No. 15-486

In the Supreme Court of the United States

DONNIKA IVY, *ET AL.*, PETITIONERS

v.

MIKE MORATH, TEXAS COMMISSIONER OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners seek a federal court order compelling the Texas Education Agency (TEA) to adopt and enforce a state regulatory scheme designed to ensure that *privately* run for-profit driver-education schools comply with Title II of the Americans with Disabilities Act (ADA) and §504 of the Rehabilitation Act (§504). These provisions, however, require that lack-of-accommodation claims against a public entity, like petitioners' claims, derive from services, programs, or activities provided by that public entity. Here, petitioners complain about driver education that is provided by the private schools—not the TEA.

Moreover, the state statutory authorization for TEA to license and regulate driver education in Texas was dramatically altered by the Texas Legislature in 2015. Effective September 1, 2015, TEA's involvement in driver education, by statute, became so limited that the future implications for the court of appeals' ruling here have been virtually eliminated.

The question presented is:

> Whether the court of appeals correctly held that petitioners' claims against the TEA, which stem from lack of access to driver education that is provided by private businesses, fall outside the scope of Title II and §504's requirements because they do not relate to the services, programs, or activities of a public entity.

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BRIEF IN OPPOSITION

INTRODUCTION

The question presented does not warrant the Court's review. This case has no meaningful future implications because the Texas Legislature dramatically altered the state statutory framework governing licensing and regulation of driver education in Texas, effective as of September 1, 2015. *See* Act of May 27, 2015, 84th Leg., R.S., ch. 1044, 2015 Tex. Gen Laws 3624.[1] Under the new stat-

[1] The act is entitled, "Transfer of Driver and Traffic Education from the Texas Education Agency and the Department of Public Safety to the Texas Department of Licensing and Regulation; Changing the Amounts of Certain Fees."

ute, the TEA has virtually no involvement in driver education. This development alone, not mentioned in the petition, warrants a denial of certiorari.

The underlying decision from the Fifth Circuit, in any event, is correct and presents no circuit split. The decision is based on considerations that the petition does not meaningfully address, including the federal statutory text, this Court's precedent, and the fact that the driver education at issue is provided by the private schools, not the TEA. If petitioners were entitled to redress, it would lie against the private driving schools themselves, under ADA Title III's provisions regarding places of public accommodation, not against the TEA under ADA Title II, §504, or some kind of ADA Title II/Title III dual obligation.

Nor does the petition implicate a circuit split. No circuit court decision cited in the petition, or that respondent is otherwise aware of, addresses the petition's notion of "dual obligations to accommodate" under Titles II and III of the ADA. Pet. i, 2. The only circuit court that has also addressed the issues presented agreed with the Fifth Circuit's holding here. And there is also no "inconsistency and confusion across [ ] state and federal court opinions" that could warrant review. Pet. 7. Rather, the few relevant state court and federal district court decisions addressing issues similar to the question presented are consistent with the Fifth Circuit's holding and analysis in this case.

The petition also attempts to re-invent the case by focusing on a supposed "depriv[ation] of the benefit of [ ] state-developed curriculum." Pet. 7. But petitioners did not raise or litigate any such question until their motion

for rehearing in the court of appeals, and that court denied the motion without comment. Moreover, re-framing the question in this manner merely assumes, without justification, that the TEA is somehow responsible for the alleged "deprivation" suffered by petitioners. But that could be the case only if the driver education at issue were a TEA service, program, or activity, which it is not.

STATEMENT

A. Factual Background

In Texas, certain first-time driver's license applicants must submit driver-education course-completion certificates to the Texas Department of Public Safety as part of their license applications. Tex. Transp. Code §521.1601. Options for driver-education classes include public-school courses, parent-taught courses for certain qualifying applicants, and courses offered at privately run for-profit driver education schools. *See* Pet. App. 3 n.2. Private schools offering driver-education and safety-courses have existed in Texas since long before they were first regulated by the state or a driver-education course-completion certificate became a prerequisite to obtaining a Texas driver's license. *See, e.g.*, Act of May 30, 1967, 60th Leg. R.S., ch. 332, 1967 Tex. Gen. Laws 794; House Comm. on Highways & Roads, Bill Analysis, Tex. H.B. 568, 60th Leg., R.S., 1967 (noting that schools "ha[d] never been under" supervision of DPS).

