No. 14-4162

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRENT LEVORSEN,

Plaintiff-Appellant

v.

OCTAPHARMA PLASMA, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, NO. 2:14-CV-00325,
THE HONORABLE DUSTIN B. PEAD

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT AND URGING REVERSAL

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BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
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STATEMENT OF THE ISSUE

The United States will address:

Whether a plasma donation center is a "service establishment," and therefore a "public accommodation" under Title III of the Americans with Disabilities Act (ADA). See 42 U.S.C. 12181(7).

INTEREST OF THE UNITED STATES

This case requires this Court to interpret and apply Title III of the ADA, which prohibits disability discrimination in places of public accommodation. The United States has a strong interest in the proper interpretation and application of Title III. The Department of Justice is the federal agency with enforcement authority for Title III and promulgates regulations interpreting it. See 42 U.S.C. 12186(b), 12188(b); 28 C.F.R. Pt. 36. The Department previously has taken the position in an enforcement action that a plasma donation center is a "service establishment," and therefore a "public accommodation." See 42 U.S.C. 12181(7)(F). That action resulted in a settlement that ensures that individuals with disabilities who pass the mandatory physical will be allowed to donate their plasma. See *Settlement Agreement Between The United States Of America And Bio-Medics*, available at http://www.ada.gov/bio-medics.htm. The United States thus files this brief as *amicus curiae* under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

1. Octapharma Plasma is in the business of operating plasma donation centers and using plasma to create medical treatments.[1] Plasma donation is similar

[1] Octapharma Plasma, *Plasma makes it possible*, http://octapharmaplasma.com/about (last visited Apr. 28, 2015).

to blood donation, but plasma centers use specialized equipment to separate plasma from other parts of a donor's blood.[2] At Octapharma centers, plasma donors earn money and other "rewards."[3] Octapharma uses the plasma to create "life-saving medicines."[4]

For several years the plaintiff, Brent Levorsen, routinely donated blood plasma at an Octapharma plasma donation center in Salt Lake City, Utah, and received about $260 per month. Aplt. App. 31-32. But in May 2013 Octapharma permanently barred him from donating plasma. Aplt. App. 31. During the routine physical exam to determine eligibility for plasma donation, Levorsen revealed that he was taking medication for borderline schizophrenia. Aplt. App. 31. There was no problem with Levorsen's plasma. Yet, because of his condition, Octapharma said he could not donate. Aplt. App. 31. It also placed him on the "National Donor Deferral Registry," an action that prevents Levorsen from donating plasma at any facility in the country. Aplt. App. 31. Octapharma claimed it stopped

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[2] Octapharma Plasma, *How does plasma donation work?*, Plasma Donation FAQs, http://octapharmaplasma.com/donor/plasma-donation-faq (last visited Apr. 28, 2015).

[3] Octapharma Plasma, *Payment & Reward*, http://octapharmaplasma.com/donor/payment-rewards (last visited Apr. 28, 2015).

[4] Octapharma Plasma, *Plasma-based medicines*, Plasma makes it possible, http://octapharmaplasma.com/about (last visited Apr. 28, 2015) (noting, as an example, that "our parent company Octapharma AG makes a medicine called octagam that's used to treat patients who have immune disorders").

Levorsen from donating because he "might have a schizophrenic episode and 'pull the needle collecting blood out of his arm and hurt him-self [sic] and/or others.'" Aplt. App. 31 (citation omitted). Seeking to counteract this misperception of his condition, Levorsen provided Octapharma with written statements from two psychiatrists explaining that he was medically suitable for plasma donation. Aplt. App. 31-32. These Octapharma disregarded. Aplt. App. 32.

