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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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the prohibitions against disability discrimination in Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), apply to Texas' development and administration of a state-designed driver education curriculum and issuance of course completion certificates that are prerequisites to obtaining a Texas driver's license.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioners, who are Plaintiffs-Appellees below, are Donnika Ivy; Bernardo Gonzalez; Tyler Davis, as next friend of Juana Doe, a minor; Erasmo Gonzalez; and Arthur Prosper IV, individually and on behalf of all others similarly situated (together, the "Petitioners"); and

Respondent, the Defendant-Appellant below, is Commissioner Mike Morath, in his official capacity as head of the Texas Education Agency.

There are no corporate parties and no parent companies or publicly held companies owning any corporation's stock.

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BRIEF FOR PETITIONERS

Petitioners Donnika Ivy et al. respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1-32) is published at 781 F.3d 250 (5th Cir. 2015). The opinion of the United States District Court for the Western District of Texas (Pet. App. 33-55) is unpublished.

JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title II of the Americans with Disabilities Act of 1990 (ADA) provides, in pertinent part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Section 504 of the Rehabilitation Act of 1973 provides, in pertinent part:

> (a) No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to

> discrimination under any program or activity receiving Federal financial assistance . . . .
>
> (b) "Program or activity" defined
>
> For the purposes of this section, the term "program or activity" means all of the operations of—
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . .

29 U.S.C. § 794.

STATEMENT OF THE CASE

1. It is illegal for a Texas resident to drive an automobile on the State's roads without a valid Texas driver's license. An aspiring driver under age 25 cannot obtain that license unless he or she has completed a driver education course approved by the Texas Education Agency (TEA or Agency)[1] and can produce a driver education certificate issued pursuant to Tex. Educ. Code § 1001.055. This certificate of

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[1] In 2015, Texas transferred the responsibility for driver education from TEA to the Texas Department of Licensing and Regulation (TDLR). The statute effecting the transfer states that the program "is transferred without change in status to the Texas Department of Licensing and Regulation, and the Texas Department of Licensing and Regulation assumes, as appropriate and without a change in status, the position of the former governing bodies in an action or proceeding to which one of the former governing bodies is a party." Act of April 30, 2015, 84th Leg., 2015 Texas House Bill No. 1786, § 72(b)(3). For ease of reference, petitioners will continue to refer to TEA as the relevant agency; TDLR's Chairman can be formally substituted for respondent Morath on remand.

completion is a "government record" under Texas law. 16 Tex. Admin. Code § 84.100(12).

Texas does not provide face-to-face instruction or course-completion certificates directly. An individual under age 18 may complete either "an approved parent-taught course" under the direct supervision of one of a specified list of relatives, Pet. App. 38, from "materials (i.e. lesson plans and other resources)" that are "department approved," 16 Tex. Admin. Code § 84.500(b), or a course offered by a TEA-approved driver-education school. The classroom component of the course lasts at least 32 hours. *See* Driver Education and Safety—Frequently Asked Questions, *available at* http://tinyurl.com/j9bgvc9 (FAQ4) (last visited Aug. 19, 2016). The district court found that "[f]or individuals age 18 to 25, however, the only option available to obtain the required Agency course-completion certificate is to take an Agency-approved course at an Agency-approved privately operated driver education school." Pet. App. 38-39; *id.* at 3 n.2 ("assum[ing] without deciding that the parent-taught class is not available to those over 18 years old"). *See* Tex. Transp. Code § 521.1601 (requiring that an applicant for a license "submi[t]" a driver education certificate showing proof that the applicant "completed and passed" the required course); 16 Tex. Admin. Code § 84.117 (providing that driver education certificates "shall be issued only to primary driver education schools"). The classroom component of a course for these young adults lasts at least six hours. *See* Driver Education and Safety—Frequently Asked Questions, *available at* http://tinyurl.com/havc6wv (FAQ1) (last visited Aug. 19, 2016).

Texas law authorizes TEA to control virtually every aspect of the operations of a TEA-licensed driving school, from establishing the curriculum, Tex. Educ. Code § 1001.101, to designating the textbooks and other educational materials, *id.* §§ 1001.101, 1001.1015, to licensing the individual instructors, *id.* §§ 1001.251, 1001.253-1001.256, to controlling the issuance of driver education certificates, *id.* § 1001.056. TEA can license a school only upon determining that it complies with "all county, municipal, state, and federal regulations." *Id.* § 1001.204(7); Pet. App. 7.

TEA has exercised that control to address virtually every aspect of how driver education is conducted in Texas. *See* 16 Tex. Admin. Code § 84.100 *et seq.* TEA's regulations govern the precise topics to be covered (for example, "[t]raffic control devices," "[m]anaging risk," and "[c]ooperating with other roadway users"), *id.* § 84.106(b)(2)(A)(v); the number of minutes to be spent on each topic, *id.*; the order in which some topics should be covered, *id.* §§ 84.106(b)(1)(E), 84.106(b)(2)(A)(v)(IX); the maximum amount of time for each break the student is permitted to take, *id.* § 84.106(b)(1)(B); the number of students taking the course and physical aspects of classroom layout, *id.* § 84.106(b)(2)(A)(vi)(IV); and the grade a student must obtain on the official Texas Department of Public Safety test of highway signs and traffic laws, *id.* § 84.106(b)(2)(A)(vi)(IX)), which the State permits TEA-licensed driver education schools to administer, *see* Tex. Transp. Code § 521.1655(a).

A student who successfully completes the TEA-prescribed curriculum at a TEA-licensed school is entitled to a driver education completion certificate—

the government document a person under age 25 must submit to the Texas Department of Public Safety before that agency may issue a driver's license, Tex. Transp. Code § 521.1601. TEA exhaustively regulates every aspect of the certificate-granting process and collects a fee for each certificate a school confers on a student. *See* 16 Tex. Admin. Code §§ 84.216-84.217; Tex. Educ. Code § 1001.055(17).