Petitioners are deaf individuals between the ages of 16 and 25 who alleged that they cannot obtain driver-education certificates because the private schools are their only option for driver education and the schools—which, prior to September 1, 2015, were licensed by the TEA—

do not accommodate petitioners' disabilities. Pet. App. 1-2. As representatives of a putative class, petitioners sought a federal-court order commanding the TEA to adopt and enforce regulations ensuring ADA and §504 compliance by the private schools.

As the court of appeals noted, "[a] Deafness Resource Specialist with the Texas Department of Assistive and Rehabilitative Services informed the TEA of the inability of deaf individuals like [petitioners] to receive driver education certificates." Pet. App. 4. "[T]he TEA declined to intervene, stating that it was not required to enforce the ADA" at the private businesses "and that it would not act against the private driver education schools unless the United States Department of Justice ("DOJ") found that the schools had violated the ADA." *Id.* "The Deafness Resource Specialist filed a complaint against the TEA with the DOJ, which the DOJ [ ] dismissed." *Id.*

The Texas Education Code provides that the TEA's primary role within the state administrative scheme is to regulate public education. *See generally* TEX. EDUC. CODE §1.001 *et seq*.

At the time petitioners filed suit, and until after the court of appeals decided this case in early 2015, the Texas Education Code's Chapter 1001 provided a role for the TEA, albeit a limited one, in the state licensure and regulatory scheme as it related to driver education. Under those provisions, the TEA was granted authority over private driver-education schools to

(1) license the schools, course providers, and instructors, *see id.* §§1001.201-.206 (2003)[2] (licensure), *id.* §1001.211 (2003) (same), *id.* §1001.251-.255 (2003) (same), *id.* §1001.303-304 (2003) (same), *id.* §§1001.151-.153 (2003) (license fees);

(2) establish and enforce minimum substantive curricular standards, *see id.* §§1001.101 (2010), .053(a)(2) (2003);

(3) take limited actions to minimize deceptive or misleading practices and fraud in connection with driver-education courses and certificates of completion, *see id.* §§1001.451-.453 (2003), .455 (2003); and

(4) undertake limited enforcement actions for violations of Chapter 1001 of the Education Code, *see* Tex. Educ. Code §1001.554 (2003).

Although Chapter 1001 provided that the TEA "'ha[d] jurisdiction over and control of' driver education schools and [wa]s allowed to 'adopt and enforce rules necessary to administer'" chapter 1001, nothing in chapter 1001 commanded the TEA to ensure ADA compliance at private schools. Pet. App. 7 (citing Tex. Educ. Code §§1001.051 (2003); 1005.053(a)(3) (2003)).[3]

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[2] Parenthetical dates in statutory citations refer to the year in which the provision became effective, and they reflect that the provision has since been amended, repealed, or otherwise changed. Current statutes are cited without a parenthetical reference to the effective date.

[3] Chapter 1001 also instructed that the delivery of the driver-education instruction to students enrolled in private courses

But the statutory scheme changed dramatically as of September 1, 2015, when Texas House Bill 1786 went into effect. The changes to chapter 1001 contained in H.B. 1786 placed the Texas Commission of Licensing and Regulation and the Texas Department of Licensing and Regulation in charge of licensing and regulating driver-education schools in Texas.[4] At the same time, Texas House Bill 1786 removed TEA from any meaningful role with regard to driver education licensing and regulation.

B. Procedural History

Petitioners sued the TEA's commissioner in 2011, alleging the TEA has a "duty to create and enforce a sys-

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was the responsibility of the private businesses conducting the classes. *See* Tex. Educ. Code §1001.204 (2003) (requiring driving school itself to provide appropriate instruction and instructors).