2. Levorsen filed suit, alleging that Octapharma's conduct violates Title III of the ADA, but the district court granted Octapharma's motion to dismiss. Title III covers public accommodations and defines a "public accommodation" by setting out 12 broad categories, including a "service establishment" category, and by listing examples of establishments that fall within each category. See 42 U.S.C. 12181(7)(F). The district court determined that Title III does not cover Octapharma because a plasma donation center is not a "service establishment," and therefore is not a public accommodation. See 42 U.S.C. 12181(7)(F). Aplt. App. 38, 42. In analyzing whether a plasma donation center fits into the "service establishment" category, the court acknowledged that the examples listed within that category are illustrative, not exclusive. Aplt. App. 36-37. However, the court determined that consideration of the listed examples revealed that Congress had in mind establishments that "in return for payment, provide a service to a member of the public." Aplt. App. 37. The court concluded that, unlike the listed service

establishments, "a plasma donation center does not offer goods or services in exchange for compensation." Aplt. App. 37. Instead, the court concluded, a plasma donation center "offers money to a member of the public in exchange for a service to the center – the donation of plasma." Aplt. App. 37. The court ruled that the liberal interpretation of "public accommodation" that would normally be required is "tempered" in this case by the need to construe the "service establishment" category in a way that is "consistent with" the listed examples. Aplt. App. 34, 38.

Ultimately, the district court recognized "the seeming lack of proportionality between Octapharma's safety concerns, which never manifested (and based upon Mr. Levorsen's doctor's [sic] evaluations were unlikely to ever do so), and the wholesale exclusion of Mr. Levorsen from the plasma donation process." Aplt. App. 41. The court also appeared to recognize that its ruling would exclude from ADA coverage "blood donation, sperm donation, egg donation, bone marrow donation and stem cell donation." Aplt. App. 41. But the court stated that these industries "appear to approach the peripheries of the term 'public accommodation,'" and opined that their inclusion "within the confines of the categories set forth under 42 U.S.C. § 12181(7), would be a question most appropriately directed to the United States Congress." Aplt. App. 41-42.

SUMMARY OF ARGUMENT

Title III of the ADA applies broadly to ensure that individuals with disabilities have the same access to all public accommodations as other members of the public. The statute defines public accommodation by setting out 12 expansive categories, one of which is "service establishments." Under a plain language reading of Title III, a plasma donation center is a service establishment because it is an establishment that provides plasma procurement services. Plasma procurement is a service under a straightforward interpretation of that word. And the fact that many state laws, including Utah's, expressly define plasma procurement as a service confirms this plain language reading. Moreover, many plasma donation centers themselves describe plasma procurement as a service.

The Supreme Court in *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661 (2001), held that Title III's coverage must be construed broadly. More specifically, the Court explained that the relevant statutory interpretation question in this context is whether Title III coverage would be inconsistent with the statute's text and expansive purpose. Thus, even if it were much less clear than it is that a plasma donation center is a service establishment, the district court should have resolved any ambiguity in favor of coverage, not exclusion from coverage.

The district court failed to apply the statute's terms and to simply assess whether a plasma donation center is an establishment that provides a service. Nor

did the district court consider whether concluding that Title III covers plasma donation centers would be inconsistent with the ADA's text and purposes. Instead, it read the examples of service establishments listed in the statute as narrowing the scope of the category and concluded that a plasma donation center is distinguishable from the listed examples. The ADA's regulatory guidance and legislative history specifically warn against precisely this erroneous interpretation of the statute.

Moreover, even if (contrary to fact) entities did need to be similar to the listed examples instead of just fitting the broad category, a plasma donation center would still qualify as a service establishment. Like the listed examples of a service establishment, a plasma donation center provides services by supplying expertise or specialized equipment. Indeed, a plasma donation center supplies both.

ARGUMENT

A PLASMA DONATION CENTER IS A "SERVICE ESTABLISHMENT," AND THERFORE A "PUBLIC ACCOMODATION" UNDER TITLE III OF THE ADA

A. Excluding Plasma Donation Centers From Title III Coverage Conflicts With The Statute's Plain Language And With Congress's Broad Purposes In Enacting It

Congress designed Title III to ensure that individuals with disabilities have the same access to the goods, services, facilities, privileges, advantages, and accommodations of public accommodations that other members of the public have.

