No. 15-486

IN THE
Supreme Court of the United States

DONNIKA IVY, ET AL.,
Petitioners,
v.
MIKE MORATH, TEXAS COMMISSIONER OF EDUCATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. This Case Contains Live Class Claims And Thus Is Not Moot 2

II. In The Alternative, The Court Should Vacate The Judgment Of The Fifth Circuit 10

III. The Fifth Circuit's Decision Is Erroneous 14

- A. The Program At Issue Is Respondent's, Not That Of Private Driving Schools 15
- B. Petitioners Have Been Denied The Benefits Of Respondent's Driver Education Program 21
- C. Respondent's Commandeering Argument Is Unfounded 22

CONCLUSION 25

APPENDIX

- Transcript of Motions Hearing Before the Honorable Lee Yeakel (W.D. Tex., May 30, 2013) 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Alvarez v. Smith,
558 U.S. 87 (2009) 10, 12, 13

Beaudry v. Telecheck Servs., Inc.,
2010 WL 2901781 (M.D. Tenn. July
20, 2010) 10

Burton v. Wilmington Parking Auth.,
365 U.S. 715 (1961) 17

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 3, 7

Camreta v. Greene,
563 U.S. 692 (2011) 10, 13

Castle v. Eurofresh, Inc.,
731 F.3d 901 (9th Cir. 2013) 18

Church v. Accretive Health Inc.,
299 F.R.D. 676 (S.D. Ala. 2014) 10

Edison v. Douberly,
604 F.3d 1307 (11th Cir. 2010) 16

Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 6, 8, 9

Honig v. Doe,
484 U.S. 305 (1988) 8

Hunter v. District of Columbia,
64 F. Supp. 3d 158 (D.D.C. 2014) 18

Jackson v. Metro. Edison Co.,
419 U.S. 345 (1974) 16, 17

Karcher v. May,
484 U.S. 72 (1987) 10

New York v. United States,
505 U.S. 144 (1992) 23

Pa. Dep't of Corr. v. Yeskey,
524 U.S. 206 (1998) 16, 23

Richardson v. Bledsoe,
829 F.3d 273 (3d Cir. 2016)............................ 9, 10

Sosna v. Iowa,
419 U.S. 393 (1975) 7

Tennessee v. Lane,
541 U.S. 509 (2004) 21, 23

U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994) 11, 13

U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 3, 7, 8, 10

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 2, 10, 13, 14

Wasvary v. WB Holdings, LLC,
2015 WL 5161370 (E.D. Mich. Sept. 2, 2015) 10

Wilkins-Jones v. County of Alameda,
859 F. Supp. 2d 1039 (N.D. Cal. 2012) 16

Constitutional Authorities

U.S. Const. art. VI, cl. 2 (Supremacy Clause) 24

Statutes

28 U.S.C. § 1292(b) 1, 4

29 U.S.C. § 201 et seq. (Fair Labor Standards Act) 9

29 U.S.C. § 794 (Section 504 of the Rehabilitation Act of 1973) ....*passim*

42 U.S.C. § 12131(2) 14

42 U.S.C. § 12132 (Title II of the Americans with Disabilities Act)...................................*passim*

42 U.S.C. § 12182 (Title III of the Americans with Disabilities Act)..................................... 14, 19

Rules and Regulations

28 C.F.R. § 35.130(b)(1) 18

Fed. R. Civ. P. 23 9

Fed. R. Civ. P. 23(b)(2).. 1, 6

Fed. R. Civ. P. 62.1 5

Texas Administrative Code 17

Texas Education Code 17

Texas Transportation Code 17

Other Authorities

Dylan, Bob, *Forever Young*, Planet Waves (Asylum Records 1974)............................ 12

Wright, Charles Alan & Arthur R. Miller, Federal Practice and Procedure (3d ed. 2008)................... 9

INTRODUCTION

Respondent and the United States argue that this case is moot. To the contrary: Petitioners' class claims remain live, and this Court has jurisdiction to answer the question on which it granted certiorari.

Petitioners sought to represent a Rule 23(b)(2) class of deaf young people whom respondent failed to accommodate in its driver education program. The district court correctly held petitioners had stated a claim for relief. But when respondent moved to certify that issue for interlocutory review under 28 U.S.C. § 1292(b), the district court announced that, until the court of appeals had reviewed that "threshold" question, App. 14a,[1] it was "not a best use of our time to go all the way through a class certification hearing," *id.* 4a. Accordingly, the court granted respondent's request, certified the question, and "stay[ed] all matters in this cause." Order 17, ECF 83. The court of appeals then answered the legal question incorrectly and rendered final judgment.

This Court should reverse that judgment to give petitioners what this Court has long required: a fair opportunity to obtain class certification. In doing so, this Court can provide the guidance the district court sought. The district court can then pick up where it left off, certify the class, and resolve the merits in light of this Court's decision.

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[1] The Transcript of Motions Hearing Before the Honorable Lee Yeakel, ECF 75, which occurred on May 30, 2013, appears as an Appendix to this brief ("App.").

As petitioners and the United States have both explained, Title II and Section 504 cover respondent's program. The court of appeals erred in framing the challenged program as involving only how private entities provide (or fail to provide) face-to-face instruction. To the contrary, petitioners have challenged a comprehensive driver education scheme whose every detail respondent dictates. Thus, respondent's reliance on the state action and anti-commandeering doctrines is misplaced. There is no question respondent is a public entity and must "provide access" to its program, for example by "develop[ing] a course intended for the hearing-impaired – perhaps a video course" in American Sign Language (ASL). J.A. 87-88.

Alternatively, if this Court were to conclude this case has become moot, it should follow its established practice and vacate the Fifth Circuit's judgment pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). As petitioners and the United States have both explained, vacatur would serve equity and the public interest.

ARGUMENT

I. This Case Contains Live Class Claims And Thus Is Not Moot.

Respondent argues this case is moot because petitioners no longer have live individual claims and have forfeited their entitlement to proceed on their class claims by not filing a motion for class certification despite "ample opportunity" to do so. Resp. Br. 20. Not so. Petitioners diligently pursued class certification until May 30, 2013, when the district court instructed them to suspend their

efforts. Under these circumstances, the lack of a formal motion does not matter: Petitioners are entitled to resume their efforts to get a class certified. The fact that their individual claims are now moot also does not matter: Certification of a class will relate back to May 30, 2013 – a date on which there was still a live individual claim.

1. A would-be class representative has "the right to have a class certified if the requirements of [Rule 23] are met," *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980), and "must be accorded a fair opportunity to show that certification is warranted," *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). The question with respect to jurisdiction is whether petitioners have yet received that opportunity. They have not.

Respondent contends that petitioners had "eleven months" to move for class certification, Resp. Br. 19; *see also* U.S. Br. 13, and that they "identify no impediment that prevented them from moving for class certification," Resp. Br. 19.[2] Respondent is wrong.

Petitioners have diligently pursued class certification since filing their initial class complaint in January 2013. The district court had previously ruled that Title II and Section 504 apply to respondent's driver education program. Order 15, ECF 41. But the preexisting scheduling order had no

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[2] The "eleven months" presumably represents the time between the filing of the third amended complaint in January 2013 and the district court's order in December 2013.

deadlines governing class certification, so "[a]ll parties [then] agreed" that class discovery would run through mid-July, when petitioners would file a motion for class certification. Plaintiffs' Response to Defendant's Motion to Modify Scheduling Order & Stay Certain Discovery 2 n.1, ECF 60 ("Plaintiffs' Response").

Petitioners then retained experts whose testimony would establish numerosity and commonality. Plaintiffs' Designation of Expert Witnesses, ECF 55. Both parties filed and served expert designations and scheduled depositions. Defendant's Designation of Rebuttal Expert, ECF 59; Plaintiffs' Designation of Rebuttal Expert, ECF 70.