[4] *See, e.g.*, Tex. Educ. Code §1001.051 (affecting jurisdiction over driver education); *id*. §1001.053 (Texas Commission of Licensing and Regulation charged with "adopt[ing] rules necessary to administer [ ] chapter [1001]"); *id.* (Texas Department of Licensing and Regulation and its executive director placed in charge of "administer[ing] this chapter," "enforce[ing] rules adopted by the [Texas Commission of Licensing and Regulation] that are necessary to administer [ ] chapter 1001"); *id*. §1001.055. (placing Texas Department of Licensing and Regulation in charge of providing course-completion certificates); *id.* §1001.101 (Texas Commission of Licensing and Regulation instructed to "establish or approve the curriculum and designate the educational materials to be used in a driver education course"). These citations are merely some examples. The entire statutory framework has been altered to essentially eliminate the TEA's prior role in connection with driver education.

tem to ensure that [private] driving schools provide reasonable accommodations to people with hearing disabilities," R.535,[5] which the TEA must do by "exercis[ing] its rule-making authority under the Texas Education Code," *id.* at 536; *see also id.* at 5, 516-57.

The Commissioner filed a motion to dismiss on the grounds that petitioners (1) lacked standing and (2) failed to state a valid claim. The district court denied the motion but granted Commissioner Williams' request that an interlocutory appeal be certified under 28 U.S.C. §1292(b). R.622-29.

The Fifth Circuit granted leave for the interlocutory appeal to proceed and then reversed. It first held that petitioners have standing to bring their claims. Moving to the rule 12(b)(6) motion, the court then determined that the outcome turned on whether the provision of driver education at private businesses "is a service, program, or activity of the TEA." Pet. App. 9-10. The court concluded that it is not—based on its analysis of the statutory text, this Court's precedent, relevant lower-court cases, and federal regulations and DOJ guidance. *Id.* at 9-18. Accordingly, the court rendered judgment dismissing petitioners' claims for failure to state a claim on which relief could be granted. *Id.* at 18.

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[5] Citations in the form R.__ refer to the court of appeals' electronic record on appeal.

ARGUMENT

I. Recent Amendments to State Law Mean This Case Has No Prospect For Future Implications.

The recent amendments to Texas Education Code chapter 1001, and other Texas law addressing driver education, mean this case will have no meaningful future implications. Even assuming a court were to conclude the TEA once had an obligation to police ADA or §504 compliance at private third-party driver-education schools—and it did not—the current state statutory framework removes the TEA's authority over, and connection to, driver-education licensing and regulation. The petition failed to address this significant development.

Moreover, the petition bases its arguments for a TEA obligation to enforce Title II and §504 compliance on an allegedly inextricably intertwined regulatory relationship between TEA and private driver education schools that simply does not exist under the current statute. *E.g.*, Pet. 13 (arguing TEA's involvement in driver education is inextricably intertwined with the school's delivery of instruction); *id.* ("The statute [chapter 1001 of the Texas Education Code] anticipates that the TEA will exert pervasive influence and control over driver-education schools and the ultimate product delivered by the schools – the course-completion certificate."). The changes in state law mean that a court order directing the TEA to adopt rules or otherwise exert regulatory or licensing control over the schools would have no practical effect; the TEA—by statute—now has no meaningful authority over the schools, even assuming *arguendo* it once did.

II. Review Is Not Warranted Because The Fifth Circuit's Decision Is Correct.

Even setting aside the insurmountable vehicle problem resulting from the recent changes to Texas law, the petition still does not warrant review.

A. The Petition Ignores Statutory Text And This Court's Precedent, Which Support The Court Of Appeals' Decision.

The Fifth Circuit held that driver education at privately run for-profit businesses is not "a service, program, or activity of the TEA" based on three considerations largely ignored in the petition: (1) the relevant statutory text; (2) this Court's decision in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 210 (1998); and (3) the fact that the driver education at issue is provided by the private businesses, not the TEA. Pet. App. 10.

Analyzing the statutory text, the Fifth Circuit noted that *Yeskey* instructs courts to interpret the phrase "services, programs, or activities of a public entity" "with reference to what 'services, programs, or activities'" are *provided* by the public entity." Pet. App. 10 (citing *Yeskey*, 524 U.S. at 210). As the court of appeals explained, the driver education at the relevant private schools is not provided by the TEA:

> Here, *the TEA itself does not teach driver education, contract with driver education schools, or issue driver education certificates to individual students.* Instead, the TEA licenses and regulates private driver education schools, which in turn teach driver

> education and issue certificates. Thus, the TEA's program provides the licensure and regulation of driving education schools, not driver education itself.

