court then went as far as to consider the donor's activity a business by which she was self-employed, thus logically meaning that she was *not* employed by the plasma donation center in the course of her donations.¹⁰² However, a donor who is running a business, and engaging with the plasma donation center as part of that business, would be doing so on a contractual basis, via a sale, as indicated in the quote above.

Whether a court considers plasma donation a simple sales transaction by an individual, an aspect of self-employment, or, albeit wrongly, an employment relationship, it is clear that the donors and the donation centers enter into a contract for each plasma donation. It is therefore proper to examine consideration as an aspect of the contract and use it to help determine whether plasma donation centers are service establishments under the ADA.

As noted in Part II(B), modern courts analyzing consideration focus primarily on whether there was a bargained-for exchange that resulted in a benefit *or* a detriment to a party. In each case here, the courts focus on benefit, rather than detriment, as it relates the concept of service.¹⁰³ There are two primary issues with the courts'

⁹⁷ See *CSX Transps., Inc. v. Occidental Chem. Corp.*, 65 Fed. Appx. 963, 966 (6th Cir. 2003).

⁹⁸ *Silguero v. CSL Plasma*, 907 F.3d 323, 331 (5th Cir. 2018).

⁹⁹ 42 U.S.C. § 12111(4).

¹⁰⁰ *Green v. Commissioner*, 74 T.C. 1229, 1234 (1980).

¹⁰¹ *Id.*

¹⁰² *Id. But see Moynihan v. Shalala*, 834 F. Supp. 1066, 1074 (N.D. Ind. 1993) (distinguishing the facts from *Green* based on the irregularity of Moynihan's donations).

¹⁰³ *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1231 (10th Cir. 2016) (defining service establishment as "a place of business or a public or private institution that, by its conduct

analyses: (1) the *Levorsen* dissent and the *Silguero* majority found that money is not a benefit to the plasma donors,¹⁰⁴ and (2) had the courts also examined detriment, as is consistent with modern formulations of consideration, it would be abundantly clear that plasma donors do suffer a detriment each time they donate. The next two Parts will make clear that regardless of what approach a court takes to analyzing the contract between donors and plasma donation centers—focusing on benefit, focusing on detriment, or simply recognizing mutual inducement—consideration is present, and a service is provided.

2. Benefits of Donating

Dealing first with the question of whether plasma donors receive a benefit when donating, it is plain that they do. Though consideration need not be money, it undoubtedly can be, and in countless personal and commercial transactions money is the traditional form of consideration.¹⁰⁵ The *Levorsen* dissent reframed the concept of benefit in a way that helps clarify how money is a benefit to plasma donors: it discussed benefit as a “desired end,” and examined who the “ultimate recipients of the desired end” are.¹⁰⁶ The dissent reasoned that because other enumerated examples of the public’s desired ends are non-monetary—“e.g., clean clothes, a haircut, repaired shoes”—that the desired end must be non-monetary and must be received by the public as a result of the service.¹⁰⁷ This narrow interpretation overlooks the broad nature of consideration and also the long-standing principle that “the term ‘public accommodation’ is to be liberally construed.”¹⁰⁸

Moreover, it is illogical to consider *the* desired end as opposed to *a* desired end. Consideration is based on mutual inducement, and courts generally will not consider the adequacy of consideration. So long as consideration is bargained for and induces the return promise, even a peppercorn is enough.¹⁰⁹ In any transaction, including ones between plasma donation centers and plasma donors, there must be two desired ends,

or performance, assists or *benefits* someone”) (emphasis added); *Silguero*, 907 F.3d at 328 (defining service establishment as “an establishment that performs some act or work for an individual who *benefits* from the act or work”) (emphasis added); *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 177 (3d Cir. 2019) (“Matheis and other donors receive money, a clear *benefit*, to donate plasma.”) (emphasis added). This focus is in line with the old, largely abandoned conception of consideration. *See supra* note 68.

¹⁰⁴ *Levorsen*, 828 F.3d at 1243 (Holmes, J., dissenting); *Silguero*, 907 F.3d at 329.

¹⁰⁵ *See e.g.*, *Judwin Props., Inc. v. United States Fire Ins. Co.*, 973 F.2d 432, 435 (5th Cir. 1992) (\$6 million and a peppercorn for covenant not to execute and release of bad faith claims).

¹⁰⁶ 828 F.3d at 1243 (Holmes, J., dissenting).

¹⁰⁷ *Id.* The dissent reasons that because the plasma donation center is the party receiving the non-monetary end of the transaction that they, not the donors, are the recipients of the desired end. *Id.*

¹⁰⁸ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 329 (2016) (citing *PGA Tour v. Martin*, 532 U.S. 661, 666–67 (2001)). *See also* discussion *infra* Part III(B)(2).

¹⁰⁹ *Pope v. Sav. Bank of Puget Sound*, 850 F.2d 1345, 1356 (9th Cir. 1988); *Val Ricks, Assent is Not an Element of Contract Formation*, 61 U. KAN. L. REV. 591, 640 (2013).

otherwise it could not be said that there was a bargain involving mutual inducement. In reality, though courts use the language benefit/detriment and mutual inducement, each party to the transaction must essentially get something in exchange for what they give.¹¹⁰ In the case of plasma donation center transactions, donors receive money in exchange for their plasma and money is those donors' desired end. That desired end is just as clearly a benefit as clean clothes, a haircut, or repaired shoes.

The Merriam-Webster Dictionary defines "benefit" as "something that produces good or helpful results or effects that promotes well-being."¹¹¹ Plasma donors receiving money is unmistakably "good" and "helpful" for them: it can act as supplementary income for living expenses, pocket change for small luxuries, and a vehicle for obtaining other goods and services of interest to the donor.¹¹² The plasma donation centers themselves tout altruistic motives as secondary or alternative reasons why the public should donate,¹¹³ and one donor even expressed that she donates to get solo relaxation time away from her children.¹¹⁴ Money and cherished alone time are far greater than a peppercorn, and thus satisfy contract law's idea of a benefit.

Plasma donation centers likewise benefit from the contract between them and their donors. The centers' desired end in the contract is plasma, which they then use to achieve various other desired ends (yet another reason to consider *a* desired end as opposed to *the* desired end), such as developing various "life-saving therapeutics."¹¹⁵

¹¹⁰ See WILLIAM T. BRANTLY, LAW OF CONTRACT 86 (2nd ed. 1912) ("Men do not make promises which induce other persons to act without at the same time themselves receiving a benefit."). I say "get something" here to make the point clear, but in reality, mutual inducement can be broader than a simple, direct two-way exchange. For instance, *A* could promise to do something for *B* and be induced to do so by *B*'s promise to do something for *C*. The key point is that each party was induced by the other's promise; the promised action does not have to act directly upon the contracting parties. See RESTATEMENT (SECOND) OF CONTS. § 71(4) (AM. LAW INST. 1981).