But in April 2013, three months before petitioners were to move for class certification, respondent moved to "stay all discovery and deadlines in this matter until the legal questions raised in the Motion to Dismiss are resolved via a § 1292(b) appeal." Defendant's Opposed, Emergency Motion To Modify Scheduling Order & Stay Certain Discovery 8, ECF 57. Petitioners urged the court, if it was going to issue a Section 1292(b) order, to certify a class as well and send both issues to the court of appeals in one interlocutory proceeding. Plaintiffs' Response, *supra*, at 6-7, ECF 60.

At a hearing on respondent's motion on May 30, 2013, the district court announced that it would not conduct class certification proceedings and "perhaps certify a class" until it received an answer from the Fifth Circuit on the "threshold issue": whether Title II and Section 504 apply to respondent's program. App. 4a, 14a. Petitioners again urged the court to "consider both the class certification issues and the

legal issues at the same time." *Id.* 8a. But the court declined to do so and directed the parties instead to propose a new schedule addressing only the "matters discussed at the May 30 hearing," Order, ECF 73 – how to "tee[] up" the Title II and Section 504 issues for interlocutory review, App. 18a. Accordingly, the parties developed a schedule focused solely on briefing and resolving those issues. Joint Status Report, ECF 74; Order, ECF 76.

In short, the only reason petitioners had not moved for class certification by December was that they had been told not to in May. And given the parties' prior agreement, there was no reason for them to have moved before then.

Respondent floats the suggestion, citing Federal Rule of Civil Procedure 62.1, that petitioners could have "move[d] for an indicative ruling on class certification during this appeal." Resp. Br. 19. But it cites no case where this has ever been done, and petitioners have found none. Once the district court entered the December order, it was impossible for petitioners to seek class certification. Moving for class certification after the district court had expressly stayed all proceedings would have amounted to pointless defiance.

The Fifth Circuit's rendition of judgment cemented into place the May 30 suspension of petitioners' attempt to obtain class certification. That judgment closed the case without petitioners having received a fair opportunity to obtain class certification. Only by reversing that judgment can this Court provide petitioners the opportunity to which they are entitled.

2. Having a fair opportunity to seek class certification matters because petitioners' complaint raises a paradigmatic class claim. Respondent has taken a categorical position that it has no obligation to ensure that deaf young Texans can benefit from its program. Thus respondent surely has "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2).

Moreover, class treatment is particularly appropriate given the nature of the putative class, which consists of hundreds of deaf young people who must participate in respondent's discriminatory program to be eligible to drive. J.A. 65, 74. Over time, although the continued existence of the class is undeniable, individuals will enter and exit the class simply by growing up. And as petitioners explained, "in spite of the alleged failure to reasonably accommodate, some plaintiffs [may] struggle and complete a driver education course" without being provided the accommodations to which they are entitled. Plaintiffs' Response, *supra*, at 6-7, ECF 60.

This case should proceed as a class action to ensure that neither the short-lived nature of any one individual's claim nor potentially protracted litigation will preclude the class from obtaining the statewide relief Title II and Section 504 provide.

3. Contrary to respondent's suggestion, Resp. Br. 16-17, the absence of a previously filed motion for class certification does not foreclose relation back. That doctrine can bridge the "jurisdictional gap" that occurs when "an individual claim becom[es] moot before the court" has certified a "representative action." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting). Such a

gap arose in this case after the district court on May 30 denied petitioners "a fair opportunity" to obtain the class certification to which they would otherwise have been entitled, *Campbell-Ewald*, 136 S. Ct. at 672. Under these circumstances, the relation-back doctrine enables the district court to certify a class and address its claims.

This Court provides an especially useful illustration of relation back in *Geraghty*. That case concerned a putative class action where the named plaintiff's individual claims had become moot before any class had been certified. 445 U.S. at 394. Nonetheless, the Court held that the case was not moot based on the following reasoning, *see id.* at 404: The plaintiff *could* have gotten a class certified before his individual claims lapsed had the district court not prevented him from doing so. Had a class been certified, the case could have proceeded on the class claims without regard to whether the named plaintiff still had live individual claims. *Id.* at 394; *see Sosna v. Iowa*, 419 U.S. 393, 399 (1975). Thus, because "correctly decid[ing]" class certification would have "prevented the action from becoming moot," the certification would "'relate[] back' to the date of the original denial." *Geraghty*, 445 U.S. at 404 n.11.

The same reasoning applies here. As in *Geraghty*, petitioners had a live individual claim when the district court prevented them, on May 30, 2013, from obtaining class certification (and they had no duty or reason to move for certification earlier). On that date, petitioner Prosper had neither turned 25, nor been able to take the driver education course required by Texas law, nor received a certificate of

completion.[3] Thus, the district court retains the ability here to certify a class, and when it does so, that decision will relate back to May 30, 2013.

Respondent resists *Geraghty*'s application because it believes that the act of filing a formal motion for class certification is the *sine qua non* of relation back. Resp. Br. 17-18. Respondent is mistaken. This Court in *Geraghty* focused on "practicalities and prudential considerations." 445 U.S. at 406 n.11.[4] Its decision turned not on what the plaintiff had done, but on the fact that the district court had prevented him from getting the class certification to which he was entitled. No doubt, there will be some cases where plaintiffs forfeit their entitlement to relation back by failing to move for class certification despite having ample opportunity to do so. But the focus should remain on whether they had a fair opportunity in the first place. Here, they did not.

Nor does this Court's decision in *Symczyk* ascribe talismanic significance to a formal motion, as respondent suggests, Resp. Br. 17-18. The key to *Symczyk* was the "fundamental[]" distinction

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[3] In part because he could not obtain a Texas license, Prosper went the prior month to be with his father in Louisiana. But at the time, he had made no permanent decision to change his domicile. He retained deep roots in Texas, where his mother, his sister, and the aunt with whom he had been living still resided.

[4] As Chief Justice Rehnquist noted with respect to mootness, this Court has a "unique and valuable ability" to "decide a case" that should not be "squandered." *Honig v. Doe*, 484 U.S. 305, 332 (1988) (Rehnquist, C.J., concurring).

between a Fair Labor Standards Act collective action, which "does not produce a class with an independent legal status," and a Rule 23 class action, which does. 133 S. Ct. at 1530. Moreover, in *Symczyk*, this Court could identify "no certification decision to which respondent's claim could have related back." *Id.* Here, by contrast, petitioners have identified that decision: the May 30 suspension of class proceedings.

The leading treatise agrees that "a bright-line test" demanding that a motion have been filed to permit relation back "is not appropriate" when "a representative plaintiff had a live claim at the time of first asserting a representative claim." 13C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3533.9.1 (3d ed. 2008). Thus, earlier this year, the Third Circuit permitted relation back to the filing of the class complaint in a case where no class certification motion had been filed but "the class certification issue was clearly presented to the District Court." *Richardson v. Bledsoe*, 829 F.3d 273, 276 (3d Cir. 2016); *see also id.* at 285-86 (citing cases).[5] Respondent's cherry-picked instances where class allegations were dismissed "when the named plaintiffs' claims become moot before a class-certification motion is filed," Resp. Br. 18, do not

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[5] If this Court were to do what the Third Circuit did in *Bledsoe*, or what this Court has done in cases involving inherently transitory individual claims, Petr. Br. 18-19, relation back would be tied to the third amended complaint. That complaint – filed on January 16, 2013 – is the first one to advance class claims and to include petitioners Prosper and Doe, who both had live claims. J.A. 3.

undercut the commonsense approach this Court embraced in *Geraghty*.