Id. (emphasis added).

Based on these considerations, the court concluded that the statutory text "suggests that driver education is not a program, service, or activity of the TEA." *Id.* The court reached an identical conclusion with respect to §504, in conjunction with the analysis in *Frame v. City of Arlington*, 657 F.3d 215, 224, 227 (5th Cir. 2011) (en banc), and relevant dictionary definitions. Pet. App. 10-11 (concluding, similarly, that "driver education seems to fall outside of the ambit of the Rehabilitation Act's definition of '"program or activity"').

The petition does not take issue with *Yeskey*, *Frame*, or the dictionary definitions utilized by the court of appeals. It also does not meaningfully challenge the proposition that the TEA does not provide driver education, or identify a single decision by this Court or other courts of appeals that conflicts with the lower court's decision.

B. Reframing Petitioners' Question As Involving A "Denial Of Access To State-Developed Curriculum" Does Not Make The Petition Worthy Of Review.

Petitioners' effort (at 17-18) to restyle their claims as involving a denial of access to a state-created curriculum, or a state benefit, does not make the petition worthy of review.

First, no such restyled question was pressed before the lower courts until after the Fifth Circuit issued its opinion and petitioners sought rehearing. The lower

courts also never passed on any such question. Accordingly, it is not properly before this Court. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (the Court typically will not review a question not pressed or passed upon below).

Second, restyling the claims cannot make the case more worthy of review because it assumes, without justification, that the TEA is responsible for the private driving schools' actions. But because driver education at those schools is not a TEA program, the TEA is not responsible for the schools' failures to accommodate the disabled. Accordingly, petitioners' claims reframed as "denial of access to state benefits" claims merely fold into, and are resolved by, the issue addressed by the court of appeals, which is whether driver education at private schools is a TEA program.

Third, this argument erroneously assumes that the TEA is solely responsible for developing driver-education curriculum. *See* Pet. 16-17 (citing Tex. Educ. Code §1001.101 and arguing that "establishing the driver-education curriculum . . . is the sole responsibility of the TEA). Chapter 1001, however, provides that "[t]he [Texas] [C]ommission [of Licensing and Regulation] by rule shall establish or approve the curriculum and designate the educational materials to be used in a driver education course."

III. There Is No Circuit Split Or Other Lower-Court "Confusion" Warranting Review.

A. The Fifth Circuit's Decision Does Not Create or Implicate Any Circuit Split.

The court of appeals' decision does not create or implicate a circuit split, and the petition does not argue that it does.

The only other circuit to have addressed the issues presented here—the Second Circuit—reached the same conclusion as the court below. *See Noel v. N.Y. City Taxi & Limousine Comm'n*, 687 F.3d 63, 70 (2d Cir. 2012); Pet. App. 16 (noting that the Fifth Circuit "join[ed] the Second Circuit" by dismissing petitioners' claims).

Consistent with the court of appeals' decision in this case, *Noel* concluded that a public entity's involvement and regulatory "control over the [relevant] industry, however pervasive . . . , does not make the private [ ] industry a program or activity of a public entity." 687 F.3d at 72 (internal quotation marks and brackets omitted); *accord* Pet. App. 16 ("public entities are not responsible for ensuring the ADA compliance of even heavily-regulated industries"). *Noel* and the decision below demonstrate an emerging consensus in the circuit courts that undermines the petition's arguments. *Cf.*, *e.g.*, Pet. 13 (arguing that "pervasive influence and control" ought to reflect a public-entity service, program, or activity).

B. There Is No Meaningful Lower-Court Confusion That Could Warrant Review.

Absent any credible claim of conflict, petitioners are left to rely on a supposed "inconsistency and confusion across [ ] state and federal court opinions interpreting

public/private arrangements in the context of disability accommodations." Pet. 7; *see also id.* at 17, 21, 23. The petition attempts to demonstrate such confusion by selectively quoting inconsequential variances and distinctions in a handful of state court and federal district court decisions. In reality, those cases reflect an emerging consensus in the law that is consistent with the Second Circuit's *Noel* decision and the Fifth Circuit's decision here. And although the court of appeals noted "little concrete guidance" in the case law, that feature is more attributable to the scarcity of these types of cases than any judicial confusion.