Individuals who are deaf or hard of hearing are eligible to receive a Texas driver's license. *See* Tex. Transp. Code § 504.204 (specialty license plates for deaf drivers); Tex. Occ. Code § 1701.253(l) (mandating peace officer training on interacting with deaf drivers). Furthermore, two Texas remedial programs for already-licensed drivers—the Driver Safety Program (for individuals who have received traffic citations) and the Drug and Alcohol Driving Awareness Program (DADAP)—expressly provide that an applicant for State approval to deliver those forms of instruction must submit, as part of the application, "a program content guide that includes . . . a statement of policy addressing entrance requirements and special conditions of students, such as the inability to read, language barriers, and other disabilities." 16 Tex. Admin. Code § 84.208(a)(1)(B)(iv) (driver safety education providers); *id.* § 84.305(a)(1)(B)(iv) (DADAP).

By contrast, TEA's regulations governing driver education for young people ignore completely the needs of aspiring drivers who are deaf (or who have any other disabilities). They require nothing of applicants for driver education school licenses showing that those schools will deal with the special conditions of students with disabilities. They require no express

undertaking by driver education schools that those schools are, and will remain, in compliance with the Americans with Disabilities Act, despite the clear legislative directive for TEA to determine whether an applicant complies with "all . . . federal regulations." Texas Educ. Code § 1001.204(7). And when TEA was made aware that deaf aspiring drivers were being refused accommodations by driving schools across Texas, TEA took the position that it was not obligated to do anything unless and until the United States Department of Justice "found a violation by a particular driving school." J.A. 72.

2. At the time they became plaintiffs in this case, four of the petitioners (Donnika Ivy, Bernardo and Erasmo Gonzales, and Arthur Prosper IV) were between the ages of 18 and 25. The fifth petitioner, Juana Doe, was under the age of 18. Pet. App. 40.[2] Each of the petitioners has a significant hearing disability. For several of them, American Sign Language (ASL) is their first language, and they have only limited English proficiency.

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[2] Petitioner Ivy filed the initial complaint solely as an individual action. The second amended complaint added Graciela Vasquez as representative of her sons Bernardo and Erasmo Gonzales, who were then minors. The third amended complaint added petitioner Prosper, added Tyler Davis (as representative of petitioner Doe), named the Gonzales brothers as plaintiffs (their having turned 18 in the interim), and sought to proceed as a class action. J.A. 33, 43-49. Because this case is before the Court on a motion to dismiss, all of the factual allegations in petitioners' fourth amended complaint must be taken as true. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

Wanting to obtain driver's licenses, each of the petitioners had contacted TEA-licensed driving schools near where they lived to find out about instruction. They had requested relatively modest accommodations for their disabilities—for example, the provision of an ASL interpreter or of materials in ASL, J.A. 66. Nevertheless, each school refused to provide the necessary accommodations. Pet. App. 40.

As a result of their inability to find a local TEA-licensed driving school that would provide accommodations for their disabilities (and, hence, their inability to obtain driver's licenses), petitioners encountered significant obstacles in their daily lives. Ms. Ivy, a native ASL speaker with limited English proficiency, was unable to obtain employment or continue her education. J.A. 67. She had been enrolled in Austin Community College, but had to stop attending due to lack of transportation. *Id.*

Petitioners Bernardo and Erasmo Gonzalez, twin brothers and native ASL speakers, faced difficulty attending church because their mother (a single parent and their primary source of transportation) attended a church that offers services in Spanish, whereas they were members of a church that provides ASL interpretation for its English-language services. J.A. 68. In addition, Bernardo was unable to participate in extracurricular activities at his public school (where he was provided with a full-time ASL interpreter, *id.* at 67) because his mother was unable to provide transportation. And because the brothers did not have licenses, their employment prospects were limited. *Id.* at 68.

Petitioner Arthur Prosper IV has been deaf since birth. His first language is ASL, and he has only

limited English proficiency. J.A. 69. Mr. Prosper had to turn down employment opportunities at an amusement park in Arlington, Texas, because he did not have a driver's license, and was unable to take on more responsibility as a youth minister in his congregation because that would have required driving to the surrounding counties. *Id.*

Petitioner Juana Doe, a minor at the time she became a plaintiff in this case, was estranged from her parents. Accordingly, she could not avail herself of the opportunity to take a parent-taught class. J.A. 69. She was unable to find a local TEA-licensed driving school willing to accommodate her disability, either for driver education for minors or—when she turned eighteen—for young adults. *Id.* at 70.

3. Having found themselves unable, because of their hearing disabilities, to obtain the driver education and the driver education certificate Texas requires for young people seeking driver's licenses, petitioners brought suit in the United States District Court for the Western District of Texas against Michael Williams in his official capacity as head of TEA (Respondent Morath is Williams' successor in office). In their third amended complaint, petitioners sought declaratory and injunctive relief on behalf of themselves and a class of similarly situated individuals. The proposed class was defined as "[a]ll profoundly deaf individuals in the State of Texas whose primary language is [American Sign Language]" who are (1) between the ages of 16 and 17 and "unable to obtain a Texas driver license because they cannot complete a driver education course without accommodations and cannot take a parent-taught driver education course" (subclass 1) or who are

are between the ages of 18 and 25 and "unable to obtain a Texas driver license because they cannot complete a driver education course without accommodations" (subclass 2). J.A. 43-44. (The proposed definition of the class is repeated in the fourth amended complaint, which is the "live pleading," Pet. App. 4, for purposes of this appeal. J.A. 73.)

Petitioners alleged that Texas' mandatory driver education program for young people is a "service, program, or activity" within the meaning of the Americans with Disabilities Act, 42 U.S.C. § 12132, and that they had been denied equal access to this service, program, or activity because of their disability. J.A. 81. They further alleged that TEA, a recipient of federal funds, had violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), by denying them the benefits of a program or activity receiving federal funds, J.A. 91.

The district court denied respondent's motion to dismiss the complaint. Pet. App. 55. It held that petitioners' complaint stated sufficient facts from which a court could find "that the driver-education program administered by the Agency is a 'service, program or activity of a public entity' under Title II of the ADA and Section 504," Pet. App. 52.

Over petitioners' objection, the district court then certified for interlocutory appeal under 28 U.S.C. § 1292(b) the question whether "the Agency's extensive and continuous involvement in the administration of the driver-education program" that the Agency had "created" brought the program "within the scope of Title II of the ADA and Section 504." Pet. App. 54. The district court then stayed all further

proceedings. *Id.* at 55. It has not yet addressed the question of class certification.