Adopting respondent's categorical requirement that plaintiffs file a motion in order to get relation back, rather than looking at whether plaintiffs have had a fair opportunity to obtain class certification, would burden courts with underdeveloped, "straight-out-of-the-chute" class certification motions. *Bledsoe*, 829 F.3d at 284 (quoting *Church v. Accretive Health Inc.*, 299 F.R.D. 676, 679 (S.D. Ala. 2014)). These "placeholder motions" are "virtually certain to impose administrative costs, unnecessary distractions, and an unhelpful drag on efficiency and judicial economy." *Church*, 299 F.R.D. at 679; *see Wasvary v. WB Holdings, LLC*, 2015 WL 5161370, at *3 (E.D. Mich. Sept. 2, 2015); *Beaudry v. Telecheck Servs., Inc.*, 2010 WL 2901781, at *2 (M.D. Tenn. July 20, 2010).

II. In The Alternative, The Court Should Vacate The Judgment Of The Fifth Circuit.

If the Court disagrees that the class claims remain live, it should vacate the judgment of the Fifth Circuit. The "established practice," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), when a case "becomes moot in its journey through the federal courts," *Karcher v. May*, 484 U.S. 72, 82 (1987), is to vacate the judgment below. The Court's recent decisions in *Alvarez v. Smith*, 558 U.S. 87 (2009), and *Camreta v. Greene*, 563 U.S. 692 (2011), confirm the continued vitality of this "equitable remedy," *id.* at 712.

1. Respondent does not deny that vacatur is the Court's established practice, but it argues it is

inappropriate here because "petitioners' voluntary actions were the sole cause of mootness." Resp. Br. 20. Respondent's argument relies essentially on one case: *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). Resp. Br. 20-26. But *Bancorp* could not be more different along every dimension.

In *Bancorp*, the vacatur-seeking party was a corporate creditor of the respondent. 513 U.S. at 19-20. After it persuaded this Court to grant certiorari, it entered into a stipulation with the respondent that both parties agreed "constituted a settlement that mooted the case." *Id.* at 20. This Court held that Bancorp had "voluntarily forfeited" its right to obtain judicial review of the adverse decision, thereby "surrendering [its] claim to the equitable remedy of vacatur" as an alternative route for wiping the decision off the books. *Id.* at 25.

In contrast to *Bancorp*, petitioners are not trying to prevent this Court from reviewing the decision below. To the contrary, they urge this Court to reach the merits and argue for vacatur only in the alternative.

To be sure, four petitioners did ultimately obtain certificates of completion. Resp. Br. 21. However, they did so not to affect this litigation, but rather to live the independent lives that Title II and Section 504 seek to secure. And they endured the kind of hardships those laws seek to combat. For example, petitioner Doe could not take the in-person courses available to minors because taking one without accommodation would have been futile. She was unable to take an online course until she turned 18. Petr. Br. 12 n.3. Even then, because the course was

not available in ASL – the only language in which she is fluent – and no other accommodation was offered, she had to repeat portions multiple times. The six-hour course took her a full week to complete.

Nor did petitioner Prosper act strategically to moot this case. His turning 25 was not strategic.[6] Nor was his going to Louisiana. Because he could not get a license, Prosper had to turn down employment opportunities and additional responsibilities as a youth minister. J.A. 69. There is no way in which either he or petitioner Doe resembles *Bancorp*'s commercial creditor who deliberately settled a case knowing it had produced unfavorable precedent.

This Court's more recent decision in *Alvarez* confirms that vacatur is appropriate here. *Alvarez* involved a federal civil rights action challenging the way Illinois's forfeiture law operated. 558 U.S. at 90. When this Court learned at argument that there were no longer live disputes about the underlying property, it found the case moot. It then did what it "normally" does: "vacate the lower court judgment." *Id.* at 94.

Respondent attempts to distinguish *Alvarez* in two ways. First, it suggests that there, the "acts causing" mootness were attributable to both parties, whereas here, petitioners' "actions alone" mooted the

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[6] Respondent seemingly agrees that vacatur would be appropriate if petitioners had "all aged out of the driver-education requirement." Resp. Br. 21. That concession is wise. Contrary to Nobel laureate Bob Dylan, one cannot "stay forever young." Bob Dylan, *Forever Young*, *on* Planet Waves (Asylum Records 1974).

case. Resp. Br. 23-24. But the involvement of both parties in mootness-creating acts cannot explain this Court's vacatur practice because both *Alvarez* and *Bancorp* were such cases, and they come out differently. In any event, petitioners have explained why their actions do not disqualify them from obtaining vacatur.

Second, respondent gleans significance from *Alvarez* becoming moot due to resolution of "cases that 'proceeded through a different court system,'" whereas here, the mootness was not attributable to other legal proceedings. Resp. Br. 24 (quoting *Alvarez*, 558 U.S. at 95). True, but irrelevant. The central question in *Alvarez* was whether "a desire to avoid review in *this* case" could be inferred from what had happened elsewhere. 558 U.S. at 97 (emphasis added). Petitioners have already explained why their decision to live their lives and do whatever they could to get driver's licenses hardly expresses "a desire to avoid review." Petitioners' claim to vacatur is thus stronger than the claim in *Alvarez*. U.S. Br. 15.

2. Vacatur would also serve the public interest. Petr. Br. 23-24; U.S. Br. 15-16.

Respondent's suggestion that vacatur is inappropriate because of the inherent value of precedent, Resp. Br. 24, gets things backwards. As this Court has explained, the whole "point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences'" – namely, precedent. *Camreta*, 563 U.S. at 713 (quoting *Munsingwear*, 340 U.S. at 41). Absent vacatur, future plaintiffs hoping to challenge respondent's program would face binding, adverse precedent. They would be able to prevail only by obtaining en banc review or

getting review in this Court. Vacatur is needed to "clear[] the path for future relitigation," *Munsingwear*, 340 U.S. at 40.

Respondent's assertion that "no 'roadblock' exists" because deaf individuals can sue individual driving schools under Title III, Resp. Br. 24 (quoting Petr. Br. 23), looks down the wrong avenue. The possibility that deaf young people may bring a different claim against a different defendant under different provisions of the U.S. Code does nothing to address the roadblock posed by the judgment petitioners seek to vacate. *See* U.S. Br. 15-16. And in any event, respondent's suggested lawsuit will do nothing to produce statewide relief of the kind available under Title II and Section 504.

III. The Fifth Circuit's Decision Is Erroneous.

There is no dispute in this case that respondent is a "public entity" within the meaning of Title II.[7] Nor is there any dispute that petitioners are qualified individuals with a disability.[8] Hence, the only Title II coverage question before this Court is whether the

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[7] Respondent contests whether it currently receives federal financial assistance, thereby subjecting it to Section 504. Resp. Br. 8. This factual question is best addressed on remand. Petr. Br. 27 n.5.

[8] Respondent claims there is some sort of "reasonableness qualification" on the "duty" imposed by Title II. Resp. Br. 29 n.6. That argument misstates the statutory command. Title II protects all "qualified individual[s]," 42 U.S.C. § 12132, defined as individuals with a disability who meet the entity's eligibility requirements "with or without reasonable modifications," *id.* § 12131(2).

driver education program that petitioners seek to participate in and receive benefits from is respondent's. It is.

A. The Program At Issue Is Respondent's, Not That Of Private Driving Schools.

Respondent presupposes that petitioners' lawsuit challenges only "[p]rivate education of drivers" and the failure of individual, privately-owned driving schools to provide reasonable accommodations to individual deaf aspiring drivers. Resp. Br. 28.