¹¹¹ *Benefit*, MERRIAM-WEBSTER DICTIONARY (online ed. 2020), <https://www.merriam-webster.com/dictionary/benefit>. I use the common dictionary definition here, as opposed to a legal definition, because the cases this Note examines rely on common dictionaries for their own definitions. Nevertheless, the Black's Law Dictionary definition is similar: "1. The advantage or privilege something gives; the helpful or useful effect something has . . . 2. Profit or gain; esp., the consideration that moves to the promisee." *Benefit*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹¹² See *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016) (majority opinion) ("For years, Levorsen has donated plasma in exchange for money in an effort to supplement his limited income."); *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 175 (3rd Cir. 2019) ("Matheis decided to donate plasma to raise extra money.").

¹¹³ *Donor Information*, OCTAPHARMA PLASMA, <https://octapharmaplasma.com/donor/> ("Donating is more than rewarding. It's lifesaving.") (last visited Feb. 6, 2022); *Why Donate*, CSL PLASMA, <https://www.cslplasma.com/why-donate> ("Your donation helps those in need to live healthier lives.") (last visited Feb. 6, 2022).

¹¹⁴ Wellington, *supra* note 13.

¹¹⁵ *What is Plasma*, BIOLIFE PLASMA SERVS., <https://www.biolifeplasma.com/us/about-plasma/what-is-plasma> (last visited Feb. 6, 2022).

In each donation transaction the plasma donation centers receive plasma and achieve their desired end.

The existence of a benefit to each party shows how, when focusing on benefit, mutual inducement is likely inevitable. The plasma donation centers are motivated to enter into the contract by the promise of plasma and the donors are motivated by payment, among other things, and each achieves their desired end. This both affirms and rebuts Judge Holmes' dissent in *Levorsen* where he argues that plasma donation centers do not provide services "for the public's use in achieving a desired end; instead, they provide them for *the centers'* use in achieving a desired end."¹¹⁶ The plasma donation centers do indeed achieve their desired end, but so does the public (in this case, the members of the public who choose to donate plasma). This weakens the argument that plasma donation centers do not provide a service to the public, as the public achieves their desired ends.

3. Detriments to Plasma Donors

Under the prevailing conception of consideration, courts may also examine whether there was a detriment to a party, regardless of whether they find that there was a benefit.¹¹⁷ Plasma donors, in addition to whatever benefit they gain, incur a significant detriment by their donation; they quite literally give away a part of themselves. The Merriam-Webster Dictionary defines "detriment" as simply "a cause of injury or damage."¹¹⁸ One donor reported feeling his legs "go rubbery" and experiencing extreme fatigue after donating, another said, "[g]oing into the center makes me feel like a lab rat," and yet another said, "[e]very time I've had this weird hollowed-out feeling. And a lot of times the next day I will have serious fatigue" and blackouts.¹¹⁹ Additionally, one researcher went as far as to accuse plasma donation centers in the United States of "knowingly endanger[ing]" donors' health by permitting an individual to donate twice per week, whereas the rest of the world permits donation only once every two weeks.¹²⁰

It is obvious that blackouts, fatigue, and loss of limb control are serious negative effects—physical injuries that could cause damage to one's body—and thus are clearly detriments. Because plasma donors effectively trade these side effects for the plasma donation centers' promise of money, this detriment satisfies contract law's model of consideration.

¹¹⁶ *Levorsen*, 828 F.3d at 1235–36.

¹¹⁷ HOLMES, *supra* note 96, at 289–90; *see, e.g.*, *Brookridge Funding Corp. v. Northwestern Human Res., Inc.*, 170 F. App'x 170, 172 (2nd Cir. 2006); *Garza v. Evans*, No. 01-11-00666-CV, 2012 Tx. App. LEXIS 4157, at *22 (Tex. App. May 24, 2012).

¹¹⁸ *Detriment*, MERRIAM-WEBSTER DICTIONARY (online ed. 2020), <https://www.merriam-webster.com/dictionary/detriment>. Black's Law Dictionary defines it similarly: "1. Any loss or harm suffered by a person or property; harm or damage. 2. *Contracts*. The relinquishment of some legal right that a promisee would have otherwise been entitled to exercise." *Detriment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹¹⁹ Wellington, *supra* note 13.

¹²⁰ *Id.*

Based on the above analyses, it is clear that whether courts focus on benefit, detriment, or simply mutual inducement, the transaction between plasma donation centers and plasma donors contains consideration. It is therefore imprudent for courts to dismiss plasma donation centers as not providing a service merely because of the type and directionality of their exchange. Statutory interpretation analyses reinforce this notion on a broader level.

B. Statutory Interpretation

Jurists largely take one of two broad approaches to statutory interpretation: textualism or purposivism.¹²¹ Textualism, the predominant approach since the 1980s, stresses adherence to the text enacted into law by the legislature.¹²² Textualists acknowledge that the words of the text could have more than one possible meaning, but largely avoid looking to extrinsic evidence to determine that meaning and instead rely greatly on canons of statutory interpretation to determine the text's meaning.¹²³ Purposivism, the dominant approach throughout most of the twentieth century, seeks to interpret the text based on Congress' purpose in enacting it, rather than seeking the meaning of the text based on its words alone.¹²⁴ In doing so, purposivists will more readily "consider an array of extrinsic interpretive aids."¹²⁵

This Part will again review the courts' analyses in each case at hand, but will do so in the context of these two jurisprudential ideologies, focusing on the courts' adherence to statutory interpretation procedures and canons. First, this Part will examine the courts' analyses based on a textualist approach, by which, to some extent, each court abided. It will then analyze flaws in the textualist approach and propose that a purposivist approach should be used here. Ultimately, the following Parts will demonstrate that however a court approaches statutory interpretation of the ADA, it should construe the statute to mean that plasma donation centers are indeed service establishments.

1. The Cases and the Canons: A Textualist Approach

¹²¹ Abbe R. Gluck, *The States and Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1761 (2010). Neither of these approaches are monolithic and each has had varied sub-approaches and adherents throughout the years, but for purposes of this Note the terms will be used in their broadest sense to encompass the many more nuanced approaches that fit within them.

¹²² Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 *AKRON L. REV.* 451, 460 (2002) (highlighting "new textualism[']s" insistence that "[o]nly the text is the law"); see also Daniel S. Goldberg, *I Do Not Think it Means What you Think it Means: How Kripke and Wittgenstein's Analysis on Rule Following Undermines Justice Scalia's Textualism and Originalism*, 54 *CLEV. ST. L. REV.* 273, 279 (2006) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol54/iss3/4> (quoting Justice Scalia, "[t]he text is the law and it is the text that must be observed").

