

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 *AMICI CURIAE* OF THE NATIONAL
ASSOCIATION OF COUNTIES, COUNCIL OF STATE
GOVERNMENTS, NATIONAL LEAGUE OF CITIES,
U.S. CONFERENCE OF MAYORS, INTERNATIONAL
CITY/COUNTY MANAGEMENT ASSOCIATION
AND INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION IN SUPPORT OF
NEITHER PARTY**

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INTEREST OF AMICI CURIAE*

The National Association of Counties is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education and research.

The Council of State Governments is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national and international opportunities to network, develop leaders, collaborate and create problem-solving partnerships.

The National League of Cities is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages and towns it represents.

The U.S. Conference of Mayors, founded in 1932, is the official nonpartisan organization of all

* No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

State and local governments both implement their own services, programs and activities and regulate the conduct of private persons. Accordingly, this Court's decision regarding when these public entities are obligated to ensure that private persons comply with the Americans with Disabilities Act will have a substantial impact on amici's members.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act (“ADA”) prohibits state and local governments and other public entities from discriminating based on disability in providing services, programs and activities of the public entity. Justice Department regulations provide that public entities may not discriminate directly or indirectly “through contractual, licensing or other arrangements” The regulations also make clear that governmental licensing or other regulation of private activity does not transform conduct by a private person into a service, program or activity of the regulating public entity itself.

Amici propose that this Court hold that state and local governments and other public entities must ensure that private persons comply with the ADA only where those private persons may fairly be said to be implementing the government’s own services, programs or activities. No amount of regulation of private conduct, by licensing or otherwise, should be sufficient to impose on a public entity a duty to enforce compliance with the ADA by private persons. This approach is consistent with the language and intent of the ADA, and also respects important practical and federalism concerns.

There are two limited circumstances in which a private person may fairly be said to be implementing a service, program or activity of a public entity: (1) where the public entity delegates to a private person implementation of a core governmental function; and (2) where the public

entity uses private persons to implement an activity engaged in by the public entity for its own benefit.

The first category includes an extremely narrow category of services that have historically been viewed as inherently the function and responsibility of the government. Examples include the administration of prisons, providing a public police force, and the provision of certain public education and public health services.

The second category includes activities engaged in by public entities for their own benefit, as opposed to regulating independent private conduct. The lottery cases provide a good example.

Applying the proposed test here, the Texas 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. Because control of driving on public roads is a core governmental function, and because a class of citizens must obtain a certificate from one of the driver education schools in order to obtain a license, the private schools providing the mandatory driver education may fairly be said to be implementing the state's program for licensing drivers. The dispositive fact is that a certificate from one of the regulated schools is required to obtain a license. If the state regulated private driver education schools exactly as it does now, but did not require a certificate from one of the schools as a condition to obtaining a license, the state should not have an obligation to enforce compliance with the ADA by the schools.

Accordingly, amici respectfully submit that the judgment of the Court of Appeals should be reversed. In doing so, however, this Court should make clear that a state or local government or other public entity has no duty to ensure compliance with the ADA by private persons when it is licensing or otherwise regulating private conduct, no matter how extensive or detailed the regulation.

ARGUMENT

- I. **The Court should hold that state and local governments and other public entities are required to ensure private persons' compliance with the Americans with Disabilities Act only where those private persons may fairly be said to be implementing a service, program or activity of the public entity itself.**

There appears, on the surface at least, to be confusion and divergent approaches surrounding the decisions of federal and state courts regarding when a state or local government or other public entity is obligated to ensure that private persons comply with the ADA. On analysis, however, the outcomes of all or virtually all of the cases are consistent with what amici submit is the proper test mandated by the language and intent of the statute and applicable regulations.