4. The Fifth Circuit granted leave for TEA to file an interlocutory appeal, Pet. App. 2, and a divided panel reversed the district court's denial of the motion to dismiss and "render[ed] judgment that the case is dismissed with prejudice for failure to state a claim on which relief can be granted," *id.* at 18.

The panel agreed that petitioners had standing. Their injury was "quite obvious"—an "inability to receive driver education certificates, which in turn prevents them from receiving driver's licenses." Pet. App. 6. That injury, the panel explained, was fairly traceable, at least in part, to TEA's "failure to inform private driver education schools of their ADA obligations," *id.*, and TEA's failure to insist on compliance with the ADA as a condition of approving a driver education school's application, *id.* And the injury could be redressed, as it was likely that individual driver education schools would comply with the ADA if TEA enforced a requirement that they fulfill their responsibility under Title III of the ADA and accommodate disabled students. Pet. App. 8.

On the merits, however, the panel majority concluded that, although it was a "close question," Pet. App. 10, "driver education" was not "a service, program or activity of the TEA," *id.* at 9-10. It emphasized that "the TEA itself does not teach driver education" or "issue driver education certificates to individual students." *Id.* at 10. In the panel majority's view, TEA's program was simply one of licensing and regulating private schools that performed those two functions. *Id.*

The panel majority recognized that the case was "complicated" by the fact that the certificate of completion provided by driver education schools "is necessary for obtaining an important government benefit—a driver's license." Pet. App. 17. The panel majority acknowledged that "it would be extremely troubling if deaf young adults were effectively deprived of driver's licenses simply because they could not obtain the private education that the State of Texas has mandated as a prerequisite for this important government benefit." *Id.* But it thought that this problem could be avoided because the Texas Department of Public Safety (the agency that actually issues driver's licenses) might be required to give licenses to deaf young people even if they could not complete the driver education program and obtain certificates. *Id.* (observing that 28 C.F.R. § 35.130(b)(8) prohibits DPS from using "eligibility criteria" that screen out disabled individuals unless it can show that those criteria—here, presenting a certificate of completion (and presumably receiving the instruction to which it attests)—are "necessary").

Judge Wiener dissented. In his view, "the actual day-to-day instruction" performed by private driving schools was "but one component of the broader program of driver education" being conducted by TEA. Pet. App. 23. Aspiring drivers were the beneficiaries of that program, and TEA could not "evade ADA responsibility" simply by "farm[ing] out the practical implementation of its program," *id.* at 28.

The Fifth Circuit denied rehearing en banc. Pet. App. 57. This Court granted the petition for a writ of certiorari.

5. During the pendency of this lawsuit, the circumstances of the individual named plaintiffs have changed. Four petitioners ultimately completed online driver education courses and received certificates of completion. But because these courses were conducted in English (in which petitioners have only limited proficiency) and without ASL interpreters or auxiliary aids for students who are deaf or hard of hearing, petitioners faced significant difficulty in learning the material. It took them longer to find courses that would work and to complete those courses than it took counterparts who do not have disabilities.

Moreover, petitioner Juana Doe was able to take an online course only after she turned 18.[3] Even then, because the course did not accommodate her hearing disability, it took her a week, rather than the normal six hours, to complete the class. Counsel for petitioners learned that she had taken and completed the course when they contacted her to inform her that this Court had granted certiorari.

Petitioner Arthur Prosper IV never completed a driver education course or obtained a driver's license. He will, however, turn 25 on September 23, 2016, and will then no longer be subject to the driver-education and certificate of completion requirements. A few

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[3] The only online driver education potentially available to individuals under age 18 comprises 56-hour-long courses offered by "[s]ome public schools." *See* Driver Education and Safety—Frequently Asked Questions, *available at* http://tinyurl.com/j9bgvc9 (FAQ26) (last visited Aug. 19, 2016). There is no opportunity to take such a course for individuals who are not enrolled in a public school or whose school does not provide such a course.

weeks ago, he informed counsel for petitioners that he has moved to Louisiana.

SUMMARY OF ARGUMENT

I. This Court has jurisdiction over this case, despite the fact that some petitioners ultimately gained access to the benefits provided by the Texas Education Agency (TEA) after facing additional burdens the Americans with Disabilities Act (ADA) and the Rehabilitation Act were designed to prevent. Petitioners have not yet received a fair opportunity to show that class certification is warranted. If a class were certified here, petitioners clearly would be entitled to continue litigating the merits.

Here, however, the district court certified the merits issue for interlocutory appeal without having addressed the class-certification question. And because the Fifth Circuit rendered judgment dismissing petitioners' claims on the merits with prejudice, they were deprived of an opportunity to return to the district court to show why class certification was warranted, which would have avoided any mootness concerns. The unique circumstances of this case permit the Court to issue a decision that will allow petitioners to seek class certification and have the claims of the class they seek to represent fully adjudicated on the merits.

If this Court nonetheless has substantial concerns about mootness, the appropriate course to take here would be to vacate the Fifth Circuit's erroneous decision lest it operate to deny other deaf and hard of hearing young Texans their day in court.

II. Petitioners, and the putative class they seek to represent, are qualified individuals with disabilities

who are eligible to receive a Texas driver's license. Yet because they are deaf or hard of hearing, they have been denied equal access to the education and certification required by the State of Texas to obtain that license. Because those benefits derive exclusively from the programs and activities of TEA, that agency must ensure that they are accessible to individuals with hearing disabilities.

Title II applies to all programs, services, and activities of a state or local government entity "without any exception." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998). Though Title II does not define "program, service, or activity," its companion statute—Section 504 of the Rehabilitation Act—provides that a state program or activity comprises "all of the operations of a . . . department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. § 794(b). Here, TEA's operations include the development, regulation, and administration of both the state-mandated curriculum and the certificates that aspiring drivers under age 25 must present to the Texas Department of Public Safety to obtain a driver's license. And TEA's driver education program, as well as its activities in developing and implementing that program, provide the public with a critical benefit—the eligibility to drive on Texas roads and the knowledge needed to do so safely—that cannot be denied to any qualified individual with a disability. Nor can the State unnecessarily burden individuals' ability to do so.