¹²³ Gluck, *supra* note 121, at 1762–63; Goldberg, *supra* note 122, at 279; accord *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia, J., concurring) (noting "how unreliable" legislative history is "as a genuine indicator of congressional intent").

¹²⁴ Gregory, *supra* note 122, at 455–56.

¹²⁵ Gluck, *supra* note 121, at 1764.

Regardless of whether a court favors a textualist or purposivist approach, it will begin by looking at the plain language of the statutory text.¹²⁶ The Ohio Supreme Court, in *Sears v. Weimer*, quotes a helpful example from Ohio Jurisprudence: “To interpret what is already plain is not interpretation, but legislation, which is not the function of the courts, but of the general assembly.”¹²⁷ Typically, only if a court finds the statute in question ambiguous will it engage in interpretation and invoke further canons of statutory interpretation or seek extrinsic evidence.¹²⁸

In line with this tradition, the *Levorsen* majority began by examining the plain language and determining it was unambiguous because plasma donation centers are, quite simply, “establishment[s]. And [they] provide a service.”¹²⁹ Thus, the court did not move beyond the plain language to do further interpretive analysis. It set out plain definitions of the words “service” and “establishment” taken from Webster’s Dictionary, adopting them as the definition of service establishment under § 12181 because it “yields neither ambiguity nor an irrational result.”¹³⁰ The court merely applied the law as it stood unambiguously, holding that plasma donation centers are service establishments subject to the ADA because they are establishments that provide a service.¹³¹ However, acknowledging that it was unnecessary, the court also examined the ADA’s legislative history, which lends support to the majority’s opinion.¹³²

The dissent took a different approach, looking first to similarities among the enumerated examples in § 12181(7)(F) to construct a definition of service establishment rather than relying on dictionaries.¹³³ Based on that constructed definition, the dissent found exactly the opposite of the majority: plasma donation

¹²⁶ *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 202 (1978) (“The starting point in statutory construction is, of course, the language . . . itself.”).

¹²⁷ *Sears v. Weimer*, 55 N.E.2d 413, 415 (quoting 85 OHIO JUR. 3D *Statutes* § 195 now updated to 37 OHIO JUR. 514, § 278, (2020)).

¹²⁸ *Garcia v. United States*, 469 U.S. 70, 75 (1984). Purposivists, though still abiding by this rule, are less hesitant to depart from the plain meaning of the text if a contrary intent is evident. Gregory, *supra* note 122, at 456.

¹²⁹ *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016).

¹³⁰ *Id.* at 1231. Though looking to a dictionary is looking to extrinsic evidence, modern textualists acknowledge that the text must be understood in context and will thus often consider dictionaries, other parts of the statute, etc. to determine whether the words are ambiguous. Gregory, *supra* note 122, at 464. Of particular note in this case is the dictionary definition of service: “conduct or performance that assist or benefits something or someone.” *Levorsen*, 828 F.3d at 1232 (quoting *Service*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002)). The merits of adopting this definition that uses the term “benefit” is bolstered by contract law formulations of consideration. *See supra* Part III(a)(i).

¹³¹ *Levorsen*, 828 F.3d at 1234.

¹³² *Id.* at 1233.

¹³³ *Id.* at 1236 (citing *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016)). This again helped place the words in their context but led to the opposite conclusion of the majority.

centers are not service establishments.¹³⁴ It then applied two other canons of statutory interpretation, *ejusdem generis* and *noscitur a sociis*, to further justify its position.¹³⁵ Under *ejusdem generis*, “when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration.”¹³⁶ Under *noscitur a sociis*, “a word is known by the company it keeps;” essentially asserting that context can be used to help determine a word’s meaning.¹³⁷ The dissent openly declared that “[w]e must construe Title III with its *broad* remedial purpose in mind,” in line with Congress’ 2008 directive.¹³⁸ However, the dissent’s method for defining service establishment pulled out narrow similarities between the enumerated examples to create defining criteria and introduced canons that greatly limit the possible meanings, negating the possibility of a broad reading.¹³⁹ The dissent’s explicit statement that Title III should be interpreted broadly and its narrow reading of the text create a major contradiction, weakening its position.

The *Silguero* court, like the *Levorsen* majority, also started with the plain meaning of service establishment by consulting dictionaries.¹⁴⁰ Again in line with the *Levorsen* majority, the *Silguero* majority concluded that the dictionary definition of service implied that a service benefits the recipient.¹⁴¹ After that point the opinions differ: the *Silguero* court focused entirely on the detriment to plasma donors, writing “[t]hey are hooked up to a machine and drained of life-sustaining fluid, subjecting them to discomfort and medical risks.”¹⁴² Because plasma donors incur a detriment, the court reasoned, they could not have possibly gained a benefit.¹⁴³ However, Part III(A) of this Note demonstrated that plasma donors do benefit from their donation; they simply also suffer a detriment, in line with consideration’s requirement of mutual inducement.¹⁴⁴ Consequently, treating benefit and detriment as binary oppositions that cannot co-exist misapplies contract theory and is an inaccurate way to examine this type of transactional relationship.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1237.

¹³⁶ *Norfolk & W. Ry. Co. v. Am. Train Dispatchers’ Ass’n*, 499 U.S. 117, 129 (1991).

¹³⁷ *Yates v. United States*, 574 U.S. 528, 543 (2015). Judge Holmes’ reliance on canons of interpretation alone, rather than engaging with the canons and extrinsic evidence like the majority did (albeit their acknowledgement that the text’s unambiguity negated that necessity), indicates that he took a textualist approach.

¹³⁸ See *infra* note 171 and accompanying text.

¹³⁹ *Levorsen*, 828 F.3d at 1235 (emphasis added).

¹⁴⁰ *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 328 (5th Cir. 2018).

¹⁴¹ *Id.*

¹⁴² *Id.* at 329.

¹⁴³ *Id.*

¹⁴⁴ See discussion *supra* Part III(A).

The court then went on to apply the same canons as the *Levorsen* dissent to support its position that plasma donation centers are distinguishable from the enumerated examples and are not service establishments.¹⁴⁵ Though the canons did not change the court's position, it was improper for the court to address these canons in the first place, having found the statute unambiguous. The court justified its effort, writing, "[c]anons of interpretation help ensure that words are not stretched past the limits Congress intended."¹⁴⁶ Regardless of that statement's truth, the court seemingly did not find service establishment an ambiguous term here and, though its inferences based on the plain language were inaccurate, under customary rules of statutory interpretation it thus should not have examined further canons.¹⁴⁷ The Supreme Court has even noted that *ejusdem generis* in particular, "is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty."¹⁴⁸ The *Silguero* court did not find that the words were uncertain, and thus should not have invoked *ejusdem generis*. Had the *Silguero* court stopped its analysis after finding that the term "service" unambiguously means "perform[ing] some act or work for an individual who benefits from the act or work,"¹⁴⁹ and then correctly applied the meaning of benefit, it would have found that plasma donation centers do indeed provide a service to plasma donors and are thus service establishments.