Specifically, public entities must ensure that private persons comply with the ADA¹ only where

¹ Petitioners brought suit under both the ADA and the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973). As the Court of Appeals for the Fifth Circuit recognized, the ADA and Rehabilitation Act “are judged under the same legal standards, and the same remedies are available under

those private persons may fairly be said to be implementing the government's own services, programs or activities. Where a state or local government or other public entity is licensing or otherwise regulating private activity, but cannot fairly be said to be implementing its own services, programs or activities, that public entity should have no obligation under federal law to ensure compliance by private persons with the ADA, no matter how extensive or detailed the regulation.²

The ADA and its implementing regulations prohibit public entities from excluding qualified individuals with disabilities from public services, programs and activities. In that regard, the statute makes clear that those individuals shall have access to services, programs or activities "of a public entity":

both acts." *Ivy v. Williams*, 781 F.3d 250, 254 (5th Cir. 2015) (quoting *Kemp v. Holder*, 610 F.3d 231, 234 (5th Cir. 2010)). Accordingly, references in this brief to the ADA apply with equal force to the Rehabilitation Act.

² This is not to say that state and local governments may not regulate in the area as they deem appropriate to protect against discrimination. Rather, state and local governments should not be held liable under a federal statute for discrimination by liquor licensees, holders of building permits or other private persons because those state and local governments license or otherwise regulate private conduct. As developed in this brief, the ADA, properly construed, applies to state and local governments and other public entities only with respect to the services, programs and activities of the governments themselves. It would go way too far, and raise constitutional issues, to hold that state and local governments must ensure compliance by private parties with the ADA where those governments are simply exercising their right and power to regulate private conduct.

[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.

The regulations provide additional guidance regarding what, specifically, public entities may not do. Public entities may not, in the course of providing “any aid, benefit, or service,” use their regulatory or licensing power to require or encourage private parties to discriminate:

A public entity, in providing any aid, benefit, or service, may not, directly, or through contractual, licensing, or other arrangements, on the basis of disability . . . [a]id or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit or service to beneficiaries of the public entity’s program

28 C.F.R. § 35.130(b)(1)(v).

Taken together, the statute and regulations confirm that a public entity may not discriminate either directly (in providing services, programs or activities “of a public entity”) or indirectly in association with a private person (“through

contractual, licensing, or other arrangements”). The plain language of the statute prohibits public entities from discriminating based on disability, and the regulations make clear that public entities may not themselves engage in discrimination indirectly by using contractual, licensing or other arrangements to cause private persons to discriminate. Stated differently, a public entity must ensure that private persons charged with providing a service, activity or program “of a public entity” comply with the ADA, and may not indirectly cause or encourage discrimination by private persons, but has no obligation otherwise to enforce the ADA.

What the statute and regulations do not say is of equal importance in defining the proper test. The statute and regulations do not make the public entity’s duty to ensure the private person’s compliance turn on the level of regulation or control exercised by the public entity in its licensing or other regulation of private conduct.

As an initial matter, and consistent with the language of the statute, the regulations make clear that licensing in and of itself does not transform a private activity into a program or activity of a public entity. *See* 28 C.F.R. § 35.130(b)(6) (“The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by [Title II(A)].”); ADA Technical Assistance Manual § II-3.7200 (“Although licensing standards are covered by title II, the licensee’s activities themselves are not covered. An activity does not become a ‘program or activity’ of a public entity merely because it is licensed by the public entity.”). In that regard, the majority opinion below was exactly right. *See Ivy v.*

Williams, 781 F.3d 250, 257 (5th Cir. 2015) (“[W]e hold that the mere fact that the driver education schools are heavily regulated and supervised by the TEA does not make these schools a ‘service, program, or activity’ of the TEA.”) (citing *Noel v. N.Y. Taxi & Limousine Comm’n*, 687 F.3d 63, 72 (2d Cir. 2012)).

In fact, no amount of regulation of private conduct, by licensing or otherwise, should be sufficient to impose on a state or local government the obligation to ensure compliance by private persons with the ADA, so long as the public entity is regulating private activity rather than implementing its own services, programs or activities through the private person. There is no basis in the language or intent of the statute to require states or local governments to take on the burden of policing compliance with federal statutes where they are merely exercising regulatory or licensing power with respect to private conduct by private persons, no matter how extensive or detailed the regulation.