The district court's narrow interpretation of "service establishment," which excludes plasma donation centers from Title III's coverage, cannot be squared with the statute's text or with Congress's broad purposes for enacting the ADA. Moreover, Title III's administrative guidance and legislative history specifically reveal that the district court's cramped interpretation of Title III's public accommodation definition was erroneous.

The result in this case is diametrically opposed to Congress's expansive purpose in enacting the ADA. One of Congress's goals was to prohibit "outright intentional exclusion" of individuals with disabilities. 42 U.S.C. 12101(a)(5). The most obvious example of such discrimination is when an establishment that is open to the public turns people with disabilities away solely because of their disabilities. Yet this is precisely what the district court has sanctioned here. Under the district court's (and Octapharma's) understanding of the law, when a person with a disability enters a public plasma donation center, blood bank, etc., the establishment is perfectly free to say "Sorry, we don't serve people who have disabilities."

1. Congress Intended For Title III To Provide Comprehensive Protection For Individuals With Disabilities

a. Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that discrimination has

diminished the rights of individuals with disabilities "to fully participate in all aspects of society." 42 U.S.C. 12101(a)(1). Specifically, Congress found that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). Congress found that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion." 42 U.S.C. 12101(a)(5). Congress therefore provided protections from discrimination for individuals with disabilities across a broad spectrum of contexts, including employment (Title I), public services or programs (Title II), and public accommodations (Title III).

b. Title III is at issue here, and it provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. 12182(a). Coverage under Title III accordingly depends on whether a private entity is a "public accommodation." The statute provides that a private entity is a public accommodation when its operations affect commerce, and it falls into at least 1 of 12 categories. Among these categories are a "place of lodging," a "place of

exhibition or entertainment," a "sales or rental establishment," and a "service establishment." 42 U.S.C. 12181(7). The statute also lists some examples of entities that fall within each category. This case is about the "service establishment" category. The ADA describes that category as including:

> 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.

42 U.S.C. 12181(7)(F).

c. An appendix to the Department of Justice's ADA Title III regulations explains: "While the list of categories is exhaustive, the representative examples of facilities within each category are not. Within each category only a few examples are given." 28 C.F.R. Pt. 36, App. C. Similarly, the Department's ADA Title III Technical Assistance Manual states that "within each category the examples given are just illustrations."[5] "As the agency directed by Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, § 12188(b), the Department's views are entitled to deference." *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (citing

[5] U.S. Department of Justice, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, available at http://www.ada.gov/taman3.html.

Chevron v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)); see also *ibid.* (deferring to one of the appendices to the Department of Justice's Title III regulations and also to its Title III Technical Assistance Manual); *Colorado Cross Disability Coal.* v. *Hermanson Family Ltd. Ptshp.*, 264 F.3d 999, 1004 n.6 (10th Cir. 2001) (deferring to one of the appendices to the Department's Title III regulations).

d. The ADA's legislative history confirms Congress's intent that the categories of public accommodation be interpreted broadly. Congress explained that "[a] person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition," but instead "must show that the entity falls within the overall category." H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 54 (1990); see also S. Rep. No. 116, 101st Cong., 1st Sess. 59 (1989) (explaining that the public accommodation categories must be construed broadly to effectuate the broad purposes of Title III); *National Ass'n of the Deaf* v. *Netflix, Inc.*, 869 F. Supp. 2d 196, 201 (D. Mass. 2012) (relying on this legislative history to conclude that "[p]laintiffs must show only that the [defendant] falls within a general category listed under the ADA"). Congress changed the language from "other similar service establishments" to "other service establishments" to make clear that any type of service establishment is covered. Compare H.R. Rep. No. 485, Pt. 4, 101st Cong., 2d Sess. 56 (1990),

with 42 U.S.C. 12181(7)(F); see also H.R. Rep. No. 558, 101st Cong., 2d Sess. 71 (1990). As Congressman Hoyer, one of the ADA's sponsors, explained, the final bill deleted the word "similar" to clarify that "a person alleging discrimination does not have to prove that a particular business is similar to one of the businesses listed" in the statute. 136 Cong. Rec. 11,472 (1990).