In fact, petitioners challenge respondent's own actions in developing a detailed driver education curriculum and dictating how it must be taught; issuing a government certificate to individuals who have learned those materials; and conditioning a practically essential and quintessentially governmental benefit – a driver's license – on earning that certificate, all without accommodating deaf aspiring drivers. These features together establish a comprehensive state program for which respondent must provide reasonable accommodations. The United States agrees. U.S. Br. 18-20. So too do other amici. Amicus Br. of Nat'l Ass'n of Counties et al. 21-24; Amicus Br. of Nat'l Ass'n of Deaf et al. 13-20; Amicus Br. of Paralyzed Veterans of Am. et al. 33-38; Amicus Br. of Tex. Bus. Women, Inc. et al. 13-22.

1. Respondent's argument that the state action doctrine controls here is unfounded. Given that petitioners are suing a public entity for its own actions, the doctrine provides no useful guidance. In any event, the doctrine does not help respondent.

a. Respondent turns to state action doctrine because it claims that the term "services, programs,

or activities of a public entity" is "undefined." Resp. Br. 32. But in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 210 (1998), this Court directed courts adjudicating Title II claims to look at how those words "are ordinarily understood." In everyday parlance, if a state agency develops an educational curriculum or issues government documents or regulations, those would be understood as "services, programs, or activities of a public entity." *See* Petr. Br. 25-29; U.S. Br. 16-28. The governing regulations confirm this commonsense understanding. U.S. Br. 21-24.

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the case respondent emphasizes, Resp. Br. 32-42, underscores why respondent is wrong to invoke state action doctrine. That case involved suit over a "private . . . company's activities." *Id.* 33. State action doctrine might be relevant to whether plaintiffs can sue private driving schools under Title II.[9] But this case presents a far simpler question, and lower courts have treated it straightforwardly: A state is liable under Title II for its activities, including when it arranges for the benefits of those activities to be administered in part by a private actor. *See infra* at 17-18.

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[9] Lower courts "have split on the issue" of whether private actors can be sued as "public entities" under Title II. *Wilkins-Jones v. County of Alameda*, 859 F. Supp. 2d 1039, 1046 (N.D. Cal. 2012). But even there, courts do not seem to draw from state action doctrine. *See, e.g.*, *Edison v. Douberly*, 604 F.3d 1307, 1310 (11th Cir. 2010).

b. If the "significant body of precedent" involving state action, Resp. Br. 32, were relevant, it would actually help petitioners. The "nexus," *Jackson*, 419 U.S. at 351, between respondent and the private driving schools in carrying out the duties set forth in the Texas Administrative Code, the Texas Education Code, and the Texas Transportation Code could not be tighter: by prescribing every aspect of driver education short of delivering respondent's curriculum in the classroom, respondent has "far insinuated itself into a position of interdependence" with the private driving schools, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). This relationship goes beyond one of mere "extensive[] regulat[ion]," Resp. Br. 39. Even calling it a "joint enterprise," *id.* 38, is an understatement. Not only does respondent rely on the schools to deliver the curriculum Texas has concluded young drivers should master in order to ensure public safety, but Texas's requirement creates the consumer demand for the instruction at issue here.

Furthermore, the driver education program is not merely "affected with a public interest," Resp. Br. 36 (quoting *Jackson*, 419 U.S. at 353). Rather, it is integral to an "exclusive state function," *id.* 34. Like "judging elections," "holding a public park in trust," "exercising the power of eminent domain," "operating courts," "making zoning decisions," "running a penal system, and administering elections," – each of which respondent concedes is state action, *id.* 34-35 – determining the eligibility for licenses to drive on public roadways by deciding what young drivers need to know and whether they have learned it is a quintessential government activity.

2. Respondent's program does not cease being the activity of a public entity merely because one aspect has been farmed out to a private actor.

The Attorney General's Title II regulations prohibit public entities from discriminating regardless of whether the public entity acts "directly or through contractual, licensing, or other arrangements." 28 C.F.R. § 35.130(b)(1).[10] Here, respondent has arranged for its curriculum and its certificates of completion to be delivered to individual students in part by private actors. This arrangement is even tighter than a usual contractual or licensing agreement.

Courts and scholars agree that a public entity cannot evade Title II liability by outsourcing one aspect of its activities. *See, e.g.*, *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 910 (9th Cir. 2013); *Hunter v. District of Columbia*, 64 F. Supp. 3d 158, 168-70 (D.D.C. 2014); Amicus Br. of Law Professors 4-9. *Castle* offers a particularly salient example: A state's Title II liability for a prisoner work program does not dissolve when it sends those prisoners to work for a private company. 731 F.3d at 910-11 ("Title II's obligations apply to public entities regardless of how those entities cho[o]se to provide or operate their programs and benefits.").

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[10] Petitioners' argument does not depend on *Chevron*. *Contra* Resp. Br. 49. First, petitioners would win were there no regulation at all. Second, the regulation merits respect because it is "consistent with the text." U.S. Br. 22. Finally, even if the statute were ambiguous, the regulation would be entitled to *Chevron* deference. Pet. App. 11 n.6.

3. Holding for petitioners would not open the floodgates of liability under Title II or Section 504. A consortium of state and local government groups has told this Court that respondent's driver education program "presents a highly unusual, and perhaps unique, circumstance where a public entity's licensing requirements for private persons may fairly be said to represent implementation of the public entity's own services programs or activities." Amicus Br. of Nat'l Ass'n of Counties et al. 21. It is telling that not a single state, county, or local government has filed in support of respondent.

Three mutually reinforcing features of respondent's program explain why holding that it is covered by Title II and Section 504 will not sweep in all regulation and licensing schemes: (1) respondent developed the driver education curriculum and dictates precisely how it must be taught; (2) respondent issues an official government document to signify mastery of that curriculum; and (3) an essential state benefit – a driver's license – is conditioned on respondent's program. *See* U.S. Br. 18-20.

These three factors make clear that applying Title II to respondent's program would not put states on the hook for the terms of all "education necessary to obtain a state license," Resp. Br. 50. If the state's educational requirements for the various fields respondent identifies are anything like legal education – the example to which it devotes the most attention, *id.* 51-53 – the distinction between those requirements and respondent's program is clear. Except with respect to public law schools within a state (which are undeniably covered by Titles II and

III), a state does not write casebooks, package a curriculum that it sends to all law schools, structure that curriculum on a minute-by-minute basis, write law school exams, approve specific law school professors, or issue law school diplomas. People who become lawyers in Texas have learned vastly different things from taking totally different courses at completely different schools. Texas has virtually no responsibility for how their legal educations were conducted. By contrast, Texas has decided literally down to the minute exactly which topics will be covered in its driver education course.

Respondent's additional examples are similarly different from the program here. The state's liability insurance requirement, Resp. Br. 50, resembles the driver education program only in that people need insurance to get a license. But Texas did not create the insurance contracts companies sell to their policyholders in the way it created the content of its driver education program. Nor does Texas issue state insurance certificates to individual policyholders the way it issues completion certificates or numbers to aspiring drivers, an act even respondent concedes "can be characterized as state action," *id.* 40. Nor would ruling for petitioners mean private hospitals would somehow turn into public entities merely because they "perform an important function," *id.* 51. The examples respondent offers involve state regulation of private activities that would exist regardless of the state's involvement. By contrast, the

driver education program that petitioners challenge exists only because Texas created it.[11]

B. Petitioners Have Been Denied The Benefits Of Respondent's Driver Education Program.

Respondent has denied petitioners equal access to two benefits of its driver education program: its curriculum and its certificates of completion.

1. Deaf students who cannot successfully complete the mandated driver education because they cannot understand the instruction have necessarily been denied the benefit of respondent's curriculum.

Even deaf students who eventually manage to complete the course may nonetheless be denied educational benefits. Students proficient in only ASL may learn less, absent accommodation, because they do not fully understand the materials. As a result, these students may lack the knowledge they need to be safe drivers. Holding that respondent has not discriminated against them would be like holding that Tennessee did not discriminate against George Lane because he eventually made it to the top of the courthouse steps by crawling, *Tennessee v. Lane*, 541 U.S. 509, 513-14 (2004).