The test propounded by amici—one centered on the private implementation of public services, programs and activities—finds ample support in well-reasoned lower court decisions. In *Reeves v. Queen City Transportation, Inc.*, for example, the U.S. District Court for the District of Colorado considered whether a private company that had been issued a certificate of public convenience and necessity by the state utility commission violated Title II by refusing to provide transportation between Denver and Colorado’s ski and gambling resorts to individuals who used wheelchairs for mobility. 10 F. Supp. 2d 1181 (D. Colo. 1998). According to the court, Title II applies to “programs

inherent to the public entity.” *Id.* at 1185 (“[T]he scope of Title II is not limitless. The language chosen by Congress in § 12132, ‘services, programs, or activities of a public entity,’ and the language chosen by the [Department of Justice] in 28 C.F.R. § 35.130(b)(1), ‘aid, benefit, or service’ and ‘program,’ limit Title II’s application to programs inherent to the public entity.”). The court first determined that the public utility commission (“PUC”) operated a certification program, not a transportation program. *Id.* at 1186; *see also id.* at 1184 (“[T]he PUC’s primary function and activity is certification, registration, and permitting of public utilities. The PUC does not offer, directly or indirectly, telephone services, electric services, motor vehicle services, or any other public utility services or programs to the public.”). The court next noted that the alleged discrimination stemmed from the private entity’s conduct, not the commission’s issuance of a certificate. *Id.* at 1186. In other words, the activity at issue was not one the private entity had been implementing for the public entity, but rather was a private activity regulated by a government agency.

Other cases, although decided using different rationales, are consistent with this test. First, cases that have been decided based on the level of state involvement, *e.g.*, regulation, would come out the same way if adjudicated using the test proposed by amici. *See, e.g., Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1441-42 (D. Kan. 1994) (public entity not required to ensure the accessibility of liquor stores); *Noel*, 687 F.3d at 71 (public taxi licensing entity not required to ensure access to taxis for individuals with disabilities).

Second, there are some very limited types of services, programs or activities that are almost universally considered to be core public functions—including certain safety, health and education functions—and so may fairly be said to be activities of a public entity where it delegates them to private persons. Thus, for example, private persons do not imprison people for violating the law, governments do. For that reason, private companies operating prisons for state and local governments may fairly be considered to be providing a service, program or activity of the public entity. Likewise, and critically here, private persons do not license drivers to use public roads, governments do. This category of core governmental activities is an extremely limited one.

As discussed below, cases involving these types of services, programs and activities, although decided using differing rationales, would have come out the same way if decided using the test proposed by amici, namely whether the activities in question may fairly be said to be those “of the public entity” itself. *See, e.g., Paulone v. City of Frederick*, 718 F. Supp. 2d 626 (D. Md. 2010); *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009).

In this regard, the majority opinion below missed the mark. The majority held that the TEA was not responsible for ensuring that private persons providing driver education comply with the ADA, in large part because the TEA had not contracted with the driver education providers. Although amici applaud the majority’s proper attempt to cabin narrowly the circumstances in which public entities are required to police private persons’ compliance

with the ADA, amici respectfully submit that the majority's approach was flawed. The issue is not whether the public entity has formally contracted with the private person, but rather whether the private person has been charged—whether by contract, license or otherwise—with implementing a public service, program or activity. It is the nature of the activity, not the form of the relationship or the extent of regulation, that should control.

This test respects important practical and federalism concerns. It is not the job of state and local governments to enforce federal statutes. To that end, this Court has routinely recognized and protected the constitutional balance between the states and the federal government. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), for example, this Court held that state judges were not covered by the Age Discrimination in Employment Act of 1967 because, absent an “unmistakably clear” expression of intent to “alter the usual constitutional balance between the States and the Federal Government,” the Court will interpret a statute to preserve rather than destroy the States’ “substantial sovereign powers.” *Id.* at 460-61 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985)); *c.f. Pa. Dep’t of Corrs. v. Yeskey*, 524 U.S. 206, 209 (1998) (affirming lower court’s holding that the ADA “unmistakably” extends to prison inmates).

To require state and local governments and other public entities to enforce federal statutes when they are acting to regulate private conduct, not to implement their own services, programs or activities, would impose a huge burden. It is one thing to prohibit state and local governments from

themselves discriminating against persons with disabilities. It is quite a different thing to impose on those governments the burden of becoming the enforcer of federal law as to all of the myriad private persons subject to substantial government regulation, by licensing or otherwise. Likewise, imposing such a sweeping obligation on state and local governments would expose them to substantial potential liability, and to the burden of defending what would no doubt be extensive litigation.