1. Petitioners point to state court decisions addressing state lottery programs, as well as a few federal district court decisions finding that activities by third parties were public-entity services, programs, or activities. Both sets of cases are distinguishable and reflect no judicial confusion. *See* Pet. App. 13-14 (distinguishing cases like *Winborne v. Va. Lottery*, 677 S.E.2d 304, 307-08 (Va. 2009), and *Paxton v. State Dep't of Tax & Revenue*, 451 S.E.2d 779, 784–85 (W. Va. 1994)).

First, in the lottery cases "it was clear that the [state] lottery commissions were running lotteries, not just licensing lottery agents." *Id.* at 14. And because "the lottery commissions themselves conducted the lotteries" and "the agents that sold the tickets were just one component of that entire program" run by the commission, the lottery was *provided* by the commission. *Id.* The commission, therefore, had an obligation to make the agents accessible. *Id.*

Here, in contrast, the court of appeals correctly found that "the TEA . . . *does not provide any portion*" of the

driver education at issue; it instead "merely licenses driver education schools." *Id.* (emphasis added). This difference is decisive because the phrase "services, programs, or activities" is interpreted "with reference to what 'services, programs, or activities' are *provided* by the public entity." *Id.* at 10 (citing *Yeskey*, 524 U.S. at 210).

"Second, in the lottery cases, the lottery commissions contracted with the lottery providers, which were paid commissions for acting as agents for the state. *Winborne*, 677 S.E.2d at 307; *Paxton*, 451 S.E.2d at 785. Here, there is no such agency or contractual relationship," which further distinguishes this case from the lottery cases. Pet. App. 14.

Disability Advocates, Inc. v. Paterson, 598 F. Supp. 2d 289 (E.D.N.Y. 2009), is consistent with the lottery cases and the court of appeals' decision here. *Cf.* Pet. 11. *Paterson* addressed the so-called "integration mandate" of Title II and §504, which—by definition—applies "when a *state provides* services to individuals with disabilities." 598 F. Supp. 2d at 292 (emphasis added). Indeed, *Paterson* involved a dispute about whether the *state services* already being received—state mental health services—were being received in the most integrated setting appropriate for their needs. *Id.* The defendants did argue that Title II did not apply to adult homes because they are privately run. *Id.* at 317. But

those privately run homes were under contract with the State—as the petition neglects to mention. *Id.* at 313-14.[6]

2. The three decisions discussed in the petition that declined to find a public-entity service, program, or activity are consistent with each other and the decision below. *See* Pet. 10 (citing *Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1441-42 (D. Kan. 1994); *Reeves v. Queen City Transp.*, 10 F. Supp. 2d 1181, 1186 (D. Colo. 1998); *Noel*, 687 F.3d at 69).

As already discussed, *Noel* reached the same conclusion as the lower court here. And *Noel* did not decline to find a state service, program, or activity because the "state had minimal involvement in the activities [at issue], and because the relationship between the [public entity and the third-party] entities was purely regulatory and limited to licensure," as the petition argues. Pet. 10. *Noel* involved "an overall public transportation policy," which is a comprehensive regulatory scheme. 687 F.3d at 66. As in this case, *Noel* declined to find Title II liability not because of minimal involvement by the public entity or a purely regulatory or licensing relationship but because "the ADA does not require a licensing entity to use its regulatory power to coerce compliance by a private industry." *Id.* at 72 n.7.

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[6] *Paulone v. City of Frederick*, which is cited in the petition without meaningful analysis or discussion, held that court-ordered alcohol education and Mothers-Against-Drunk-Driving classes were part of a public program. 718 F. Supp. 2d 626, 636 (D. Md. 2010) (mem. op.). The court's single-sentence holding, which contained no analysis, can hardly demonstrate widespread judicial confusion.