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[11] Petitioners do not argue that respondent is responsible for all the driver education that occurs in Texas. If a private driving school were to offer an optional course designed for adults over the age of 25, that course would not be a "service, program, or activity" of respondent's.

Respondent ignores this benefit of its program when it suggests petitioners should have sued the Department of Public Safety, Resp. Br. 1-2; *see also* Pet. App. 17-18. Even if that Department would issue licenses to deaf drivers who had not received the required education, petitioners still would have been denied the benefits of that education. It would not be an accommodation, let alone a reasonable one, for a school district to decide that rather than accommodating deaf students, it would simply hand them a high school diploma when they turned 18. So too here.

2. The certificate of completion is yet another benefit of the driver education program. Indeed, by acknowledging that providing these certificates is "state action," Resp. Br. 40, respondent concedes that they are a benefit for purposes of Title II. Texans under the age of 25 cannot receive a driver's license without this official state document. Respondent downplays petitioners' argument that "driving is important." Resp. Br. 27. But it is, especially for people who are deaf. Amicus Br. of Nat'l Ass'n of Deaf et al. 6-8; Amicus Br. of Tex. Bus. Women Inc. et al. 5-10; *see also* Petr. Br. 30-31.

C. Respondent's Commandeering Argument Is Unfounded.

1. Respondent argues that applying Title II to the program here would present "serious concerns of

unconstitutional commandeering."[12] Resp. Br. 42. Not so.

Impermissible commandeering occurs when the federal government uses states as "implements of regulation," *New York v. United States*, 505 U.S. 144, 161 (1992) – in other words, when the federal government forces states to do the work of regulating *others* on its behalf. But Title II does not require respondent to impose obligations on others. Rather, it simply imposes obligations on respondent. And this Court has upheld Title II's application to state agencies without ever hinting at a commandeering defect. *Lane*, 541 U.S. 509; *Yeskey*, 524 U.S. 206. Telling a state agency it has to put ramps in its buildings is not commandeering, even if telling the state it has to sue private building owners to ensure they install ramps would be. So, too, telling respondent that it has to ensure equal access to its driver education program is not commandeering.

Respondent argues that requiring it to comply with Title II would confuse the "assignment of electoral accountability." Resp. Br. 45. If petitioners win this suit and obtain a judgment requiring respondent to accommodate deaf young people, it is certainly possible some Texans will see the changes and think Texas chose them on its own. But rulings

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[12] Anti-commandeering doctrine does not apply to petitioners' Section 504 claim. So long as an entity is not subject to some unconstitutional condition, it remains free to refuse the federal funds and avoid any obligation that would attach to accepting them. *New York v. United States*, 505 U.S. 144, 166-67 (1992).

from this Court have required states to desegregate public schools and facilities and to provide marriage licenses on an equal basis. There was no commandeering there. Nor is there here. This is what the Supremacy Clause means.

2. Respondent places the cart before the horse with its fear that particular remedies might constitute commandeering, *see* Resp. Br. 42-46. Holding that respondent's driver education program is covered by Title II does not determine how respondent should comply. As the United States explained, "[i]f petitioners were to prevail, the State would have flexibility in suggesting an appropriate Title II remedy to the district court." U.S. Br. 30.

Petitioners and the United States have already identified several remedies respondent might propose to the court to fulfill its federal responsibilities. Petr. Br. 36; U.S. Br. 31. The Fifth Circuit, in its discussion of redressability, also suggested multiple potential remedies that would steer clear of any commandeering concern. Pet. App. 7-8.

One potential remedy in particular shows just how unfounded respondent's commandeering argument is. In their fourth amended complaint, petitioners alleged that respondent had already "developed a written model course" that it made readily available, and suggested that respondent could comply with its federal obligations by "develop[ing] a course intended for the hearing-impaired – perhaps a video course in ASL." J.A. 88. This kind of modest, one-time investment by respondent in its own program would raise no constitutional concern whatsoever.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed and the case remanded for further proceedings in the district court.

Respectfully submitted,

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October 26, 2016

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DONNIKA IVY, GRACIELA VELASQUEZ, BERNARDO GONZALEZ, TYLER DAVIS, ERASMO GONZALEZ, ARTHUR PROSPER IV,	)	AU: 11-CV-00660-LY
	)	AUSTIN, TEXAS
Plaintiffs,	)	
vs.	)	
ROBERT SCOTT, ROBERT REYNA, MICHAEL WILLIAMS, JERRY PALMER,	)	
Defendants.	)	MAY 30, 2013

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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEE YEAKEL

****

APPEARANCES:

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Proceedings recorded by computerized stenography, transcript produced by computer.

* * *

[2] (Open Court)

THE COURT: We're here this afternoon on the motions in Cause Number 11-CV-660, *Ivy v. Williams*. Let me get announcements by the parties, starting with the plaintiff.

MR. SANDERS: Good afternoon, Your Honor. Joe Sanders and Olga Kobzar on behalf of the Plaintiffs.

MR. BERRA: And Joseph Berra on behalf of Plaintiffs.

THE COURT: And for the defendant?

MS. KANE: Good afternoon, Your Honor. Erika Kane from the Office of the Attorney General, here on behalf of the defendant.

THE COURT: All right. Well, basically what we have here – and I wrestled with it a little bit and looked through it and decided it would probably be better to get you-all together before I started ruling – we have got the Commissioner's Third Amended Motion to Dismiss or, In the alternative, For Certification For Interlocutory Appeal under Title 12, Section 1292(b) of the United States Code which was filed in April and then supplement to the motion filed May the 9th. And I also have Plaintiff's response. And then I have the defendants' motion, also Commissioner Williams' motion, to modify the schedule order and stay discovery filed at the same time.

Obviously, we have an existent scheduling order that we rendered January the 2nd. But since then the complexion of [3] the case changed to a class action.

What I'm looking for and what I desire your help on is what is the most efficient way to handle this. I have rendered the previous order, which is referred to in part of the alternative for the commissioner's motion, which has effectively stated that the case remains live and should not be dismissed at this point for several reasons, all expressed in my previous order on the motion to dismiss rendered last September.

Seems to me issue at that juncture is joined on whether the State is correct, and this is [s]imply a matter of licensing agencies to conduct driver license courses or whether or not it is more than that and invokes the ADA because there is no other way to obtain a driver's license if you are in the certain group that is discussed in the pleadings.

So I guess my first question is: Now that the case has changed complexion and is looking to build toward

a class action as opposed to just an action between these parties, whether it would be more appropriate to certify this case for interlocutory appeal and decide whether it should remain in court at all.

That was not a consideration, in my opinion, when I rendered the initial order because I thought it was better just to get to a resolution of it at that point, and then the Circuit would have everything in front of it in a fully [4] developed order. My concern is that if the Circuit disagrees with me and agrees with the State, it seems like a – not a best use of our time to go all the way through a class certification hearing, perhaps certify a class, go through a class trial, and then have it go to the Circuit.

So those preliminary statements having been made, since it is effectively Ms. Kane's motion, I will hear from the State on this and then I will hear from the plaintiff on this.

MS. KANE: Thank you, Your Honor. I think the Court understands the concern. I think when we left the Court back in January at the beginning of the year, the case was not a class action and the Court had denied the motion to dismiss as to the second amended complaint. We were viewing this as we'll just take this through summary judgment.

After the class action complaint was filed in late January, we did start discussing scheduling issues. And this brought back anew this issue of whether or not – this very preliminary issue that it's the State's position as a matter of law, interpreting ADA with respect to the statutes that exist in this matter on TEA, as something that would be proper, appropriate for certification for interlocutory appeal and is probably the most efficient

way of disposing, or at least having this case reviewed at this juncture, rather than delving into class action issues and, particularly, issues related to the merits – the ultimate merits and conclusion of this case.