That TEA has created and administers a licensing arrangement with private entities to provide classroom instruction and to distribute course

completion certificates does not shield TEA from its obligation to comply with Title II and Section 504. For one thing, TEA—not the driving schools—authorizes the content and method of the curriculum taught by the driving schools for the benefit of the students. For another, TEA exercises extensive and exclusive control over the schools' issuance of the course completion certificates, which are government records under state law. At bottom, TEA's relationship with the private entities it licenses to provide both the education and certification required to obtain a driver's license amounts to nothing more than an "arrangement" with those entities, one that has thus far discriminated against petitioners and the class they seek to represent.

ARGUMENT

The ability to drive, especially in a state as geographically extensive as Texas, is critical to gaining the independence and full integration into society that petitioners and the putative class members seek, and that federal law aims to secure. *See* 42 U.S.C. § 12101(a)(7) (expressing in the Americans with Disabilities Act a national commitment to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities).

Driving provides full access to places of employment, education, worship, and recreation. Driving is often the most convenient means to see friends, purchase goods, earn a living, or simply experience the joy of the open road. As this Court emphasized in *Bell v. Burson*, a driver's license "may

become essential in the pursuit of a livelihood." 402 U.S. 535, 539 (1971).

Texas, however, has set up a licensing regime that denies young Texans who are deaf or hard of hearing an equal opportunity to obtain that license. The chokepoint is the driver education system developed, regulated, and overseen by TEA. Because of the way TEA operates that system, petitioners and the putative class they represent are denied the benefits TEA provides to others, in violation of Title II of the ADA and Section 504 of the Rehabilitation Act.

I. This Court Has Jurisdiction To Review The Judgment Of The Court Of Appeals.

By the time this Court is scheduled to hear oral argument in this case, none of the five named plaintiffs will still lack Texas driver's licenses because of Texas' requirement that individuals under age 25 obtain a state-mandated driver education and certificate of completion.[4] Nonetheless, under the unusual circumstances of this case, where the district court certified an interlocutory appeal and stayed all further proceedings without first addressing the question of class certification and the court of appeals rendered judgment without remanding the case to the district court, this Court still has jurisdiction to rule on the question presented.

If, however, this Court were to have substantial concerns that the case, in its present form, has become

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[4] As petitioners explained above, some petitioners have aged out of the putative class. Others obtained driver's licenses after exceptional efforts despite the fact that TEA failed to provide equal access to the state-mandated program. *See supra* at 12.

moot, then this Court should vacate the judgment of the court of appeals with directions for that court to return the case to the district court to consider class certification.

A. This Case Is Not Moot.

Petitioners properly sought class action status for this case. *See* J.A. 34-34, 36, 43-49 (third amended complaint); *id.* at 64, 66, 72-79 (fourth amended complaint). Thus, petitioners "present[ed] two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that [they are] entitled to represent a class." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980). The latter claim precludes this case from being moot, regardless of whether petitioners' individual claims on the merits have become moot.

1. Had the district court certified a class before this appeal, this Court would plainly have jurisdiction to decide the merits question: whether Title II of the ADA and Section 504 of the Rehabilitation Act apply to TEA's driver education program. That would be true without regard to whether petitioners' individual claims had become moot.

As long ago as *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1970), *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), and *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 752-57 (1976), this Court recognized that once a class has been certified under Fed. R. Civ. P. 23, the fact that the named plaintiff's individual claim has become moot does not deprive the federal courts of jurisdiction to adjudicate the class claim. Here, as in *Dunn*, which involved a challenge to durational residency requirements to vote (and where the named

plaintiff had satisfied the requirement by the time the district court issued its opinion in the case), "the laws in question remain on the books," *id.* at 333 n.2, and Texas continues to require that young people take a TEA-controlled driver education course and obtain a TEA-issued and TEA–regulated certificate of completion as a prerequisite to obtaining a driver's license. And here, as in *Gerstein v. Pugh*, 420 U.S. 103 (1975), which involved a challenge to Florida's processes for pretrial detention, the "constant existence of a class of persons suffering the deprivation is certain," *id.* at 110 n.11, given the hundreds of young people in Texas who are deaf or hard of hearing, J.A. 74, 102-03. Thus, here, as in *Geraghty*, which involved a challenge to federal parole release guidelines, the "controversy" over whether TEA's driver-education program is covered by Title II and Section 504 "is still a 'live' one" between TEA "and at least some members of the class" that petitioners seek to represent, 445 U.S. at 396.

In later cases, this Court has recognized that, even when a class has not yet been certified when "the named plaintiffs' claims [have] become moot," federal courts can certify the class to decide the merits of the class's claims. That is particularly so when the underlying claims are "inherently transitory." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991).

To be sure, the claim here is not as starkly transitory as the claims in *McLaughlin* or *Gerstein*, where any individual was a member of the class for only hours or days. Nonetheless, this class is easily as transitory as the proposed class at issue in *Geraghty* (which consisted of "all federal prisoners who are or will become eligible for release on parole," 445 U.S. at

393). And the proposed subclass of 16 and 17-year-olds (who do not have an opportunity to take six-hour online courses—the only way any petitioner was able ultimately to obtain a certificate), like the classes in *Sosna* or *Dunn* (each involving one-year residency requirements), is even more transitory: There is not a single person who was a member of the proposed subclass on the day the third amended complaint sought class action status for this case who will still be in the proposed class on the day this case is argued. And even with respect to the subclass of 18 to 25-year-olds, it is telling that petitioner Ivy, who filed her initial complaint when she was 21 years old, is now beyond the age where Texas' requirement of a driver education course and a certificate of completion apply. The case is still being litigated on a motion to dismiss and the district court has yet to consider whether to certify a class.

2. Had the district court *denied* class certification, it is also clear beyond cavil that this case would not be moot. Petitioners would have been entitled to appeal that denial, regardless of whether their individual substantive claims had become moot. This Court has squarely held that "an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied." *Geraghty*, 445 U.S. at 404; *see also Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326, 336 (1980). The "proposed representative" may appeal the denial and "[i]f the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*," *Geraghty*, 445 U.S. at 404—that is,

the representative can proceed to litigate the class claims on the merits despite the representative's personal substantive claim's being moot.