The *Matheis* court, rather than engaging in its own statutory interpretation analysis, simply weighed the merits of the Tenth Circuit and Fifth Circuit analyses.¹⁵⁰ It ultimately sided with the Tenth Circuit, acknowledging, finally, that "[b]usinesses that offer services to the public convey something of economic value in return for something else of economic value Money is one proxy for economic value, and economic value is fungible."¹⁵¹

The variety of approaches in *Levorsen*, *Silguero*, and *Matheis* demonstrate that, even with long-standing rules governing statutory interpretation analyses, courts use inconsistent processes.¹⁵² This is the first indication that using customary textualist

¹⁴⁵ *Silguero*, 907 F.3d at 329.

¹⁴⁶ *Id.*

¹⁴⁷ *Lockshin v. Semsler*, 987 A.2d 18, 29 (Md. 2010). This is custom, to some extent, for both textualist and purposivist approaches. See Gregory, *supra* note 122, at 456, 464.

¹⁴⁸ *United States v. Powell*, 423 U.S. 87, 91 (1975) (quoting *Gooch v. United States*, 297 U.S. 124, 128 (1936)).

¹⁴⁹ *Silguero*, 907 F.3d at 328.

¹⁵⁰ *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171, 176–78 (3d Cir. 2019).

¹⁵¹ *Id.* at 177–78.

¹⁵² For a well-crafted overview of the varied and inconsistent approaches courts take to statutory interpretation, see Gluck, *supra* note 121 at 1761–64. A particularly poignant quote reads, "The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." *Id.* at 1761 (quoting HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)). This Note, though advocating for a particular interpretive method in the context of plasma donation centers' status under the ADA, does not purport to know the best single method

statutory interpretation rules and analyses alone are insufficient to determine the meaning of the term service establishment.

The second indication that canons of statutory interpretation alone should not be determinative in courts' decisions on whether plasma donation centers are service establishments is the notion that all canons of statutory interpretation are merely presumptions.¹⁵³ As presumptions, despite the great weight they may carry and long-standing customs governing their use, any canon can be rebutted.¹⁵⁴ Moreover, nearly every canon can actually be rebutted by yet another canon.¹⁵⁵ For instance, “[i]f language is plain and unambiguous it must be given effect,” but, “[n]ot when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose.”¹⁵⁶ Also, “[t]he meaning of a word may be ascertained by reference to the meaning of words associated with it,”¹⁵⁷ but, “[a] ‘word may have a character of its own not to be submerged by its association.’”¹⁵⁸ Yet another, “[t]he statute’s meaning ought justly to be gathered from its words as promulgated to the public rather than from the expressions of legislators or even of their committees pending its passage,”¹⁵⁹ but, “[g]reat weight must be accorded . . . to opinions expressed [in the Congressional Record] by members of committees having the legislation in charge . . .”¹⁶⁰ And one more: “[i]t is a general rule of construction that where general words follow an enumeration they are to be held as applying only to persons and things of

of statutory interpretation that courts should adopt, or even if taking a single approach is wise. It merely seeks to provide an example of one situation in which an openness to extrinsic evidence can provide an easier route to reaching a legally correct and socially desirable conclusion.

¹⁵³ See, e.g., *United States v. Davis*, 139 S. Ct. 2319, 2332 n.6 (2019) (presumption of constitutionality); *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 115 (2013) (presumption against extraterritorial application); *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 634 (1993) (“Following the usual presumption of statutory interpretation, that the same term carries the same meaning whenever it appears in the same Act . . .”); *United States v. Kohlbeck*, 78 M.J. 326, 332 (C.A.A.F. 2019) (presumption of validity); *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 200 (5th Cir. 2017) (presumption against retroactivity).

¹⁵⁴ *Lockhart v. United States*, 577 U.S. 347, 352 (2016).

¹⁵⁵ KARL N. LLEWELLYN, *COMMON LAW TRADITION: DECIDING APPEALS* 521 (1960). Llewellyn sets out a comprehensive list of canons of statutory interpretation, structured as a table, with each canon listed next to another canon that rebuts it. Scrolling through the list quickly shows how any canon could be easily argued away, either by one that directly rebuts it or by another that is slightly different and works against it in a particular case. *Id.*

¹⁵⁶ *Id.* at 524. These are often known as the “plain language rule” and the “rule against absurdity.”

¹⁵⁷ *Id.* at 529 (quoting *Int’l Rice Milling Co. v. NLRB*, 183 F.2d 21, 25 (5th Cir. 1950)).

¹⁵⁸ *Id.* (quoting *Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923)).

¹⁵⁹ *Id.* at 531 (quoting *Marchese v. United States*, 126 F.2d 671, 674 (5th Cir. 1942)).

¹⁶⁰ *Id.* at 532 (quoting *United States ex rel. Chapman v. Fed. Power Comm’n*, 191 F.2d 796, 802 (4th Cir. 1951)).

the same general kind or class specifically mentioned,” but, “[g]eneral words must operate on something . . . *ejusdem generis* is only an aid in getting the meaning and does not warrant confining the operations of a statute within narrower limits than were intended.”¹⁶¹ These examples are a small part of an endless chasm of statutory interpretation rules, exceptions, exceptions to exceptions, and some blatant contradictions. Together, they support the proposition that canons may be of limited use here, and, as one commentator hoped, seeing the endless conflict should prompt courts “to settle down instead to a court’s own real and responsible business of trying to make sense out of the legislation”¹⁶²

The following Part will examine how a court could approach determining whether plasma donation centers are service establishments under the ADA within the more flexible purposivist approach. It also will closely examine a number of canons that parties or courts may invoke. However, it will also demonstrate that regardless of the approach a court takes, it must find that plasma donation centers are indeed service establishments that are subject to the ADA.

2. The Purposivist Approach

The job of the courts when examining a federal statute is to determine the intent of Congress.¹⁶³ To do so, why would the courts not use all the resources at their disposal? They frequently consult dictionaries, so why not also legislative history, other parts of the statute, and agency reports? The purposivist approach embraces this process and it should be used to determine whether plasma donation centers are service establishments under the ADA.¹⁶⁴

By nature of purposivism’s broad inquiry, purposivist opinions tend to be open to broader interpretations of statutes, as long as the interpretation does not run contrary to legislative intent. The Supreme Court has held that remedial statutes like the ADA should be interpreted broadly, and various other remedial statutes, particularly civil rights-focused statutes like the ADA, have been interpreted as such throughout the years.¹⁶⁵ Thus, taking a broad approach to interpretation and using all the resources at

¹⁶¹ *Id.* at 526–27.