[5] We had actually agreed with the plaintiffs that we would be open to the idea of at least teeing up the question of certification at the same time – certification of the class, excuse me – and having that hearing and then have the court have the opportunity to, if it wants, to decide on the class certification, decide on the motion to dismiss. And then those would all be able to go up to the Fifth Circuit if the Fifth Circuit decided to take those appeals.

And we're open to that. But, certainly, what I believe is still on the table is an idea that this case would be tried all the way through to the merits fully. And we just believe that because the issue – this predicate issue with respect to whether or not TEA is even the proper party to be bringing this suit against given the scheme and given we have third-party private entities that actually provide the commercial driving education courses that are really at issue in this case and deliver those services, that really that predicate issue is ripe for review, right for appeal, and would be proper for certification.

But, in the alternative, at most we think it would be proper to have this case teed up and have that issue teed up alongside the class certification issue through a hearing and then let that go up to the Fifth Circuit if the Fifth Circuit decided to take it.

THE COURT: Thank you.

[6] All right. Mr. Sanders, Ms. Kobzar, Mr. Berra, whoever wants to proceed.

MR. SANDERS: Thank you, Your Honor. There's really three issues. One, the way that the purported legal issue to be taken up on appeal at this juncture has been framed, I don't think that that particular issue has been decided. I think that –

THE COURT: What issue do you think has not been decided?

MR. SANDERS: Whether or not the agency can essentially license away its ADA obligations in a way that it no longer has those obligations on its own. I think the Court's order actually says that[.] While the court remains dubious of that argument, it's not addressing it by this order.

And I will find that here shortly.

But I don't think that that's an issue that cannot be overcome working together, because I think we probably do agree on – on the main issue, that there is a threshold legal issue. And if we properly frame it, it could be properly presented to the Fifth Circuit.

THE COURT: Well, let me add one thing here. Whether I agree with you totally or not, one thing that has changed since I rendered my previous order is we now have a third amended complaint. So if we were to look at structuring this in order to take an interlocutory appeal now, my belief is I [7] would need to, at a minimum, render a new order that brought forward the old order and direct itself to the third amended complaint in order that we don't have a gap procedurally and the court sends it back on the basis that it was – that it was not properly presented.

MR. SANDERS: And that's exactly –

THE COURT: Whether I'm agreeing with you 100 percent or not, I do agree there needs to be some more work done before the case is ready for certification to the Circuit or not.

MR. SANDERS: Right. And that's actually what I was suggesting, is I think we are at a place in the case now where we could sort of clean that up, to use your phrase.

But, secondly – and I think this is very important for this particular case – one of the issues that if this case goes to the Fifth Circuit that the Circuit will need to wrestle with, in my judgment, is the extent to which the agency exercises dominion and control over these licensees and this program. We have certainly alleged that and at least thus far alleged it sufficiently to satisfy the Court on the defendants' motion to dismiss. But we would think that the Fifth Circuit would be aided by us making a record factually on that issue so that if the Fifth Circuit is called to decide it – to decide the issue of the agency's exercise – the extent to which the agency exercises dominion and control, I think that issue would be aided by a record that's a little bit broader than what we [8] have today.

Third, their [sic] exists the possibility that if we go up now, that, potentially, we could have two stops at the Fifth Circuit. If we were to go up now on the gut legal issue –

THE COURT: Well, there's always that risk, because I could certify it and the Circuit might decide not to take it and then it would come right back. Or they could take it and rule and affirm this Court and then it comes back and we need to go up again on the

merits. So we always have the possibility that it will go to the Circuit twice.

MR. SANDERS: Right.

THE COURT: Which you apparently are talking about it going to the Circuit twice in close proximity at the preliminary phase.

MR. SANDERS: Right. Both on the issue of this particular legal issue. And if we sever them, the issue on class certification, potentially. And so to the extent that we are considering this avenue, for the sake of efficiency, I think we ought to also consider that possibility. And so, again, maybe a solution there would be to consider both the class certification issues and the legal issues at the same time so that they can be presented to the Fifth Circuit at the same time.

THE COURT: How far do you-all think you could come to an agreed or stipulated record on those points, because it [9] may be more efficient for the Fifth Circuit to have them both at once. It's not necessarily more efficient for me to have them both at once, particularly in light of what's happening to us on funding and the continued pressure due to Congress's desire not to fund the courts at any meaningful level for the future.

The civil docket is going to start getting squeezed really hard by the criminal docket, and it's going to take longer and longer to deal with civil matters. So if I have to work in a full-blown class certification hearing, that is not the most efficient thing, for me to send the two issues up together. So what is you-all's feeling on that?

I think you can provide me with the additional information I need by agreement to determine the dominion and control issue and to set up at least the

issues that were initially addressed in my September order. But I am not sure that it is best – I'm not sure that it's not – but I'm not sure that it is best to proceed ahead with whether I'm going to certify a class. For one reason, if you can agree on a record in that regard, I think there might be a need for some discovery there and things of that nature and I would not like to wait forever. So what's your response to that, and I'll let Ms. Kane also respond to it.

MR. SANDERS: Well, hopefully, Ms. Kane will agree that we had some preliminary discussions on that issue, the [10] issue of –

THE COURT: I think she'll agree with you that far. I don't know that she'll agree that you resolved anything, but I don't think she'll disagree that you've had some preliminary discussions on the matter.

MR. SANDERS: I don't expect that she will either. Maybe I should have better characterize[d] the discussions, some preliminary promising discussions. I do think that we would need – the plaintiffs would need some additional discovery from the State so that we can better understand the extent to which the agency interacts with the private driving schools and to [sic] extent to which the agency administers the driver education program.

THE COURT: Well, let me interrupt you again, because that's what I do. Lawyers tend to think linearly based on what they learned in law school, and they always let discovery stick its head in because that's a phase of the trial because, as you say, you need to know more about how they interact. I don't know why you need discovery to do that. It is what it is. I don't know why you can't have a discussion with the State and

have the State tell you how it operates and you stipulate to that.

I think I understand it. I think it is really straightforward. I don't know that you need to spend a lot of money and spend a lot of time on being comfortable with your [11] knowledge of what happens between the State and these driver schools.

So we could put this off and give you six weeks worth of discovery, or we could put it off and you could get together and you could reach an agreement and have a stipulation on how it works, because it is what it is. I think Ms. Kane would even agree with that. You know, it can't be that hard.

MS. KANE: No, Your Honor. Our position is that everything that they need to know and that exists is frankly set out in the statute and regulation. And I'm not sure what other information they're seeking that goes beyond that. Or it's published on our Web site, and we've provided that.

THE COURT: What do you think is occurring or suspect is occurring beyond that? Because right now the issue seems squarely teed up for me. They can either do what they're doing or they can't do what they're doing. I don't find it hard to get my arms around it.

MR. SANDERS: I understand that. Maybe I can better explain it through an example. One of our theories of the case and really supporting the relief we seek is that we think the agency has the legal authority and the power to enforce noncompliance by the driving schools. And that enforcement power and [sic] is frankly part of the relief that we seek here.

And in the past – I can't find past examples of the State exercising that enforcement authority. So, for example, [12] there exists in the State's records that I won't have available to me aside from discovery a complaint filed by a hearing disabled person and the State taking action in respect to the private driving school to satisfy that complainant. I think those facts would be – would go directly to the issue that's joined here of whether or not the State has the authority to exercise that kind of control.

MS. KANE: Your Honor, just to respond, that's actually alleged by the plaintiffs. And for purposes of the Rule 12 motion, we have to – the Court and us have to take that as true. And our position is beyond – even if that might be the case, there's still no liability here because of the way this is structured, because the services that are at issue are actually delivered by a nonparty to this suit.