e. The Supreme Court, in *PGA Tour, Inc.* v. *Martin*, relied on Congress's expansive purposes for enacting the ADA in construing liberally the scope of Title III's coverage. 532 U.S. 661, 676-677 (2001). The Supreme Court explained that "[t]he phrase 'public accommodation' is defined in terms of 12 extensive categories, which the legislative history indicates 'should be construed liberally' to afford people with disabilities 'equal access' to *the wide variety of establishments available to the nondisabled*." *Ibid.* (citing S. Rep. No. 116, 101st Cong., 1st Sess. 59 (1989); H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 100 (1990)) (emphasis added); see also *Carparts Distribution Ctr., Inc.* v. *Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (explaining that "Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments and made available to those who do not have disabilities"). The Court used this legislative purpose as the interpretive key to discerning Title III's scope, asking whether the activity in question – there, provision of the opportunity for golfers who meet set qualifications to compete in

tournaments for a fee – "fit comfortably within the coverage of Title III." *PGA Tour*, 532 U.S. at 677. The Court's analysis turned on whether concluding that the activity is subject to Title III "would be inconsistent with the literal text of the statute as well as its expansive purpose." *Id.* at 680. Thus, in order for Title III to be interpreted correctly, the scope of its coverage must be interpreted "broadly." *Ibid.*

2. Under Title III's Plain Language, Plasma Donation Centers Easily Fit Into The Service Establishment Category And Thus Are Subject To Title III's Requirements

a. Title III provides that a "service establishment" is a public accommodation. 42 U.S.C. 12181(7)(F). Thus, the relevant inquiry here is whether a plasma donation center is a "service establishment." And since a plasma donation center is obviously an establishment, the only question is whether it provides a service.

Dictionary definitions of "service" are easily broad enough to encompass the act of taking people's blood plasma to use for medicines and treatments. One dictionary defines service as "an act of helpful activity."[6] If a person wishes to provide blood plasma to be used in the production of medical treatments, he or she will need help to do that. Blood plasma centers like Octapharma supply that help

[6] Dictionary.com, service, http://dictionary.reference.com/browse/services (last visited Apr. 29, 2015).

in the form of trained personnel and necessary medical equipment. Without this helpful activity – that is, service – individuals who wish to provide blood plasma for medical use would be unable to do so. Indeed, another definition of service is "the organized system of apparatus, appliances, employees, etc., for supplying some accommodation required by the public."[7]

State-law treatment of blood plasma procurement confirms that it is a service. Many state laws – including Utah's – expressly define procurement of blood plasma as a service. The Utah State Code defines "the procurement, processing, distribution, or use of a blood product for the purpose of injecting or transfusing the blood product into the human body" as "the *rendition of a service*." Utah Code Ann. § 26-31-201(1) (West 2014) (emphasis added). Many other States also define procurement of blood products as a "rendition of a service." See, *e.g.*, Ala. Code § 7-2-314(4) (1975) (stating that procuring plasma, as well as other blood products and human tissues "is declared *for all purposes to be the rendition of a service*") (emphasis added); Vt. Stat. Ann. tit. 9A, § 2-108 (2014) (similar); Cal. Health & Safety Code § 1606 (West 2014) (similar); Neb. Rev. Stat. § 71-4001 (2014) (similar); Kan. Stat. Ann. § 65-3701 (2014) (similar). So, while

[7] *Ibid.*

Octapharma contends in this litigation that it does not render a service, Utah and many other States say it does.[8]