3. Had the court of appeals simply answered the certified question and then remanded the case to the district court for further proceedings, class certification could have been sought, thereby avoiding any problem of mootness. This holds true even assuming the court of appeals has answered the certified question in a manner adverse to petitioners' position. If, on remand, the district court had certified the class and then dismissed the complaint, petitioners clearly could have sought review of the merits from this Court. (And if on remand the district court had declined to certify a class, the case would be in the same posture as *Geraghty*.)

4. The complication in this case arises from the district court's decision to certify an interlocutory appeal on the merits without first resolving the question of class certification and the Fifth Circuit's subsequent decision to render judgment rather than to answer the certified question and then remand. The lower courts' election to proceed this way has placed petitioners and the putative class in a Catch-22.

In *Geraghty*, this Court stated that while a plaintiff whose individual substantive claim has become moot can nonetheless appeal a denial of class certification, that right is "limited to the appeal of the denial of the class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified." 445 U.S. at 404 (citing *Roper*, 445 U.S. at 336-37). Taken by itself, this statement might suggest that because the class in this case has not yet

been certified, petitioners cannot challenge the Fifth Circuit's decision limiting the scope of Title II and Section 504. But because the Fifth Circuit rendered judgment for respondent, petitioners are unable to follow the path laid down in *Geraghty* of obtaining class certification and then litigating the merits.

5. To resolve this conundrum, this Court should hold that petitioners' ability to seek and obtain class certification in the event that this Court reverses on the merits preserves their Article III standing to pursue this appeal. Just last Term, this Court emphasized that "[w]hile a class lacks independent status" under Article III, "until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016) (citing *Sosna*, 419 U.S. at 399). The same must be true of a plaintiff who had a live claim that became moot only because, on an interlocutory appeal, the court of appeals rejected the merits of the claim without ever affording the plaintiff a fair opportunity to have a class certified. Here, because the Fifth Circuit rendered judgment dismissing this case on the merits with prejudice, Pet. App. 18, petitioners cannot go back to the district court to seek that certification and to fulfill the "responsibility" this Court has recognized for them "to represent the collective interests of the putative class," *Roper*, 445 U.S. 331.

In order to provide plaintiffs a fair opportunity to show that class certification is warranted in cases where mootness problems are likely to arise, Fed. Rule Civ. Proc. 23(c)(1) directs district courts to address class certification "*[a]s soon as practicable* after the

commencement of an action." *Swisher v. Brady*, 438 U.S. 204, 213 (1978) (emphasis supplied by this Court). But there will be some cases where the district court may believe a different sequence makes sense—when, for example, it thinks class certification would involve a complex and costly inquiry for no purpose given that resolution of an unsettled but controlling question of law could foreclose the underlying substantive claim. Article III should not punish plaintiffs where district courts choose that latter path.

In short, the only way this case can be returned to the district court for petitioners to seek class certification is for this Court to reverse the judgment of the court of appeals. The "flexible character of the Art. III mootness doctrine," *Geraghty*, 445 U.S. at 400, permits this Court to issue a decision that will enable petitioners to seek class certification and will enable petitioners and the members of the putative class to have the full merits of their Title II and Section 504 claims "adjudicated pursuant to the holding in *Sosna*," *Geraghty*, 445 U.S. at 404.

B. At A Bare Minimum, This Court Should Vacate The Court Of Appeals' Judgment.

This Court has the authority to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances" in any case lawfully brought before it for review. 28 U.S.C. § 2016. This includes cases where the Court has concerns about mootness. *Camreta v. Greene*, 563 U.S. 692, 712 (2011); *see also U.S. Bancorp Mortgage Co. v. Bonnet Mall Partnership,* 513 U.S. 18, 21 (1994).

This Court has long recognized that the proper course in a case where a petitioner is deprived of the opportunity to obtain review of an adverse judgment by the "vagaries of circumstance," *Bonnet Mall Partnership*, 513 U.S. at 25, is "to reverse or vacate the judgment below and remand with a direction to dismiss" the underlying complaint, *id.* at 22 (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). Vacatur in such circumstances properly "eliminates a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. It "rightly 'strips the decision below of its binding effect,' and 'clears the path for future relitigation'" of important legal questions, *Camreta*, 563 U.S. at 713 (quoting *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) and *Munsingwear*, 340 U.S. at 40).

Petitioners believe this *case* (as opposed to their individual claims) is not moot. But if this Court is inclined to disagree, vacatur would be especially appropriate here given the procedural posture. The Fifth Circuit's decision constitutes binding precedent that TEA is not required to ensure that Texas' system of driver education for young people complies with the ADA or Section 504. *See* Pet. App. 18. That binding precedent places a roadblock in the path of a putative class of hundreds of young Texans who are deaf or hard of hearing and who need driver's licenses to carry on their daily lives.

This Court's grant of certiorari reflects a determination that the Fifth Circuit's decision merits further review. And the arguments presented in this brief and in the brief of the United States as *amicus curiae* show that the Fifth Circuit took an erroneously

cramped view of two foundational federal statutes. Under these circumstances, it would be unfair to petitioners and unjust to the individuals who will continue to be subject to the existing driver education regime in Texas to leave the Fifth Circuit's decision with precedential weight.

In *Camreta*, this Court altered its disposition of the case "slightly from the normal *Munsingwear* order vacating the lower court's judgment and remanding the case with instructions to dismiss the relevant claim" to take account of that case's "unique posture." 563 U.S. at 714 n.11. The same should be true here. In this case, a decision to vacate and remand for further proceedings (namely, class certification) would better serve the ends of justice than would the standard *Munsingwear* order. But even the "normal" *Munsingwear* order would at least leave class members with the ability to litigate their claim without the Fifth Circuit's decision standing in their way.

II. Title II Of The Americans with Disabilities Act And Section 504 Of The Rehabilitation Act Require That The Texas Education Agency (TEA) Ensure That Texas' Driver Education Program Be Equally Accessible To Young People Who Are Deaf Or Hard Of Hearing.