Tyler and *Reeves* likewise do not conform to the petition's description of them and are not in conflict with the court of appeals' decision here. Consistent with the decision below, *Tyler* held that the public entity could not be liable under Title II because the ADA "simply does not go so far as to require public entities to impose on private establishments, as a condition of licensure, a requirement that they make their facilities physically accessible to persons with disabilities." 849 F. Supp. at 1442. And *Reeves* rejected Title II liability because the alleged discrimination at issue there "flow[ed] from [the private third party's] conduct, not the [public entity's] issuance of a certificate" permitting the third-party to do business. 10 Supp. 2d at 1186. The facts and circumstances at issue here are similar.

C. There Is No Meaningful Lower-Court Confusion About Agency Or Contractual Relationships Between Private Parties And Public Entities.

Petitioners argue that the Fifth Circuit adopted a bright-line rule that an agency or contractual relationship is necessary for a court to find a public-entity service, program, or activity. *See, e.g.*, Pet. i (suggesting the Fifth Circuit "decid[ed] that the relationship between public and private actors does not invoke dual obligations to accommodate in any context other than an express contractual relationship between a public entity and its private vendor"); Pet. 23 (suggesting the Fifth Circuit held "that the lack of a contractual or agency relationship between driver-education schools and the TEA is the reason no liability exists" (quotation marks omitted)).

But the court of appeals adopted no bright line rule. Instead, it explained that the lack of a contractual or agency relationship here is significant for three reasons. Each of those considerations is in line with an emerging consensus in the lower courts.

First, the lack of such a relationship distinguishes this case from the state-lottery and scattered few other cases in which a relationship of this sort supported a holding that Title II and §504 might apply. Pet. App. 14; *see supra* Part III.B.1.

Second, the absence of any such formal relationship here shows that the decision below is consistent with other decisions in which "courts have routinely held that a public entity is not liable for a licensed private actor's behavior" in "the absence of such a contractual or agency relationship." Pet. App. 15 (citing *Noel*, 687 F.3d at 72; *Bascle v. Parish*, No. 12-CV-1926, 2013 WL 4434911, at *5–6 (E.D. La. Aug. 14, 2013); *Reeves*, 10 F. Supp. 2d at 1187; *Tyler*, 849 F. Supp. at 1441–42).

Third, the discussion of an agency or contractual relationship reflects consistency with DOJ's interpretive guidance. Pet. App. 15-16 (discussing DEPARTMENT OF JUSTICE, TITLE II TECHNICAL ASSISTANCE MANUAL § II-1.3000), which "provid[es] three examples of a private actor's activities being covered by Title II because of the 'close relationship' between the private actor and a public entity" and noting that "[a]ll three examples involve some form of contractual or agency relationship").

D. There Is No Credible Allegation That Agencies, Including The TEA, Are Seeking To Avoid Their Responsibility To Comply With Federal Laws.

The petition's speculation that public entities could farm out their public functions to private actors and thereby avoid their obligations to comply with federal law is unsubstantiated. *See* Pet. i, 24. There is no credible allegation that the TEA has ever had any such motivation or engaged in any such arrangement. Any suggestion along these lines is belied by the existence of driver-education schools and courses in Texas long before they were licensed or regulated by the State. *See, e.g.*, Act of May 30, 1967, 60th Leg. R.S., ch. 332, 1967 Tex. Gen. Laws 794; House Comm. on Highways & Roads, Bill Analysis, Tex. H.B. 568, 60th Leg., R.S., 1967 (Bill Analysis noting schools "ha[d] never been under" supervision of DPS). The TEA, in other words, did not create driver-education schools, or even encourage their creation, so it could avoid ADA obligations; such schools existed long before the TEA or the driver's license requirement of a course-completion certificate came into the picture.

Moreover, cases in which the actual services, programs, or activities of public entities are performed by a third party under a formal agency or contractual arrangement with the public entity—like lottery, prison-benefits, and public-health services cases—reflect that public entities cannot escape their obligations to comply with federal law through the use of third parties, even were they inclined to do so. The petition's suggestion

that public entities somehow could and would coerce private businesses to provide public-entity services or programs (including without contracts, agency relationships, or other formal arrangements) so as to avoid ADA compliance is pure speculation.