Indeed, even the names of Octapharma's competitors and descriptions of their businesses confirm that procuring blood plasma is commonly understood within that industry to be a rendition of a service. For example, one blood plasma firm is called "BioLife Plasma Services." On its website, BioLife Plasma Services states that part of its "vision" is that "[e]very donor is recognized for his or her contribution and *given exceptional service*."[9] Another organization called "Community Blood Services" states that "[o]ur blood collection, umbilical cord

[8] By defining Octapharma and other entities that collect and distribute blood products and other human tissues as providers of services, these state laws ensure that these entities will not be subject to products liability lawsuits. Octapharma would very likely embrace the service provider distinction in a state-law products liability case. See, *e.g.*, *Doe* v. *Cutter Labs.*, 703 F. Supp. 573, 575 (N.D. Tex. 1988) (determining that "a supplier of blood derivative products such as lyophilized plasma and cryoprecipitate is not liable under theories of strict liability and breach of the implied warranty of fitness"). But here, Octapharma argues that it does not provide a service because it wishes to avoid liability under Title III. It should not be allowed to have it both ways.

[9] BioLife Plasma Services, *Who We Are*, http://www.biolifeplasma.com/about-biolife/who-we-are.html (last visited Apr. 28, 2015) (emphasis added).

blood, and bone marrow *services* join individuals, organizations and communities together in partnership with us to help save lives."[10]

In short, the plain meaning of the term "service establishment" encompasses plasma donation centers like the Octapharma center that discriminated against Levorsen. And state laws defining plasma procurement as a service, as well as descriptions of plasma procurement as a service by many plasma procurement providers, confirm that Octapharma fits easily into the "service establishment" category.

b. Even if Title III coverage of plasma donation centers were not clear, *PGA Tour* instructs that any ambiguity should be resolved in favor of coverage rather than exclusion. 532 U.S. at 676-677. As explained above, the Supreme Court has made plain that, in order to give effect to Congress's intent and purpose in enacting the ADA, Title III's coverage must be construed "broadly." *Id.* at 680. Thus, the relevant statutory interpretation question for a court assessing the scope of Title III's coverage is whether coverage "would be inconsistent" with the statute's text and "expansive purpose." *Ibid.*

As discussed above at p. 8, not only is including plasma centers within the category of "service establishments" consistent with the purposes of Title III, but

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[10] Community Blood Services, *Our Services*, http://www.communitybloodservices.org/os_ourservices.php (last visited Apr. 28, 2015) (emphasis added).

excluding them is at odds with the statute's purpose and with the interpretive framework *PGA Tour* sets out. A plasma donation center is among "the wide variety of establishments available to the nondisabled," and fits "comfortably within the coverage of Title III." *PGA Tour*, 532 U.S. at 677. Construing Title III to exclude plasma donation centers, as the district court did, thwarts the statute's purpose by allowing them, and similar entities, to intentionally discriminate against individuals with disabilities.

Moreover, in light of *PGA Tour*, the district court's analysis fails even on its own terms. The district court actually appeared to recognize that plasma procurement *could* be viewed as a service when it said that "industries and establishments supporting biological material donation encompass technology and concepts that appear to *approach the peripheries* of the term 'public accommodation.'" Aplt. App. 41 (emphasis added). If an entity truly were approaching the peripheries of 1 of the 12 public accommodation categories, that would mean that Title III coverage would not "be inconsistent" with the statute's text and purposes. As explained, a plasma donation center fits easily into the "service establishment" category because it provides a service. But even if the district court were right that it is close to the outer boundary of the category, under *PGA Tour*, it should have preserved Title III coverage.

B. The District Court Failed To Apply Title III's Plain Terms And Failed To Effect Congress's Expansive Purpose

The district court failed to give effect to the straightforward meaning and broad scope of the "service establishment" category. And in so doing it reached a result that undermines the purposes of the ADA. Two key errors led to these failures. First, the district court wrongly used the examples of a "service establishment" provided in the statute to restrict the scope of the category. Second, the district court then distinguished plasma donation centers from the listed examples in a way that makes no sense.