¹⁶² *Id.* at 528–29.

¹⁶³ *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1236 (10th Cir. 2016) (Holmes, J., dissenting); *see also* *NLRB v. United Food and Com. Workers Union, Local 23*, 484 U.S. 112, 123 (1987). This may be considered a canon in and of itself, but to attempt to rebut it would be to endorse judicial activism, which is often strongly frowned upon as interfering with the political branches’ powers; *see, e.g.*, *Island County v. State*, 955 P.2d 377, 392 (Wash. 1998) (Sanders, J., concurring); Robert Justin Lipkin, *We Are All Judicial Activists Now*, 77 U. CIN. L. REV. 181, 182 (2008). This Note, despite expressing skepticism as to the weight given to canons of interpretation and their usefulness, takes no issue with the proposition that it is the job of the courts to determine the intent of Congress.

¹⁶⁴ Gregory, *supra* note 122, at 456–58.

¹⁶⁵ *See, e.g.*, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 680 (2001) (interpreting the ADA); *Dennis v. Higgins*, 498 U.S. 439, 445 (1991) (interpreting Section 1983); *McDonald v. Santa Fe Trail Transp. Co.* 427 U.S. 273, 278–80 (1976) (interpreting Title VII of the Civil Rights Act of 1964 broadly, and relying on legislative history to support the conclusion); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (interpreting Securities Exchange Act); *accord* Joseph

the court's disposal would comport with analogous precedent. Precedent is the backbone of the U.S. courts' legal interpretation, regardless of jurisprudential ideology, and here precedent indicates that courts should use the broad purposivist approach.

A dissent by Justice Stevens in *Sutton v. United Air Lines*, a case interpreting the term "disability" under the ADA, exemplifies a broad purposivist opinion.¹⁶⁶ Justice Stevens first looks to other parts of the ADA itself, one of which, appropriately, is the section where Congress explicitly outlined its purpose.¹⁶⁷ He then examines another similar statute that defines "disability" to help shed light on what it means in the context of the ADA.¹⁶⁸ Next, Justice Stevens examines Senate and House committee reports, followed by agency interpretations.¹⁶⁹ Only after examining that plethora of authority does he invoke a canon of interpretation: "remedial legislation should be construed broadly to effectuate its purposes."¹⁷⁰ After reviewing previous cases that have construed civil rights and remedial statutes broadly, and critiquing the majority's narrow construction, Justice Stevens concludes that "disability" should be read broadly in favor of the petitioners. Though in dissent at the time, Congress' amendments to the ADA in 2008 explicitly rejected and superseded the *Sutton* majority, endorsing Justice Stevens' broader interpretation.¹⁷¹

In the issue at hand, implementing the purposivist method would clearly support the Tenth and Third Circuits' opinions that plasma donation centers are service establishments under the ADA. For one, Congress mindfully included in the ADA a purpose section, telling the world, including courts, what the ADA was intended to do.¹⁷² A purposivist would undoubtedly consult this section, as it is the most explicit statement of Congress' intent. The ADA's first, most prominently stated purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."¹⁷³ Obviously, holding that

William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 91, 98 (2011) ("While courts sometimes view later, specific statutes as impliedly limiting earlier, broader statutes, the courts have generally eschewed that line of interpretation in interpreting the civil rights laws of the 1960s.").

¹⁶⁶ *Sutton v. United Air Lines*, 527 U.S. 471, 495–513 (1999) (Stevens, J., dissenting).

¹⁶⁷ *Id.* at 497.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 499–503.

¹⁷⁰ *Id.* at 504 (quoting *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)).

¹⁷¹ ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4)–(6), 122 Stat. 3553, 3553–56 (2008) ("[T]he holdings of the Supreme Court in *Sutton v. United Air Lines* . . . have narrowed the broad scope of protection intended The purposes of this Act are . . . to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*").

¹⁷² 42 U.S.C. § 12101(b).

¹⁷³ *Id.* § 12101(b)(1).

plasma donation centers are service establishments under the ADA and thus subject to the ADA's antidiscrimination provisions would work to eliminate discrimination against individuals with disabilities in plasma donation centers. Thus, Congress' intent for the ADA, as explicitly stated, would be advanced.

Purposivist opinions also regularly consult legislative history as a guide toward the legislature's intent, and the ADA's legislative history clearly supports the Tenth and Third Circuits' positions.¹⁷⁴ A House of Representatives Conference Report, noting changes made and agreed to by the Senate in the then-bill, speaks directly to the catchall provision at the end of § 12181(7)(F).¹⁷⁵ The report notes that the bill previously included the phrase "and other similar places," but the legislators agreed to delete the word "similar."¹⁷⁶ Later the provision was seemingly overhauled, and the phrase "and other places"/"and other similar places" was deleted altogether.¹⁷⁷ However, the initial deletion of the word "similar" demonstrates that Congress was moving toward a broader view of public accommodations.

Another House Report clarifies that, though the twelve categories of public accommodations are exhaustive, "within each category, the bill lists only a number of examples," which is "only a representative sample of the types of entities covered under [each] category."¹⁷⁸ Moreover, the report specifically states, "[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. Rather, the person must show that the entity falls within the overall category."¹⁷⁹ Unfortunately, the legislature provided no further guidance on how to discern whether an entity would fall into an overall category.

Like Justice Stevens' *Sutton* dissent, a court may also turn to canons of interpretation for further analysis if it is not yet satisfied.¹⁸⁰ The statute itself and the legislative history would have already provided the court with significant evidence of

¹⁷⁴ See *County of Washington v. Gunther*, 452 U.S. 161, 182 (1981) (Rehnquist, J., dissenting) ("I had thought it well settled that the legislative history of a statute is a useful guide to the intent of Congress . . ."); *Helvering v. N.Y. Tr. Co.*, 292 U.S. 455, 464 (1934) (Cardozo, J.) ("[T]he expounding of a statutory provision strictly according to the letter without regard to other parts of the Act and legislative history would often defeat the object intended to be accomplished.").

¹⁷⁵ H.R. REP. NO. 101-596, at 75 (1990) (Conf. Rep.).

¹⁷⁶ *Id.*

¹⁷⁷ There is no final catchall category of public accommodations in the final statute. Congress instead decided to include only the twelve listed categories, including "service establishments," which they state is "exhaustive." See H.R. REP. NO. 101-485, pt. 3, at 54 (1990).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; see also *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1233 (10th Cir. 2016). The *Levorsen* court, based on the traditional statutory interpretation formulation prohibiting courts from looking to legislative history unless a statute is ambiguous, maintained that it did not need to examine the legislative history at all to sustain its position, but did so merely for the sake of argument. *Id.* at 1233 n.7.