By contrast, the adverse consequences of accepting petitioners' arguments would be substantial. As the court of appeals recognized, petitioners' position entails "substantial policy, economic, and federalism concerns." Pet. App. 16 ("The named plaintiffs essentially argue that the TEA's pervasive regulation and supervision of driver education schools transforms these schools into agents of the state.").

Moreover, petitioners' cannot articulate a principled distinction between regulating agencies that are subject to Title II and those that are not. Accordingly, petitioners cannot explain why Title II, as they view it, would not require every licensing agency in Texas (and every other State) to adopt regulations or otherwise ensure via discretionary action that private third-party licensees comply with the ADA. The absurdity of that scenario reflects that petitioners' theory of Title II was properly rejected by the court of appeals.

IV. Jurisdictional Concerns Render This Case A Poor Vehicle For Resolution Of The Question Presented.

This case is also a poor vehicle because there are jurisdictional concerns. Petitioners lack standing because their claims are neither fairly traceable to the TEA nor redressable through this litigation. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (standing

requires that injury be fairly traceable to the defendant and not the result of independent action by a third party, and that it is likely the injury will be redressed by a favorable decision).

Petitioners complain about the actions of the independent third-party schools, and they seek an order from a federal court compelling the TEA to redress harms caused by those third parties. As the court of appeals noted, the individual schools provide the driver education. If petitioners suffered injuries, those independent third-parties are the ones whose actions caused the alleged injuries and to whom those alleged injuries are fairly traceable. *See Lujan*, 504 U.S. at 560-61. In fact, petitioners brought, and then voluntarily dismissed, claims against two private driving schools in this litigation. *See* R.31, R.95, R.103-04, R.196, R.211-12. One of those defendants provided an affidavit in which the school's owner stated that upon learning of the school's Title III obligations, the owner vowed in the future to "always provide an [accommodation] if required." R.557.

To the extent petitioners' complaints are directed at the State, it is the Texas Legislature or the public entities now charged with licensing and regulating driver education, not the TEA, to whom petitioners should look for the cause of their alleged injuries and redress for them. There is no longer a state statutory authorization for the TEA to engage in rulemaking in connection with driver education. And even when the TEA was charged with some rulemaking authority, there was no statutory directive to adopt rules to ensure ADA compliance by in-

dependent third-party schools providing driver education.[7] Instead, the no-longer-in-effect statutory grant of authority to the TEA directed it to license private driver-education schools, provide substantive curricular guidelines, and take limited actions to counter fraud, deceptive practices, and the like.[8] There was never a mandate from the Texas Legislature to adopt and enforce an ADA regulatory scheme for private driver-education businesses. *Cf.* Pet. App. 6-7 (citing general authorization to license driver-education schools). There certainly is not one now.

Because there is no directive to TEA from the Texas Legislature ordering it to ensure independent third-party compliance with the ADA and §504, the TEA is not

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[7] *See State, Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 131 S.W.3d 314, 321 (Tex. App.—Austin 2004, pet. denied) (citing *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992)) (noting that "[a]n agency's rules must comport with the agency's authorizing statute"); *Tex. Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2007) ("In ascertaining the scope of an agency's authority, we give great weight to the agency's own construction of a statute."). *See also Pub. Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 312 (Tex. 2001) ("For us to conclude that the [agency] acted within its authority, we must determine that the agency's power to regulate . . . is 'reasonably necessary' to carry our an express duty of function assigned to the [agency] under the [relevant statute]").

[8] *See, e.g.*, Tex. Educ. Code *see id.* §§1001.201-.206 (2003), *id.* §1001.211 (2003), *id.* §1001.251-.255 (2003), *id.* §1001.303-304 (2003), *id.* §§1001.151-.153 (2003), §1001.101 (2003), .053(a)(2) (2010); *id.* §§1001.451-.453, .455 (2003).

at liberty to reallocate scarce resources and accede to petitioners' requests for regulation and enforcement.

Finally, reading Title II, §504, and the state statutory authorization to TEA for licensing and regulating driver education as directing TEA to police independent third-party ADA compliance would essentially commandeer the TEA, transforming it into a mechanism for enforcing federal law. *Cf. New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997). Such an unconstitutional interpretation of state and federal law should be avoided, and it is not supported by state law, the text of either federal statute, or the relevant federal regulations and guidance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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