1. The Listed Examples Do Not Constrict The "Service Establishment" Category

The district court made no attempt to determine whether a plasma donation center fits within the ordinary meaning of the term "service establishment." Instead, the district court compared a plasma donation center to the examples of service establishments that the statute provides. This was error.

Indeed, it is exactly the error that Title III's administrative guidance and legislative history warn against. The Department's ADA guidance and the statute's legislative history make clear that the examples provided within each of the 12 categories of public accommodations are not intended to constrict the category. As explained, p. 10, *supra*, an appendix to the ADA regulations states that the "few examples" provided in each of the public accommodation categories

are not "exhaustive." 28 C.F.R. Pt. 36, App. C. And the Department's ADA Title III Technical Assistance Manual instructs that the examples listed in each of the 12 public accommodation categories are "just illustrations."[11]

Title III's legislative history makes this point perhaps even more forcefully. See p. 11, *supra*. Congress specifically said that a plaintiff does *not* need to show that the defendant is similar to the listed examples, but only that it "falls within the overall category." See H.R. Rep. No. 485, Pt. 3, 101st Cong., 2d Sess. 54 (1990). And Congress removed the word "similar" from the originally proposed language of Title III for the express purpose of clarifying this point. See 136 Cong. Rec. 11,472 (1990).

In other words, the district court's whole mode of analysis in this case was flatly contrary to Title III's administrative guidance and to Congress's evident intent. To be sure, courts, including this one, sometimes apply the *ejusdem generis* statutory construction canon to restrict the meaning of a general term in statutes that, like Section 12181(7)(F), contain a list of specific items followed by a more general category. See, *e.g.*, *United States* v. *Brune*, 767 F.3d 1009, 1023 (10th Cir. 2014), cert. denied, 135 S. Ct. 1469 (2015) (explaining that the *ejusdem generis* canon means that when "general words follow specific words in a statutory

[11] U.S. Department of Justice, *ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, available at http://www.ada.gov/taman3.html.

enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words") (citation omitted). But this Court has explained that the canon applies "when a broad reading of an undefined term serves to undermine Congress's decision to specifically list items that the statute covers." *Ibid.*

Here, it is clear that it is in fact a *narrow* reading of the term "service establishment" that would undermine Congress's goal of providing equal access for individuals with disabilities to the wide variety of establishments available to others. See, pp. 16-17, *supra*; *United States* v. *Alpers*, 338 U.S. 680, 682 (1950) ("When properly applied, the rule of *ejusdem generis* is a useful canon of construction. But it is to be resorted to not to obscure and defeat the intent and purpose of Congress, but to elucidate its words and effectuate its intent."); accord *United States* v. *West*, 671 F.3d 1195, 1200 (10th Cir. 2012). Indeed, as explained, Congress and the Department of Justice specifically anticipated that the listed examples might be misread as restricting the scope of the broad public accommodation categories, and warned against that erroneous interpretation of the statute.

2. A Plasma Donation Center Is Relevantly Similar To The Examples Of Service Establishments Listed In The Statute

a. Even if the *ejusdem generis* canon were applicable here, the district court's analysis would fail. A correct application of the canon would actually confirm that the "service establishment" category is a broad one and that a plasma donation center fits comfortably into it. Section 12181(7)(F) lists "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, [and] hospital." This list includes a wide variety of establishments; banks and shoe repair shops are not establishments that one typically thinks of as belonging together. The most reasonable interpretation of the listed examples in Section 12181(7)(F) is that the characteristic that holds this group together is simply the provision of services. The *ejusdem generis* canon is most useful when the particular items listed have a clear commonality that is narrower than the broad description that follows, not when the listed items are varied in ways that embody that broad description. For example, the Supreme Court made use of the canon in interpreting a statute that defined "motor vehicle" as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." *McBoyle* v. *United States*, 283 U.S. 25, 26 (1931) (citation omitted). The Court concluded that the listed items established that "a vehicle running on land is the

theme." *Ibid.* Thus, despite the fact that the broad category could plausibly be read to include boats and airplanes, the listed items counseled against that reading. No similarly clear restrictive theme is discernible from Section 12181(7)(F)'s list of service establishments.