So, again, that's why we come back to the conclusion that we don't believe further discovery is necessary to resolve that legal issue.

THE COURT: Well, I think further discovery may not be necessary if you-all cooperate and come up with a joint statement. And I would suspect Commissioner Williams and his staff could just tell you whether they've ever investigated something or not, and that would solve your problem if you have any lingering doubt about that because I'm sure it will be in the records of the commissioner. And I'm more than happy to accept an undertaking by the commissioner that this has or has [13] not happened.

MS. KANE: And, Your Honor, again, this is attached – allegations and evidence to support this is

attached to their complaint which we're accepting as true for purposes of our motion.

MR. SANDERS: And we got that information through discovery. But I agree with you that we can reach a stipulation provided that there is that open dialogue where we're entitled to informally – rather than the formal discovery procedures to informally inquire of the State of the topics that we're interested in. And then we'll accept as true, just like the Court would, the State's responses. But I'd like to have some avenue, whether it's formally or informally, to obtain that information because I think adding those facts adds color to one of the main legal issues in this case that I think would aid the Fifth Circuit in its determination of those issues.

THE COURT: Well, I think it might be interesting to the Fifth Circuit and it would be interesting to me, but I don't think it aids in the determination. I will tell you this: I really don't care if the State has exercised this power in the past or hasn't exercised this power in the past. But it probably is better to have a record that says whether they have or not.

But I think it is as clear as looking at the statute [14] and determining whether this is just a licensing function or whether it is so intertwined with the ability of the people between the ages of, what, 18 and 25 that don't have parents that teach them how to drive. Is the State abrogating any responsibility that it might have to issue a driver's license by putting it all in the hands of a driver's training school which may not be compliant with the ADA?

I think that's the issue here and the threshold issue because, if the wise people in New Orleans believe that

the system as currently set up by the State is just a licensing function and does not in any way implicate anything else, then that's the issue we want to get over with at this point, or whether the system as established by the State goes further because it is depriving these people in this class of any ability to get a driver's license between the ages of 18 and 25. Then there could be ADA ramifications.

Again, I don't find that hard to put together a record on. And, Ms. Kane, I feel certain that you would be more than happy to sit down with someone in a position to know in the Texas Education Agency and walk through exactly how it works and entering a stipulation on that. And if we later find out that that was false, then we have ways to deal with that.

So I'm just trying – I suspect your clients don't have a lot of money. I don't want to tap more State resources than I need to tap. So it just seems to me that it's a waste [15] of time and effort to do formal discovery in this case when I think it's a – particularly if the State is prepared to stipulate that they do it exactly the way the statute says and do it exactly the way they do it on their Web site, I think that's what the Circuit needs to look at and what I need to look at.

MR. SANDERS: And I think all that makes sense, so maybe the way we could handle this if we could have an amount of time, maybe two weeks, to meet and confer and reach an agreement and report back to the Court the status of that agreement.

MS. KANE: That's fine. I mean what I would suggest is, again, for purposes of posturing as a motion to dismiss order, that if we can communicate gaps that they feel are in the complaint because they need

discovery and we can stipulate to that, if they want to amend their complaint and add all that in so that they pled their best case on these issues and we tee that up again, we're happy to do that to get this in a posture that's in the most efficient way of resolving it.

THE COURT: Yeah. I think it needs some work to get it there, and I'm not opposed to you-all amending it again after you have a chance to discuss. But my tendency is to want to get this issue, this threshold issue, done before we spend any time on anything else.

And it may be – and Ms. Kane and you-all hear me say [16] this a lot – that although I have a propensity to not like *seriatim* dispositive motions, this may very well be a case that now that we're beyond the motion to dismiss, that I have cross-motions for summary judgment on this issue with an agreed summary judgment record to where there's no question before the Circuit but that I considered the outside evidence that would provide it in the agreed record and I did not rely just on the pleadings, that that may be the way to get it in this particular case situated best for the Circuit.

But I'm not going to tell you-all how to practice law. That's something you-all would have to work out. But what I want you to do is work out a platform to get this threshold issue before the Circuit and the Circuit can decide to take it or decide not to take it. And I would look to do that before I conducted a class action hearing on it, because this does involve basic jurisdiction here. And if I don't have it, I don't want to spend any more time on it. If I do have it, then we can proceed forward.

I suspect that if I do have that jurisdiction, that the best course of action might be – nobody has to make a commitment on this now – to concede the class or, if not

concede the class, that I render a judgment. And, of course, the judgment after a hearing, whether class action or not, would certainly affect everybody else in the State that was applying.

[17] So class action to a big – large degree with me is kind of distinction without a difference in this case anyway. I've never seen the State in an instance where you had a class of people that was not certified as a class where a state action or an administrative action was struck down as to one plaintiff does not agree not to enforce it as to similarly situated plaintiffs. So, you know, I think sometimes class actions are asked to carry more weight than they need to carry when you look at the real world context. Mr. Berra, you are up. Would you like to participate?

MR. BERRA: I would, Your Honor, if I may?

THE COURT: You may.

MR. BERRA: Just briefly. One of our concerns, Your Honor, is simply the historic exclusion of the deaf community and having, to some extent, their voice heard and the facts of their situation as they relate to this issue of whether a state-created obligation, how it affects their community.

And just as an example, you know, a common misunderstanding that perhaps a – a written content curse would somehow be accessible to them because there's a presumption that if they've been to school, they can read and write when, in fact, as our experts would show, that is not the case. And that if their first language is American [S]ign [L]anguage, that's a different language.

[18] So there is a sense from our side that the Court would be well served by hearing testimony from our clients and from our experts. Again, the parent-taught course itself, whether a parent can actually do that with their deaf child is another issue.

THE COURT: I'm sympathetic to that, but that's not what we're here for in the first instance. We get to that if we get to the merits. If the case survives at all, we get to that, because I'll say this in Ms. Kane's presence, if it goes to the Circuit and it either comes back down because they didn't want to hear it or it comes back down because they say, No, State's wrong on this thing, then I'm not likely to look favorably on further dispositive motions because I will take that as a sign that you have to develop the record, which either means that the State changes its procedure or we proceed to trial.

So I'm sympathetic – I'm always sympathetic to the argument of people getting their day in court. But as a threshold issue, I don't think where I am is to provide days in court until I am told that this case is appropriate to go forward or whether it's not appropriate to go forward. And so that's where I am, particularly since, as I said earlier, I'm being squeezed more and more on my time that your Congress is getting ready to cut us back to 2006 levels. Unless something changes over the summer, we're going to look back after October [19] the 1st, the beginning of the fiscal year and think sequestration was the happy times because of what they're doing with the budget.

And I just can't be in a position where there is a legal issue that I need to get by of scheduling hearings and trials just so people can be heard until I know they

have a right to be heard. And I'm not convinced at this point that they do. I have made my decision. It needs to be conformed to the current state of things and perhaps one more pleading. But I really do want that issue determined, whether the State is correct and this Court should not involve itself in it at all, before I conduct any hearing with people in here because I simply don't have time to do it.

MR. BERRA: And one other angle, Your Honor, if I might add just for clarification and something we might be able to work out in this discussion on an agreed upon record. But the State raises the issue of redressability, and we've made some arguments in that regard in our briefing. And there are certain areas that the State has the power to do things, for example, as we've learned, there is a – a course for deaf – young, deaf drivers at the School for the Deaf. It's certainly not sufficient to accommodate all of the deaf community. But, again, it shows that there is another factual issue that came out in our information on the matter that relates to the power of TEA to do certain things that would help address this. But, [20] again, it all goes back to the legal issue of whether they actually have an obligation to do that. So I guess another aspect –

THE COURT: The issue to me is whether or not there is a valid argument that the State is not addressing adequately the needs of the hearing impaired people between the ages of 18 and 25 years old to obtain a driver's license by pushing this off to driver's education courses and not enforcing or not demanding of them that they make accommodation for the hearing impaired.