The State of Texas has decided for the State's own purposes that it is important that individuals under age 25 successfully master a state-created driver education curriculum before they are eligible to receive a driver's license. The actions of the Texas Education Agency (TEA) in designing, administering, and regulating the delivery of that curriculum and the

certificate that attests to successful completion are activities of TEA for purposes of federal antidiscrimination law. Petitioners and the class they seek to represent have been denied equal access to the benefits of the state-created driver education program, and the State cannot avoid its obligations under federal law because of the involvement of private entities in carrying out the State's program.

A. The Driver Education Program Administered By TEA Is An Activity Of TEA Within The Meaning Of Title II And Section 504.

1. The Americans with Disabilities Act of 1990 (ADA) establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA addresses discrimination by a "public entity," which the Act defines to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.* § 12131(1)(B).

As a substantive matter, Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Section 504 of the Rehabilitation Act imposes a similar prohibition on entities receiving federal funding, providing in pertinent part that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be

denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 749(a).

Congress directed that, absent an exception, "nothing" in the ADA "shall be construed to apply a lesser standard than the standards applied under" the Rehabilitation Act. 42 U.S.C. § 12201(a). It also directed the Attorney General to "promulgate regulations" to implement Title II, 42 U.S.C. § 12134(a), that are "consistent" with the regulations promulgated under Section 504. Thus, in light of the parallel language and goals of the two statutes, Title II and Section 504's prohibitions have long been read in tandem. Pet. App. 9; *see Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) ("construe[ing] the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act"). *See also* 42 U.S.C. § 12133 (providing that "[t]he remedies, procedures, and rights" available under the Rehabilitation Act "shall be the remedies procedures, and rights" available under Title II of the ADA); *Frame v. City of Arlington*, 657 F.3d 215, 222 (5th Cir. 2011) ("ADA and the Rehabilitation Act generally are interpreted in *pari materia*."). The difference between Title II and Section 504 goes to which entities are covered, and not to covered entities' substantive antidiscrimination obligations. In this case, it is uncontested that TEA is a "public entity" within the

meaning of Title II and a recipient of federal funds within the ambit of Section 504. Pet. App. 9.[5]

Title II does not itself define what counts as "the services, programs, or activities" of public entities. But Section 504 does. The term "program or activity" includes "*all* of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government" that is covered by the Rehabilitation Act. 29 U.S.C. § 794(b)(1)(A) (emphasis added).

2. TEA's "operations" include being responsible for a state-mandated driver education program, the successful completion of which (as reflected by a TEA-controlled certificate expressly defined as a government record) serves as a prerequisite to obtaining a driver's license for any aspiring driver in Texas under age 25. State law specifically directs TEA to "administer" the chapter of the Texas code dealing with "Driver and Traffic Safety Education," to "enforce minimum standards for driver training schools," and to ensure the "compliance" of schools and course providers with the provisions governing driver and traffic safety education. Tex. Educ. Code § 1001.053. No entity other than TEA can perform these functions. By definition, these are activities and programs of TEA.

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[5] The question whether TLDR, the successor agency to TEA, *see supra* note 1, is also a recipient of federal funds, will need to be resolved on remand. The answer to that question will determine whether TDLR must comply with Section 504. But because TDLR is undeniably a "public entity" within the meaning of Title II, its substantive antidiscrimination and accommodation obligations will be unaffected by the answer.

The plain language of Title II and Section 504 leaves no doubt that TEA's actions in developing the curriculum for the driver education program for young people, licensing private schools to conduct direct instruction, overseeing those schools' operations, and managing a system for providing those schools with driver education certificates of completion (or unique certificate numbers) must comply with Title II and Section 504. Those operations are "the services, programs, or activities" of TEA, acting on behalf of the State. Only last Term, Texas argued to this Court that it had a "sovereign interest" in the way it issues driver's licenses. Br. for State Resps. at 24, *United States v. Texas* (No. 15-674).[6] In light of that insistence, respondent cannot turn around here and credibly argue that a central aspect of Texas' issuance of driver's licenses—driver education and certification—is somehow not a State activity or program.

This Court has long recognized that control over who drives on a state's roads is a quintessential state function. In *Dixon v. Love*, 431 U.S. 105 (1977), this Court emphasized that controlling who can possess a driver's license serves "the important public interest in safety on the roads and highways." *Id.* at 114. In *Mackey v. Montrym*, 443 U.S. 1 (1979), the Court termed the "interest in highway safety" served by regulating driver's licenses "compelling." *Id.* at 19; *see also South Dakota v. Dole*, 483 U.S. 203, 208 (1987)

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[6] In fact, Texas emphasized that it subsidizes the licenses it issues to its citizens, in the amount of at least $130 per license. *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

(further underscoring the importance of highway safety and special concerns about young drivers).

In holding that "TEA does not provide the program, service, or activity of driver education," Pet. App. 18, the Fifth Circuit emphasized that TEA does not provide "driver education itself," *id.* at 10. To be sure, TEA does not itself directly explain to aspiring drivers why "leaving children in vehicles unattended" is a bad idea, 16 Tex. Admin. Code § 84.106(b)(1)(C), or how "traffic control devices" work, *id.* § 84.106(b)(2)(A)(v)(IV). But the Fifth Circuit's granular focus on day-to-day classroom instruction in isolation overlooks the reality that classroom instruction occurs within Texas' comprehensive scheme to train, license, and regulate young drivers. TEA's operations in administering that scheme, along with its benefits, are subject to Title II and Section 504. And, as petitioners explain below, *infra* at 33-38, TEA cannot escape its responsibilities for the way it conducts its own operations by pointing out that other entities involved in that scheme may also be subject to the ADA.[7]

B. Petitioners And Other Members Of The Putative Class Have Been Denied Two Benefits Of TEA's Driver Education Program Because Of Their Disability.