¹⁸⁰ *Sutton v. United Air Lines*, 527 U.S. 471, 504 (1999) (Stevens, J., dissenting).

the legislature's intent. However, the statute may still appear somewhat ambiguous. Knowing the legislature's general intent—to eliminate discrimination against people with disabilities, and to provide categories of covered entities with some examples that do not have to be “similar” to other examples in the category—the court should apply canons of interpretation under that framework.¹⁸¹

The first canon a court would likely apply is the Plain Language Rule. The Plain Language Rule requires a court to look to the plain meaning of the words of the text—as opposed to twisted derivative meanings or niche definitions—to determine what they mean.¹⁸² This is when courts will consult common dictionaries, such as Merriam-Webster, and adopt those basic definitions as the meaning of the words in the statute. If, after determining the plain meaning, it aligns with statute's purpose, the court will merely apply the statute's meaning to the facts at hand.¹⁸³ Here, as the *Levorsen* court put it, “giving the term ‘service establishment’ its ordinary meaning (i.e., an establishment that provides a service) yields neither ambiguity nor an irrational result.”¹⁸⁴ Whether plasma donation centers are “establishments” is an easy question: a common dictionary definition of the word is a “place of business” or “a public or private institution,” and parties in each case do not dispute that plasma donation centers are, generally, establishments.¹⁸⁵ Rather, the emphasis is on the meaning of “service.”¹⁸⁶

The plain meaning of “service,” taken from a lay-person's dictionary, is an “act giving assistance or advantage to another,”¹⁸⁷ or “conduct or performance that assists or benefits someone or something.”¹⁸⁸ Nowhere do these definitions mention money, directionality of the assistance, or any other specifics. The definitions are broad, but such broadness is appropriate based on the expansive scope of the ADA as indicated

¹⁸¹ *Id.* at 496 (Stevens, J., dissenting) (“[O]ur task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.”).

¹⁸² *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

¹⁸³ *Id.*

¹⁸⁴ *Levorsen*, 828 F.3d at 1232.

¹⁸⁵ *Id.* at 1231 (quoting *Establishments*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002)); see also *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 328 (5th Cir. 2018) (“[The parties] also agree that CSL Plasma is an ‘establishment.’”).

¹⁸⁶ *Levorsen*, 828 F.3d at 1239–40 (Holmes, J., dissenting); *Silguero*, 907 F.3d at 329–32.

¹⁸⁷ *Silguero*, 907 F.3d at 328 (quoting *Service*, WEBSTER NEW WORLD COLLEGIATE DICTIONARY (3d ed. 1996)) (internal quotations omitted).

¹⁸⁸ *Levorsen*, 828 F.3d at 1231 (quoting *Service*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002)). Generally, dictionaries provide multiple definitions of a word; the two given here (this footnote and the preceding footnote) are simply representative examples of commonly understood definitions of “service.” They do not demonstrate every possible conception of the word, but merely represent common—or plain—definitions.

in the statutory text, legislative history, and court decisions.¹⁸⁹ Thus, a court would find that a service establishment is simply a place of business that assists, benefits, or provides an advantage to another.

That definition of service establishment is broad but is easily applicable by answering a few simple questions: (1) Are plasma donation centers businesses? Clearly, yes. (2) Do plasma donation centers assist, benefit, or provide an advantage to another? Yes, in multiple ways. Most obviously, and most relevantly, they provide money to plasma donors.¹⁹⁰ They also provide plasma to other companies that “produce therapies that are used around the world to treat bleeding disorders . . . immune deficiencies . . . and neurological disorders.”¹⁹¹ While more indirect, providing plasma to other companies is a benefit to those companies and eventually a benefit to the countless patients who receive plasma-based medical treatment.¹⁹² Together, it becomes clear that plasma donation centers are businesses that provide services, and are thus service establishments under the ADA.¹⁹³

Under traditional statutory interpretation rules, a court would stop interpretation and simply apply the law based on its plain meaning at this point.¹⁹⁴ However, for the sake of argument and clarity, this Note will consider a few other canons relevant to whether plasma donation centers are service establishments under the ADA.

The Rule Against Absurdity is somewhat of a catch-all rule that can be thought of as an exception to the plain language rule, but it is one that has been invoked by courts of all levels in numerous cases.¹⁹⁵ It is worth examining it under the assumption that

¹⁸⁹ 42 U.S.C. § 12101(b); H.R. REP. NO. 101-485 (1990); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (noting the ADA’s “broad mandate,” “comprehensive character,” and “sweeping purpose”).

¹⁹⁰ See, e.g., *Why Donate?*, CSL PLASMA, <https://www.cslplasma.com/why-donate> (last visited Oct. 20, 2020).

¹⁹¹ *Id.*

¹⁹² The Webster’s Third New International Dictionary definition specifies “to someone or something,” indicating that the benefit or assistance need not necessarily be to a natural person and implying that a service could be provided to an entity, such as a company that produces plasma-based medical treatments. See *Benefit*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002).

¹⁹³ This conclusion demonstrates that a textualist approach could just as easily find that plasma donation centers are service establishments under the ADA as a purposivist approach. Like noted earlier, both systems of interpretation begin by looking at the text and primarily differ as to the question of how far outside the text to venture in determining Congress’ intent. See *supra* Part III(B)(1) ¶ 2.

¹⁹⁴ *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003)).

¹⁹⁵ See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892) (“If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.”); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”); *State ex rel. Z.C.*, 165 P.3d 1206, 1208 (Utah 2007) (“[A]pplying the statute to treat Z.C. as both a victim

a court would invoke the Rule Against Absurdity if it found that the term service establishment was not, in fact, plain and unambiguous. The Rule Against Absurdity presumes that Congress did not intend its statutes to have absurd results and necessitates that a different interpretation be followed if it can be consistent with legislative intent.¹⁹⁶ Here, with knowledge that Title III is to be construed broadly, as discussed above, adopting a definition that adds a similarity requirement—or an even more stringent monetary directionality requirement—to service establishments would lead to an absurd result. It would directly conflict with the legislature’s intent that the statutory language be broad, and thus it cannot be the correct interpretation.¹⁹⁷

Moreover, an amicus curiae, the Plasma Protein Therapeutics Association, which supported the defendant plasma donation center in *Matheis*, even conceded that a pawnshop is a service establishment under the ADA.¹⁹⁸ A district court in the Ninth Circuit also found that recycling centers are service establishments under the ADA.¹⁹⁹ Pawnshops and recycling centers, like plasma donation centers, provide money to members of the public in exchange for their possessions (no-longer-wanted items and recycling, respectively). If these two entities, neither of which are enumerated in § 12181(7)(F), are service establishments, then it would be absurd to hold that plasma donation centers are not. Thus, because adopting the narrow conception of service establishment propounded by the *Levorsen* dissent and the *Silguero* court would lead to an absurd result, a reviewing court would have to adopt the broader definition set forth by the *Levorsen* majority and adopted by the *Matheis* court, under which plasma donation centers are clearly service establishments.

