No. 15-486

In The Supreme Court of the United States

DONNIKA IVY, ET AL.,

Petitioners,

v.

COMMISSIONER MIKE MORATH,
TEXAS COMMISSIONER OF EDUCATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Petitioners' challenge to a state agency's refusal to comply with the disability statutes through use of a public/private licensing scheme presents an issue of great constitutional importance that this Court should address. The question of whether a state can avoid its obligation to ensure equal access to a state program unless there is an express contractual relationship between a state agency and its private vendor is pressing, recurring, and critically important to disabled individuals whose rights are protected under the ADA.

The Texas Education Agency's ("TEA") assertion that there is no meaningful lower-court confusion as to this question misses the mark because, as the Fifth Circuit itself recognized, this is an important area of law for which courts have little guidance. This Court should also reject TEA's argument that this case is an unfit vehicle for addressing this question due to the change of the agency in charge – the applicable law has not changed substantively, and the Federal Rules of Civil Procedure provide a mechanism to address a transfer of interest such as this one. Petitioners respectfully request that their petition be granted.

I. Recent Amendments do not change the impact of this case.

The TEA incorrectly argues that this case will have no meaningful future implications because Texas House Bill 1786 ("HB 1786") placed the Texas

Department of Licensing and Regulation ("TDLR") in charge of licensing and regulating driver-education schools in Texas. Opp. 6, 8. While HB 1786 revised the language of the Texas Education Code to replace the TEA with the TDLR as the agency in charge of driver education, it did nothing to alter either the fundamental issues or the potential impact of this case. The minor changes to the Texas Education Code made to accommodate the agency transfer can be addressed in the Petitioners' brief on the merits. But the fact remains that Petitioners were denied access to a mandatory driver-education program managed by the State of Texas, a program that continues in an identical structure under HB 1786. Petitioners' causes of action and injuries remain intact, and future generations of disabled individuals will continue to be denied access to the driver-education program because of the state's strategic use of private licensees to perform government functions. That the TDLR now administers the state's driver-education program does not change this reality.

If nothing else, the move of driver education from the state's education agency to the agency in charge of licensing highlights the ways in which states can restructure program administration to minimize their Americans with Disabilities Act ("ADA") liability. Left unchecked, this type of restructuring will persist unless this Court speaks on the issue of public agencies' Title II liability in the context of public/private program administration arrangements.

Further, Rule 25(c) of Federal Rules of Civil Procedure anticipates that situations such as this one may occur – namely, that an interest in a lawsuit may be transferred while the case is pending – and allows cases to continue, uninterrupted, in such situations. Specifically, the rule provides that "[i]f an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party." Fed. R. Civ. P. 25(c). Rule 25(c) is "designed to allow an action to continue unabated when an interest in a lawsuit changes hands, rather than requiring the initiation of an entirely new lawsuit." *ELCA Enterprises, Inc. v. Sisco Equip. Rental & Sales, Inc.*, 53 F.3d 186, 191 (8th Cir. 1995) (quoting *General Battery Corp. v. Globe-Union, Inc.*, 100 F.R.D. 258, 261 (D. Del. 1982)) (internal quotations omitted). The Eighth Circuit further explained that "[t]he rule expressly permits parties to continue in an action, even if they do not remain the real party in interest, as long as the cause of action itself survives the transfer to the new party." *Id.* Here, it unmistakably does.

The TEA's interest in managing the Texas driver-education program was transferred to the TDLR through HB 1786. In fact, HB 1786 is titled, "Transfer of Driver and Traffic Safety Education from the Texas Education Agency and the Department of Public Safety to the Texas Department of Licensing and Regulation; Changing the Amount of Certain Fees." 2015 Tex.