The driver education program placed under TEA's aegis provides young aspiring drivers with two important benefits: (1) knowledge that will enable

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[7] The parties agree that individual driver education schools are themselves subject to the prohibitions on discrimination contained in Title III of the ADA, 42 U.S.C. §§ 12181-12189, which covers "place[s] of education," *id.* § 12181(7)(J).

individuals who take the state-mandated course to be qualified, safe drivers (i.e., the TEA-mandated substantive curriculum) and (2) a course completion certificate that must be provided to the Texas Department of Public Safety before that government agency can issue them a driver's license, Tex. Transp. Code § 521.1601. Aspiring young drivers who are deaf or hard of hearing have been unable to obtain those benefits, and have faced burdens not imposed on their counterparts who are not disabled, because of the failure of TEA to ensure that the program it has designed and regulates is open to their participation.

1. The statutes and regulations governing driver education in Texas make clear that TEA's prescribed curriculum is designed to benefit petitioners and the members of the class they seek to represent. The enabling statute defines "driver education" as instruction "to prepare persons for written and practical driving tests that lead to authorization to operate a vehicle." Tex. Educ. Code § 1001.001(6).

Access to that educational benefit is useful for everyday life in Texas. On average, seventy-six percent of U.S. workers drive themselves to work. U.S. Dep't of Transportation, Bureau of Transportation Statistics, Transportation Statistics Annual Report at 23 (2012), *available at* http://tinyurl.com/OT16Ivy1 (last visited Aug. 19, 2016). In Texas, where public transportation is often scarce, that percentage is higher.[8] It is not a surprise, then, that people "without

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[8] *See, e.g.,* Aman Batheja, *Poll: Texans Don't See Public Transit as a Congestion Cure*, THE TEXAS TRIBUNE, Sept. 25, 2014 ("Ninety-one percent of Texans use a personal automobile as their

access to a personal vehicle, especially the poor, have difficulty reaching stores, services, and workplaces outside of their immediate neighborhoods." *Id.* at 26. Petitioners themselves faced precisely these problems in getting to college, to church, and to places of potential employment. *Supra* at 7-8. The entitlement to drive plays a significant role in everyday life, not just for the individual who drives, who may use a car to go to the doctor, to vote, or to get to work, but for his or her ability to provide transportation to other family members as well.

Petitioners were denied the benefit of Texas' state-mandated, state-designed, and state-regulated driver education curriculum because of their disability—precisely the result prohibited by Title II and Section 504.[9] The Fifth Circuit's suggestion that ADA regulations might require the Department of Public Safety to "give exemptions to certain deaf individuals" from the requirement of submitting certificates of completion, Pet. App. 17, misses the point. That proposal is no solution: it would continue to deny petitioners and the class they seek to represent the actual education in safe driving that Texas thinks is important for young drivers to have.

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primary means of transportation."); *accord* John D. Harden, *Lack of Transit Options Leaves Many in Bind,* THE HOUSTON CHRONICLE, February 14, 2015.

[9] The fact that some of the individual petitioners were eventually able through repeated efforts, and with substantial difficulty, to find and complete online courses, *see supra* at 12, does not undercut the claim that TEA fails to provide aspiring drivers who have disabilities with *equal* access to the driver education program.

2. The driver education certificate of completion is clearly a second "benefit" produced through TEA's "activities" within the meaning of Title II and Section 504. TEA is the sole entity authorized to create these documents, whose benefit to the recipients is quite concrete: eligibility to obtain a Texas driver's license before they turn 25. Texas law expressly anticipates that TEA will sell these certificates to driver education schools for delivery to the students taking driver education courses. 16 Tex. Admin. Code § 84.117.

TEA generates and sells uniquely-numbered course-completion certificates (or unique certificate numbers) to private driving schools to be distributed to students at the end of the course. Tex. Educ. Code § 1001.055. These certificates are "government record[s]." 16 Tex. Admin. Code § 84.100(1), (12). TEA regulates the form in which the certificates are printed and delivered. *Id.* § 84.100; Tex. Educ. Code § 1001.055.

It therefore defies common sense not to characterize these certificates as benefits of TEA's "activities." In treating them otherwise, the panel majority ignored the fact that the certificates are a benefit to the *students* who take, and successfully pass, a driver education course, and that they cannot be created or distributed without TEA's active involvement. That the actual handoff of certificates is made by a private vendor is irrelevant.

Because Texas law provides that certificates of completion "shall be issued *only* to primary driver education schools," Tex. Admin. Code § 84.117 (emphasis added), individuals who are deaf or hard of hearing are denied this benefit created and regulated by TEA if they cannot obtain accommodations that

enable them to successfully complete the underlying state-mandated and TEA-designed driver education curriculum those schools provide. That denial, again, is precisely what Title II and Section 504 prohibit.

C. The Fact That The Direct Instruction Of Students Is Performed By Private Entities Rather Than TEA Itself Does Not Relieve TEA Of Its Obligations Under Title II Or Section 504.

This is not a case about a government agency that merely licenses a private business to carry on the private goals of that business's owners. Nor is it even a case about a government agency that regulates some aspects of an essentially private enterprise. To the contrary: the beginning and end of Texas' driver education system are undeniably government programs or activities designed to serve the State's "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles," *Delaware v. Prouse*, 440 U.S. 648, 658 (1979). TEA has designed a driver education curriculum literally down to the minute, decides nearly every aspect of who can offer a course based on that curriculum and how they can do so, and creates certificates of completion that reflect an aspiring driver's successful mastery of that curriculum. After submission of that certificate and final testing, the Texas Department of Public Safety then issues a license.[10] *See* Tex. Transp. Code

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[10] In contrast to TEA, the Texas Department of Public Safety (DPS) provides that aspiring drivers "who are hearing impaired" may "request DPS to provide a certified ASL interpreter" for the driving test. DPS has committed itself "[i]n accordance with the

§§ 521.142(d), 521.1601; Tex. Educ. Code §§ 1001.053(3), 1001.051, 1001.206(7).

Only one intermediate aspect of Texas' fundamentally public system of deciding which of the State's young people can drive a car has been "farm[ed] out," Pet. App. 28, 46, to nongovernmental actors: in the case of the educational benefit, that aspect is the physical delivery of classroom instruction. In the case of the certificate of completion, that aspect is the physical handoff of the certificate to the individual student. But that farming out does not relieve TEA of its obligations under Title II or Section 504.