And by doing that, if they are doing that, is that finding a way around a responsibility the State has under the ADA, because I'm looking at a picture that – that broadly transcends and goes beyond the hearing impaired. I'm concerned about precedent here. If the State can set up independent entities to conduct schools and therefore avoid a responsibility it has under federal law, that is the issue that needs to get decided. And I think that needs to get decided in the first instance. And that is of concern to me.

I'm not saying that they're doing it or not doing it. But that is the issue that I would liked [sic] teed up and I would like the Circuit to look at. Because if the Circuit just looks at this and says, No, no. This is fine. There's no violation of the ADA here. This works. The State has legitimately acted here, then I think that runs the table on [21] all the other issues.

And I believe very strongly, if you-all work with one another in good faith, you can come up with a record that has all of this in it. That does not mean that you have to agree with the State. There can be things in an agreed record that say "Mr. So and So" from the State has expressed dah, dah-dah, dah-dah, dah-dah, but "Ms. So and So," someone you know, perhaps a party, perhaps not, specifically says that is not the way it occurred with regard to her or with regard to someone else.

Don't think that an agreed record is an attempt to trick anybody into something where they make concessions they don't need to make. I just can't see here where going through a discovery process enhances the record beyond what you-all could sit down and put

together. If it does, then we have no choice to delay this thing, which I don't want to do.

I will admit to you-all that I am not pleased that you interjected the class action into this at the stage of this proceeding when you did. I was prepared to proceed forward on what we had in front of us and get the case to the Circuit as quickly as I can. But you have a right to plead what you want to plead, and you have the right to represent your clients in the best possible way. But I don't think a class action enhances anything in this lawsuit and gets you closer to a resolution of the issues that you want resolve[d]. And I'll just [22] tell you that straight-up. I think on the existent pleadings, we could have proceeded to a quick trial in this case and gone forward. But that's your decision. I just say that. I think you have – you have created more problems than you've solved, but you have a right to determine you want to proceed as a class action. So I'm not talking you out of that.

But now that you've done that, I want to get this threshold issue that was originally addressed by me in September to the Circuit as quickly as I can get it to the Circuit. So that's where we are.

MR. SANDERS: Well, then maybe – I don't know your particular schedule, but maybe three weeks would be enough to confer?

MS. KANE: I was going to say, given – if that's the Court's intent, would it make most sense – I don't think we have in front of the Court any kind of proposed order that contemplates a schedule that's specifically directed to getting the best complaint on file – getting our motion to that best complaint on file and

getting everything teed up so that you can issue an order on this predicate issue.

THE COURT: All right. Let me make it real easy for you. I vacate the existing scheduling order. That's my order right now. And we will do an order that vacates that. So no one is operating to their detriment under my previous scheduling order.

[23] Now, what I want to do is give you some time to discuss both sides amending their pleadings, seeing if you can work out an agreed record, and seeing if this is better teed up on cross-motions for summary judgment on the law. Or – and I'm [n]ot suggesting we do it. Maybe we can do it on a subsequent motion to dismiss. But the motions, anything I'm going to rule on, has to be directed solely at the last live pleadings of the parties in order that we have a record that will make some sense to the Circuit.

Now, I'm likely not to change my findings in my September order, so you can rely on that, and I will bring that order forward. But I think we're going to need a new order, which will be the stuff of the interlocutory appeal if I certify it for interlocutory appeal.

Now, how long do you think you need to have discussions on that? And I'm not pressing you on this. I'm going to be, unless I am luckier than I think I am, in a trial the next two weeks anyway on a highly volatile police shooting case here in Austin and I'm not even going to think about your case while I'm trying that case because I'm going to have all on my plate. So I don't mind giving you a reasonable period of time to sit down and see what you can work out. I'm not pushing you on it.

So what do you think, in your best professional judgment as the competent lawyers you are, what a reasonable [24] time would be to discuss this? You may need more than one get-together. You may need more than one phone call.

MS. KANE: I think that the limine factor is going to be what claims they feel they need to have the record they want on this issue.

THE COURT: So that probably involves –

MR. SANDERS: One month.

THE COURT: – having an initial conference and then Ms. Kane talking to her people about it. Ms. Kane can tell her people that I strongly urge them to be cooperative on this because, as I said, I believe it is what it is. And it's – you know, we ought to be able to do it. So then y'all may get back together. She's going to have to talk to her clients. You-all are going to have [to] talk among yourselves and talk to your clients. I mean, I understand how it works. So did I hear you, Mr. Sanders, a month?

MR. SANDERS: Yes, you did, Your Honor.

THE COURT: All right. That would get us – do you think that's fair, Ms. Kane?

MS. KANE: That's fine.

THE COURT: Okay. We're here at the end of May, so that would get us to the end of June.

Why don't I say I want a status report on or before June 28th, 2013 that tells me what you have agreed upon. You don't have to file your motions or amended pleadings. And then [25] within that status report, if you have agreed on a procedure, give me what your

proposed dates are for future filing. And if I think we need to get back together, we'll get back together. Otherwise, I'll render an order pretty much based on what y'all say.

I spend most of my time on this bench dealing on what lawyers don't agree on, not what they do agree on. So I feel certain if you have agreed on something, I'm going to let you have your way with it. And I strongly urge you to agree on something. I think it can be done. I don't think it is a hard thing.

You need the cold comfort that you know everything. The State needs the cold comfort that they've got it presented in the light where they can make their legal argument first to me and second to the Circuit. And I think that's just really where we are here.

MS. KANE: We can work this out, I'm sure.

MR. SANDERS: I agree.

THE COURT: All right. Anything else we need to take up or discuss while I've got you-all here?

MS. KANE: Not from us. That's it. I'm assuming, to the extent – to the extent the plaintiffs wish to file an amended complaint, the Court is granting leave for that so that we can get –

THE COURT: Put it all in your status report. If the [26] plaintiffs feel a need to have an amended complaint because they don't think they have pleaded this as adequately as they would like, they can. And, of course, you get the opportunity to file an amended answer. It goes without saying.

MS. KANE: Thank you.

THE COURT: So think about your best, clearest pleadings that frames this issue and protects your record on any other issue you might want to bring later. And then what we do with the record and whether we can do it on a new motion to dismiss or whether you think cross motions for summary judgment would be appropriate. Those are the things I want you to talk about.

I want you to talk about the procedural structure to get this issue before me so I can rule on it in the first instance and the Circuit can rule on it, if they desire to do so, in the second instance. Because I am not opposed to certifying this for interlocutory appeal because I think if the Circuit believes the State's scheme is appropriate, then that ends the whole thing and we don't go any farther than that. And I don't mean "scheme" in a derogatory way.

MS. KANE: And I can say, too, Your Honor, depending on whatever comes out of the Circuit, then Defendants' position may change in the case going forward to the extent the case comes back. So it does have a great effect however it's resolved.

[27] THE COURT: I've never had an instance either on the State bench or this bench where the State has refused to follow as precedent something that's come out of the Circuit, whether it was formed as a class action or not. So I think we can get there from here.

MR. SANDERS: I agree.

THE COURT: Mr. Sanders, anything else?

MR. SANDERS: Nothing further, Your Honor.

THE COURT: Mr. Berra?

MR. BERRA: Nothing further, Your Honor.

THE COURT: Ms. Kobzar, you have been the most enthusiastic participant in this. Is there anything you'd like to say?

MS. KOBZAR: No, Your Honor.

THE COURT: Ms. Kane, anything further?

MS. KANE: No. Thank you for your time, Your Honor.

THE COURT: All right. Thank you-all. I appreciate you're cooperating together. The Court's in recess.

(End of transcript)