Sess. Law Serv. Ch. 1044 (HB 1786). When one state agency is named the successor of another, an interest is transferred for Rule 25(c) purposes. *See, e.g.*, *Organic Cow, LLC v. Ctr. for New England Dairy Compact Research*, 335 F.3d 66, 71-72 (2d Cir. 2003) (explaining that one way to evaluate whether there has been a transfer of interest for Rule 25(c) purposes when a government agency, commission, or corporation expires is to determine whether Congress (or the state legislature) appointed a successor in interest or established a method for identifying such a successor). Here, the Texas Legislature explicitly transferred the TEA's interest in driver education to the TDLR. Thus, there has been a transfer of interest sufficient for Rule 25(c) to apply here. Additionally, because the transfer in interest occurred during the pendency of this action, Rule 25(c) applies. *See, e.g.*, *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1407 (11th Cir. 1998) (citations omitted) ("Rule 25(c) applies only to transfers of interest occurring during the pendency of litigation and not to those occurring before the litigation begins."). Therefore, this action may continue against the TEA unless the Court, on motion, orders the TDLR to be substituted in the action or joined with the TEA. *See* Fed. R. Civ. P. 25(c); *see also* § 1958 Transfer of Interest in Action, 7C Fed. Prac. & Proc. Civ. § 1958 (3d ed. April 2015) ("The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred.").

The TEA's assertion that this case will have no meaningful future implications is incorrect. Even if the TDLR is not substituted or joined in this case, any judgment of this Court will be binding on the TDLR. *See, e.g.*, *Froning's, Inc. v. Johnston Feed Serv., Inc.*, 568 F.2d 108, 109-10 (8th Cir. 1978) (explaining that plaintiff's successors-in-interest would be liable for any counterclaim recovery, even though they were never substituted as plaintiffs); *F.D.I.C. v. SLE, Inc.*, 722 F.3d 264 (5th Cir. 2013) (holding that a company that was the successor-in-interest to the original plaintiff was allowed to file a "Revival Motion" to revive a stipulated judgment entered into ten years prior by original plaintiff, even though company was never substituted as plaintiff); § 1958 Transfer of Interest in Action, 7C Fed. Prac. & Proc. Civ. § 1958 (explaining that under Rule 25(c), an action can be continued by or against the original party after an interest has been transferred, and the judgment will be binding on the successor-in-interest even if the successor is not named).

Because the TDLR, as the TEA's successor-in-interest, will be bound by the ruling of this Court, the future implications of this case have not changed. To find otherwise would only encourage states to shuttle programs from agency to agency, perpetuating a perennial shell game as a means to avoid Title II liability altogether.

II. This Court should grant the Petition to resolve pervasive confusion as to when Title II liability arises in a public/private arrangement.

Despite the TEA's assertions to the contrary, a careful review of the case law reveals that no clear test has been articulated to determine whether and when dual Title II and Title III liability arises. This reply will not belabor the point, as it has been extensively addressed in the Petition, but a brief summary of the confusion and lack of consensus amongst the lower courts regarding Title II liability in a public/private arrangement is warranted.

The state courts have not articulated a consistent test in this context. In *Paxton v. State Dep't of Tax and Revenue*, the West Virginia Supreme Court indicated the amount of control exercised by a public entity over a private one plays a part in determining whether Title II applies to the public entity. 451 S.E.2d 779, 785 (W. Va. 1994). Yet the Virginia Supreme Court downplayed the importance of control the public entity exercises over a private actor, and instead focused on whether the public entity was "responsible for the operation" of the program or activity at issue. *See Winborne v. Virginia Lottery*, 677 S.E.2d 304, 307 (Va. 2009). The TEA's assertion that these cases are distinguishable because they deal with programs that are "provided" by a public entity is not grounded in fact, and, in any event, fails to explain why the reasoning from these cases should

not apply in cases like this one, where it is asserted that a public agency is "running" a state program.