1. TEA, and not the schools themselves, is responsible both for the content of the driver education curriculum and for deciding what methods can be used to deliver that curriculum. *See* 16 Tex. Admin. Code § 84.118 (authorizing and governing "alternative" methods for conducting driver education courses, such as internet-based instruction). And TEA, not the schools, decides whether a school is capable of

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Americans with Disabilities Act," to "provide reasonable accommodations for all requests." *See* Texas Dep't of Public Safety, Testing in Other Languages, *available at* http://tinyurl.com/hcecrst (last visited Aug. 19, 2016).

Recently, however, DPS has begun to outsource its skills testing to licensed private driver education schools. *See* Texas Dep't of Public Safety, Third Party Skills Testing Program, *available at* http://tinyurl.com/hmh9e2q (last visited Aug. 19, 2016). In light of the Fifth Circuit's decision here, the deaf community has serious concerns regarding access to driver's licenses, because these include the same schools whose refusal to accommodate deaf students in their driver education courses gave rise to this suit.

delivering the TEA-mandated curriculum and providing students with the certificate of completion.

In the part of its opinion holding, correctly, that petitioners had standing to seek injunctive relief, the Fifth Circuit acknowledged that Texas law "provides that the TEA 'has jurisdiction over and control of' driver education schools and is allowed to 'adopt and enforce rules necessary to administer' the [State's law] on driver education." Pet. App. 7 (quoting Tex. Educ. Code §§ 1001.051; 1001.053(a)(3)). And it also recognized, correctly, that TEA "has the power to withhold licenses from driver education schools that fail to comply with the DOJ's ADA regulations," in light of the fact that TEA is authorized to "issue a license to a driver education school only if the school 'complies with all county, municipal, state, and federal regulations,'" Pet. App. 7 (quoting Tex. Educ. Code § 1001.204(7)). But having recognized that TEA has "the power to enact regulations relating to ADA compliance in driver education schools," Pet. App. 7, the panel majority inexplicably failed to draw the appropriate conclusion: when TEA designs the curriculum, materials, and methods of instruction that it will require schools to use, and when it decides whether to license a particular school, TEA must ensure that deaf and hard of hearing individuals have equal access to driver education that TEA has crafted. The ADA and Section 504 require that TEA accommodate those individuals.

Petitioners alleged in their complaint that TEA had a wide menu of options and relatively modest accommodations in its operational role for ensuring that they and other members of the putative class could benefit from the TEA-designed curriculum and

could obtain the TEA-governed certificates of completion. Some of these options having nothing to do with TEA's role in licensing or directly regulating private driving schools. For example, TEA could create "specialized driver education materials." J.A. 87. Or TEA could itself develop "a video course in ASL," or figure out a way to disseminate the TEA-licensed ASL course offered only at the Texas School for the Deaf, *id.* at 88. In addition, TEA could act with respect to its relationship with the schools that deliver the content TEA has selected to ensure that its curriculum and its certificates are available to young people who are deaf or hard of hearing. TEA could mandate that schools provide "interpreters or other aids for people with hearing disabilities," *id.* at 89, just as it requires them to provide "appropriate seating and writing facilities as necessitated by the activity patterns of the course," 16 Tex. Admin. Code § 84.112(c). And by denying or suspending the licenses of noncompliant schools, J.A. at 89, it could create powerful incentives for those schools to implement their own accommodations for students who are deaf or hard of hearing. Pet. App. 8.

Each of those options or accommodations requires only a modest change in TEA's own activities to ensure that petitioners and other deaf young people can have "meaningful access to the benefit[s]" TEA provides, *Alexander v. Choate*, 469 U.S. 287, 301 (1985)—namely, knowledge about safe driving and other important subjects and an opportunity to obtain the certificate of completion necessary to receive a driver's license. Petitioners sued TEA not to challenge "[t]he programs or activities of entities that are licensed or certified" by TEA, 28 C.F.R. § 35.130(b)(6) (explaining that those actions are "not, themselves, covered"), but

to challenge how TEA has been conducting its own operations. Texas, for its own purposes, has required young people who want driver's licenses to take a TEA-designed curriculum from one of a list of schools that TEA has licensed and then to submit TEA-issued and TEA-regulated certification that they done so. Under these circumstances, TEA cannot shift the blame for the denial of access to the private schools.

2. Lest there be any doubt, the ADA's implementing regulations, which are entitled to "deference" under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-44 (1984), Pet. App. 11 n.6, reinforce the conclusion that the involvement of private driving schools in Texas' system for driver education does not relieve TEA of its obligations under Title II and Section 504.

Those regulations provide that a public entity may not discriminate either "directly or through contractual, licensing, or other arrangements," 28 C.F.R. § 35.130(b) (governing Title II); 28 C.F.R. § 41.51(b)(1) (governing Section 504).

The Texas system for providing driver education and certificates of completion clearly involves some form of "arrangemen[t]" for delivering benefits (a state-created driver education curriculum and a government record certifying completion of that curriculum) through a private actor—namely, the TEA-licensed driving schools. As petitioners have already explained, that arrangement is governed, administered, and regulated by TEA; further, that arrangement is core to the overall State scheme of licensing drivers and ensuring traffic safety.

The system Texas created thus differs materially from one of mere licensing and regulation of commercial services—such as tattoo parlors and liquor sales—provided to the public by private vendors, who have significant autonomy to decide what to sell and how to sell it. To say, as the Fifth Circuit did, that TEA "clearly does not provide any portion of driver education," Pet. App. 14, is simply wrong. TEA provides the content and the reward.

CONCLUSION

The State of Texas has determined that the public interest requires all Texans under age 25 to be educated on traffic safety and certain other State policies before those individuals can drive on Texas roads. The State has directed one of its agencies to develop and manage both the educational curriculum and the certificate of completion reflective of that mandatory education. These functions are part of the agency's operations and, by definition, constitute programs, services, or activities of TEA.

Title II of the ADA and Section 504 of the Rehabilitation Act require TEA to ensure its programs, services, or activities are equally open to qualified individuals with disabilities. By placing the mandatory certificates and educational content in the hands of private driving schools for delivery to the public, but outside the reach of petitioners and the putative class members they represent, TEA has failed to comply with its federal obligations.

The Fifth Circuit's judgment should be reversed and the case remanded for further proceedings in the district court.

Respectfully submitted,

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