Courts have also said that the meaning of a statute should be guided by the evil it is designed to remedy.²⁰⁰ Here, Congress made discerning the evil the ADA was designed to remedy abundantly clear and simple. Section 12101 lays out Congress’

and a perpetrator of child sex abuse for the same act leads to an absurd result that was not intended by the legislature. As such, we reverse”); *Griffith v. State*, 116 S.W.3d 782, 785 (Texas Crim. App. 2003) (“If one reasonable interpretation yields absurd results while the other interpretation yields no such absurdities, the latter interpretation is preferred.”).

¹⁹⁶ *Griffin*, 458 U.S. at 575.

¹⁹⁷ However, if such a similarity requirement was proper, the 10th and 3rd Circuit positions could still prevail. As demonstrated in Part III(A)(1), *supra*, the enumerated service establishments all enter into contracts with the other party, as do plasma donation centers. Thus, they are similar in this regard. The similarity is broad, but, as explained throughout this Part, a broad reading and understanding of the ADA is appropriate.

¹⁹⁸ Brief for Plasma Protein Therapeutics Association as Amicus Curiae Supporting Appellee, *Silguero v. CSL Plasma Incorporated*, 907 F.3d 323 (5th Cir. 2018) (No. 17-41206), 2018 WL 1363938.

¹⁹⁹ *Estrada v. South Street Property, LLC*, No. 2:17-CV-00259, 2017 WL 3461290, at *3 (C.D. Ca. Aug. 11, 2017).

²⁰⁰ *Church of the Holy Trinity*, 143 U.S. at 463; *Newgirk v. Black*, 156 N.W. 708, 710 (Iowa 1916) (“[I]n construing a statute, it is important to consider the state of the law before it was enacted and the evil it was designed to remedy, and that it is the business of courts to so construe an act as to suppress the mischief and advance the remedy.”); *Miller v. Fairley*, 48 N.E.2d 217, 221 (1943).

findings and purpose:²⁰¹ Congress saw that there was rampant discrimination against people with disabilities that harmed the disabled community and the country as a whole, and enacted the ADA to end discrimination against people with disabilities.²⁰² To hold that plasma donation centers are not service establishments would work directly against the evil that the ADA is trying to remedy by permitting discrimination against people with disabilities to continue. It would validate discrimination in the case of plasma donation centers by finding that they are not beholden to the ADA at all. Accordingly, finding that plasma donation centers are not service establishments under the ADA would not only be absurd, it would work directly against Congress' intent by permitting the evil the statute was enacted to remedy to continue.

One of the most common canons of statutory interpretation, and one that the courts address in *Levorsen*, *Silguero*, and *Matheis*, is *ejusdem generis*. While this Note has already established that using *ejusdem generis* (or most of the canons discussed, for that matter) is unnecessary because the statute's plain language is unambiguous, it is worth examining in light of the courts' reliance on it in the relevant cases. *Ejusdem generis* instructs that, "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration."²⁰³ On its face *ejusdem generis* appears to mandate that service establishment be understood to include only things similar to the enumerated examples, but it is improper to adopt that understanding here. As discussed above, all canons are mere presumptions, which means they can be rebutted.²⁰⁴ The ADA's legislative history pointedly indicates that an entity does not need to be similar to the enumerated examples to fall into the category—this clearly rebuts the *ejusdem generis* presumption.²⁰⁵

Noscitur a sociis, the other canon relied on by the *Levorsen* dissent, but not addressed in *Silguero*, is similarly rebutted by legislative history. This canon advises that "a word is known by the company it keeps."²⁰⁶ The same legislative history that counsels against applying *ejusdem generis*—specific indication that "other service establishments" do not need to be similar to the enumerated examples—counsels against applying *noscitur a sociis*.²⁰⁷ Moreover, were *noscitur a sociis* to be applied, it would still raise the question of how broadly to apply it. A narrow application would lead to the *Levorsen* dissent's conclusion; that because money flows from the public to the entity in all of the enumerated examples, the same must be true of any non-enumerated service establishments.²⁰⁸ As discussed, the Rule Against Absurdity and

²⁰¹ 42 U.S.C. § 12101.

²⁰² *Id.*

²⁰³ *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1237 (10th Cir. 2016) (Holmes, J., dissenting) (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 223 (2008)).

²⁰⁴ *Lockhart v. United States*, 577 U.S. 347, 352 (2016).

²⁰⁵ H.R. REP. NO. 101-485 (1990).

²⁰⁶ *Levorsen*, 828 F.3d at 1237 (Holmes, J., dissenting) (quoting *Ali*, 552 U.S. at 226).

²⁰⁷ H.R. REP. NO. 101-485.

²⁰⁸ *Levorsen*, 828 F.3d at 1239 (Holmes, J., dissenting).

the notion that a statute should be interpreted in light of the evil it is designed to remedy would bar this conclusion. Were *noscitur a sociis* to be applied broadly, which would be the more appropriate application,²⁰⁹ a court would reach the same conclusion that this Note did in its examination of the plain language—that all of the enumerated entities provide a benefit or advantage to the public, and that plasma donation centers do as well.

It is evident that, regardless of the statutory interpretation approach a court takes, it would be right to interpret § 12181(7)(F) to include plasma donation centers as service establishments. If a court began by examining only the statute’s text alongside dictionary definitions and discerning the plain meaning, it would conclude that service establishment is an unambiguous term with a broad meaning and that plasma donation centers are indeed service establishments. This would satisfy either a textualist or purposivist approach. If a court took the same approach but, for whatever reason, determined that service establishment is an ambiguous term, the canons discussed above would still mandate finding that plasma donation centers are service establishments. This would still satisfy both approaches. Finally, if a court used a truly purposivist approach and spent time examining the ADA’s legislative history, it would, after considering the text, canons, and history, result in the strongest argument that plasma donation centers must be considered service establishments. Effectively, whichever way a court addresses the issue, principles of statutory interpretation demand that courts hold plasma donation centers to be service establishments that are subject to the ADA.

C. Public Policy

As discussed throughout this Note, Congress enacted the ADA in response to extreme injustice it saw throughout the country; routine, blatant discrimination against people with disabilities in all facets of life, rendering them unable to fully participate in society.²¹⁰ President Bush, when he signed the ADA into law, even referred to that day as “another ‘Independence Day,’ one that is long overdue.”²¹¹ A hundred years prior—or even a mere few decades—the general American sentiment toward people with disabilities was one of disgust, shame, and dehumanization.²¹²

However, through the efforts of disability rights groups and determined individuals, the American perspective began to change. In 1978, the National Council

²⁰⁹ *See id.* at 1238 (Holmes, J., dissenting) (“[W]e construe statutes like Title III of the ADA liberally to effectuate their remedial purposes”); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

²¹⁰ 42 U.S.C. § 12101; *see also* Burgdorf, Jr., *supra* note 50.