There is also confusion among federal courts as to when dual Title II and Title III liability arises. For example, the United States District Court for the Middle District of Florida held the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") was not responsible for an ADA violation carried out by a private DUI school it licensed because "the DHSMV provides a plethora of services, only one of which is to license the DUI programs to these private entities and then regulate and supervise the programs." *Wendel v. Florida Dep't of Highway Safety & Motor Vehicles*, 80 F. Supp. 3d 1297, 1306 (M.D. Fla. 2015). On the other hand, the United States District Court for the District of Colorado held that Title II's application is not decided based on how many services an agency provides, but rather limited "to programs *inherent* to the public entity." *Reeves v. Queen City Transp.*, 10 F. Supp. 2d 1181, 1185 (D. Colo. 1998) (emphasis added). Finally, the United States District Court for the Northern District of California focused its analysis on whether the public entity formally contracted with the private entity to carry out a portion of the state program when deciding whether Title II applies. *See Indep. Hous. Servs. of San Francisco v. Fillmore Ctr. Assocs.*, 840 F. Supp. 1328, 1344 (N.D. Cal. 1993).

Taken together, these state and federal cases do not provide a clear test to determine whether and when dual Title II and Title III liability arises and

often seem to contradict each other. The TEA's argument that "these cases reflect an emerging consensus in the law" is simply false. *See* Opp. 13. This Court's guidance is necessary to articulate a test to determine the state's duty to provide equal access under the ADA in public/private program arrangements. Without such guidance, conflicting and contradictory interpretations of the scope of Title II liability will continue and disabled individuals' right to obtain equal access to state programs and services will be at the mercy of inconsistent interpretation of the arrangements a particular state elects to put in place. That status quo directly contradicts Congress's clear intent to eliminate disability discrimination. *See* Findings and Purposes of ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553 (stating that Congressional intent in enacting the ADA was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage.").

III. The TEA's attempt to revive jurisdictional concerns is meritless and should be disregarded.

The TEA's argument that this case is "a poor vehicle because there are jurisdictional concerns" is unpersuasive. Opp. 19. The TEA argues that "Petitioners lack standing because their claims are neither fairly traceable to the TEA nor redressable through

this litigation." Opp. 19. This argument was rejected by district court and the Fifth Circuit, and should likewise be rejected by this Court. Although Petitioners bear the burden of establishing jurisdiction, "at the standing stage, the Court must presume the validity of the Plaintiff's legal theory." *Equal Rights Ctr. v. Dist. of Columbia*, 741 F. Supp. 2d 273, 289 (D.D.C. 2010) (internal quotations omitted). Hence, the Court must assume that TEA has discriminated against Petitioners because of their disabilities, as Petitioners have asserted. Moreover, Petitioners' injuries – their inability to receive the course-completion certificates they need to apply for state-issued driver licenses – is the result of the state's refusal to ensure equal access to driver education. Petitioners' claims are redressable through this litigation even after the TEA's interest in managing the state's driver-education program has been transferred to the TDRL. As explained above, any judgment in this case, whether the TDRL is substituted or not, is binding on the TDRL.

Finally, the TEA asserts that "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." Opp. 22. This argument has been raised before and disregarded by the courts below as inapplicable. *Printz v. United States*, cited extensively by the TEA, explains that commandeering exists when

Congress tries to force state officials to take certain actions to enforce federal law, in interference with the states' basic exercise of sovereignty. *See* 521 U.S. 898, 925-33 (1997). There is no question that the ADA applies to both state agencies and private actors, independently. The question presented in this case is whether a state agency can claim compliance with its independent ADA obligations while failing to ensure that a mandatory state program that agency administers is accessible to the disabled. As the lower courts have recognized, this case does not seek to force an agency to enforce the ADA by making the private driving schools come into compliance. The TEA's commandeering argument does not bar review by this Court.

CONCLUSION

The "problems" the TEA purports to find in Petitioners' case are nothing but strawmen born of its own imagination. The Fifth Circuit below acknowledged the confusion and lack of guidance on the question of when a public/private arrangement invokes an agency's Title II obligations, which are manifest across the state and federal court cases on this important issue. Because the Fifth Circuit incorrectly held that the state's involvement with Texas driver

education did not rise to the level of a "service, program, or activity" of the state, perpetuating the confusion, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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