A plasma donation center is relevantly similar to the varied service establishment examples listed in Section 12181(7)(F) because, as explained pp. 13-14, *supra*, it provides a specialized service. The commonality among the listed service establishments is that they provide services by supplying expertise or equipment or both. For example, a hospital provides specialized equipment like a CAT-scan machine and also trained doctors and nurses; a barber has expertise in cutting hair and typically has a variety of scissors, razors, etc. for doing the job; a shoe repair service uses both trained employees and particular equipment; and so on. Plasma donation centers have these same characteristics. They provide the specialized equipment needed to procure plasma and trained personnel to assess donor eligibility, operate the equipment, etc. Applying the *ejusdem generis* canon to Section 12181(7)(F) would therefore confirm that a plasma donation center is a "service establishment."

b. Rather than consider whether a plasma donation center is relevantly similar to the examples of a "service establishment" that the statute lists, the district court asked whether a plasma donation center "is distinguishable" from the

specific examples of a "service establishment" listed in Section 12181(7)(F). Aplt. App. 37. This is the polar opposite of what *PGA Tour* requires. See 532 U.S. at 680 (framing the Title III coverage inquiry as whether Title III coverage "would be inconsistent" with the ADA's text and purposes).

To make matters worse, the characteristic of the listed service establishments that the district court focused its distinguishability analysis on – "the provision of goods or services to the public, in exchange for money" (Aplt. App. 37) – is neither unique to nor descriptive of the service establishment category. Many establishments that fall into other categories, particularly the "sales or rental establishment" category, commonly require payment by members of the public. See 42 U.S.C. 12181(7)(E). Many service establishments also typically require payment for services rendered, but others do not. One example is a recycling center that provides payment to the public for bottles or scrap metal. Though a recycling center is not one of the examples listed in Section 12181(7), collecting peoples' recycling is clearly a service and so it fits into the service establishment category under a straightforward reading of the statute. Moreover, even the listed service establishments might sometimes provide payment to customers rather than the other way around. For example, a bank typically pays interest to people who open savings accounts, yet provision of savings accounts is obviously one of a bank's services. Similarly, a hospital might pay people who participate in clinical

trials, and such payment would not prevent the health care offered during such a trial from being a service.

c. Finally, the district court made a related error by accepting Octapharma's argument that it cannot be a service organization because it receives services rather than provides them. Even assuming a person who agrees to have his or her blood plasma extracted is providing a service, that fact in no way prevents Octapharma's use of trained personnel and equipment to extract the plasma from also being a service.[12] It is possible that the district court misunderstood the inquiry and focused, not on whether the procurement of blood plasma was a rendition of service, but instead on whether payment to the donor was. Levorsen did not, however, argue that Octapharma's payment was a service (nor does Levorsen make such a claim on appeal). Instead, the question before this Court is whether Octapharma's procurement of blood plasma is a service. It is. Whether the plasma donor is also providing a service is immaterial.

[12] Similarly, certain establishments in the "social service center establishment" category, such as a food bank, receive donations and provide services. See 42 U.S.C. 12181(7)(K). So Congress plainly anticipated that Title III would cover establishments that operate in that way. In fact, though Levorsen is not making the argument, plasma donation centers may fit into the "social service center establishment" category as well as the "service establishment" category.

CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: May 4, 2015

CERTIFICATE OF DIGITAL SUBMISSION

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I hereby certify that on May 4, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANT AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Seven copies of the same were sent by Federal Express to the Court.

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