²¹¹ Presidential Statement on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1162, 1163 (July 25, 1990) (internal quotation marks omitted).

²¹² *See, e.g.*, Burgdorf, Jr., *supra* note 50 (“sub-human”); Susan Schweik, *Kicked the Curb: Ugly Law Then and Now*, 46 HARV. C.R.-C.L. L. REV. 1, 1 (2011) (“she was ‘too terrible a sight for the children to see’”); *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927) (upholding a Virginia statute providing for compulsory sterilization of the “feeble-minded,” finding “[t]hree generations of imbeciles are enough”).

on Disability was established within the Department of Education.²¹³ A few years later, The United Nations declared 1981 the International Year of Disabled Persons and called for “a plan of action at the national, regional and international levels, with an emphasis on equalization of opportunities, rehabilitation and prevention of disabilities.”²¹⁴ In 1984, the National Council on Disability was elevated to its own independent agency “charged with reviewing all federal disability programs and policies.”²¹⁵ These government developments likely responded to and grew alongside a plethora of private disability rights groups that sprung up around the country during the preceding decades. For instance, the National Association for Down Syndrome was founded in 1961,²¹⁶ the Consortium for Citizens with Disabilities was founded in 1973 to advocate for federal legislation and regulations supporting people with disabilities,²¹⁷ and the Disability Rights Legal Center was founded in 1975, to name only a few.²¹⁸

Congress enacting the ADA was the culmination of a century of activism, and, as Senator Ted Kennedy put it in 1990, “the [ADA]-and the many disabled Americans who have worked tirelessly for its passage-have opened the eyes of Congress and the country to the realities and consequences of disability-related discrimination.”²¹⁹ Congress, elected by the people and working on behalf of the people, found that increasing inclusivity and opportunities for people with disabilities would benefit the country as a whole. To work in opposition to that finding and unjustly deny people with disabilities access to plasma donation centers would be against the country’s best interest.

Likewise, plasma donation centers themselves and the general public would directly benefit from allowing people with disabilities to participate in their services. For one, “plasma is used to create a number of life-saving medicines that treat patients with rare, chronic, and inherited diseases.”²²⁰ People with disabilities may have some medical impairment, but it is not necessarily one that affects the quality or

²¹³ *About Us*, NAT’L COUNCIL ON DISABILITY, <https://ncd.gov/about> (last visited Oct. 15, 2020).

²¹⁴ *The International Year of Disabled Persons 1981*, UNITED NATIONS, <https://www.un.org/development/desa/disabilities/the-international-year-of-disabled-persons-1981.html> (last visited Oct. 15, 2020).

²¹⁵ *About Us*, *supra* note 213.

²¹⁶ *About Us*, NAT’L ASS’N FOR DOWN SYNDROME, <https://www.nads.org/about-us/> (last visited Oct. 15, 2020).

²¹⁷ *About CCD*, CONSORTIUM FOR CITIZENS WITH DISABILITIES, <http://www.c-c-d.org/rubriques.php?rubpage=1> (last visited Oct. 15, 2020).

²¹⁸ *About Disability Rights Legal Center*, DISABILITY RTS. LEGAL CTR., <https://thedrlc.org/about/> (last visited Oct. 15, 2020).

²¹⁹ 136 Cong. Rec. S9,680 (daily ed. July 13, 1990) (statement of Sen. Kennedy).

²²⁰ *Plasma Donation FAQs*, OCTAPARMA PLASMA, <https://octapharmaplasma.com/donor/plasma-donation-faq> (last visited Oct. 15, 2020).

obtainability of their plasma.²²¹ For instance, plaintiff Mark Silguero, who had donated plasma previously, was denied because his “bad knees” required him to use a cane,²²² and plaintiff Brent Levorsen was denied because of his schizophrenia, a mental disorder, even after providing forms from his psychiatrists indicating his fitness to donate.²²³ No facts in either case, or in the case of plaintiff George Matheis, indicate that there was anything wrong with their blood or plasma.²²⁴ Barring these plaintiffs and other disabled individuals from donating when they are ready, willing, and able only limits the amount and diversity of plasma that plasma donation centers can use to create medical treatments. Prohibiting people with disabilities from donating plasma is largely unnecessary and reduces plasma donation centers’ potential to do good, and consequently it is against the public interest.

IV. CONCLUSION

The year 2020 marked the 30th anniversary of the ADA, yet 61 million American adults living with a disability continue to face barriers that make their full participation in American society difficult, if not impossible. Plasma donation centers have been part of the problem. They have alleged that they are not subject to the ADA’s nondiscrimination requirements and have turned otherwise qualified donors away because of disabilities that have no demonstrated impact on the quality of their plasma.

This Note has demonstrated how legal principles of contract law and statutory interpretation, as well as service of the public interest, should compel courts to find that plasma donation centers are service establishments subject to the ADA. Common understandings of contractual consideration show both that the directionality of benefits and detriments are nondeterminative, and that the existence of money (or lack thereof) as part of a transaction is irrelevant. Furthermore, whatever approach a court takes to statutory interpretation—examining canons relied on by courts for centuries, legislative history, and common dictionary definitions, or only some of those resources—it is evident that Congress did not intend the term service establishment to have such a narrow meaning as to exclude plasma donation centers. Moreover, declaring plasma donation centers to be service establishments under the ADA would serve the public interest by permitting plasma collection from a higher number and wider variety of people, which would then increase the plasma supply necessary to create life-saving medical treatments. Finally, and perhaps most importantly for future cases, finding that plasma donation centers are service establishments would set precedent that is in line with prior holdings, which would allow the ADA to continue as a living document; one that is malleable enough to encompass a constantly changing and growing society. Together, all of these considerations make it abundantly clear

²²¹ See *Levorsen v. Octapharma Plasma, Inc.*, 828 F.3d 1227, 1229 (10th Cir. 2016) (noting that two psychiatrists signed off on a potential donor with schizophrenia as being able to safely donate plasma).

²²² *Silguero v. CSL Plasma, Inc.*, 907 F.3d 323, 326 (5th Cir. 2018).

²²³ *Levorsen*, 828 F.3d at 1229.

²²⁴ See generally *Silguero*, 907 F.3d 323; *Levorsen*, 828 F.3d 1227; *Matheis v. CSL Plasma, Inc.*, 936 F.3d 171 (3d Cir. 2019).

that plasma donation centers must be considered service establishments that are subject to Title III of the ADA.