There is nothing in the language or intent of the ADA suggesting that Congress meant to impose this enforcement obligation on state and local governments or other public entities. To the contrary, the statute simply prohibits public entities from themselves discriminating based on disability. That is not to say that private persons must not comply with the ADA or that private persons may otherwise engage in unlawful discrimination. Rather, it is merely to say that the ADA does not impose the duty of enforcing that federal statute on state and local governments, and that it would not be reasonable or proper to do so.

- II. A private person may fairly be said to be implementing a service, program or activity of a public entity only in two limited circumstances: (1) where the public entity delegates to a private person implementation of a core governmental function; and (2) where the public entity uses private persons to implement an activity engaged in by the public entity for its own benefit.**
- A. A state or local government may be required to ensure ADA compliance by private persons where the public entity delegates to the private person implementation of a core governmental function.**

The first category of circumstances in which a private person may fairly be said to be implementing a service, program or activity of a public entity is where the state or local government delegates to the private person implementation of a core governmental function.

There are a small category of activities that historically have been viewed as inherently the function and responsibility of government, and so are considered core governmental functions. Examples include the administration of prisons, providing a public police force, and the provision of certain public education and public health care services.

Amici do not propose a specific definition of “core governmental functions,” but rather observe that an extremely narrow category of services, programs or activities provided by governmental entities—whether because of a statutory mandate or

as a matter of tradition—are widely recognized to be core governmental functions. *See, e.g., Yeskey*, 524 U.S. at 209 (internal quotations omitted) (“It may well be that exercising ultimate control over the management of state prisons, like establishing the qualifications of state government officials, is a traditional and essential state function . . . One of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task.”); *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments.”); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1284 (2d Cir. 1995) (“State governments have turned to the private sector to ‘contract out’ or ‘outsource’ numerous governmental functions, including services in correctional facilities, the management of concessions in public parks, the operation of mental health facilities, the training of displaced workers, and the operation of toll roads.”).³

³ Notably, Courts tasked with deciding whether a federal statute validly abrogates a state’s sovereign immunity often consider whether an activity is a core governmental function exercised by the state. This Court has decided that Title II of the ADA abrogates state sovereign immunity where there are violations of the Fourteenth Amendment, allowing private rights of action against state governmental entities for ADA violations. *See United States v. Georgia*, 546 U.S. 151, 159 (2006) (“[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.”).

Amici also note that some types of core governmental functions may overlap with services also provided by private persons independently. Education provides a prime example. State and local governments are historically responsible for providing public education, such that if they were to delegate that function to private persons those private persons could fairly be said to be implementing a service, program or activity of the public entity. That does not mean, however, that state or local governments are responsible for ensuring compliance with the ADA by purely private schools, which operate separately from public education.

Likewise, the fact that providing a public police force is a core governmental function does not mean that private security guards fall into that category. A state or local government should be permitted to license and otherwise regulate extensively private companies providing security services without thereby transforming private activity into a service, program or activity of the government itself.

Analyzing whether a service, program or activity constitutes a core governmental function in order to determine whether a public entity must ensure compliance with the ADA is consistent with the decisions cited by the Petitioner. In *Paulone v. City of Frederick*, for example, the plaintiff was required by court order to attend privately administered alcohol awareness and treatment classes as part of her probation. 718 F. Supp. 2d at 630. Courts have routinely held that the administration of the justice system, which includes

probation and parole requirements, to be a core governmental function. *See Yeskey*, 524 U.S. at 209 (“One of the primary functions of government,’ we have said, ‘is the preservation of societal order through enforcement of the criminal law”’) (quoting *Procunier v. Martinez*, 416 U.S. 396, 412 (1974), *overruled on other grounds sub nom. Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989)). Although the *Paulone* court did not indicate the reasoning behind its decision, the court’s conclusion that the State of Maryland was required to ensure that the privately administered alcohol education programs were in compliance with the ADA aligns with this proposed category. *See Paulone*, 718 F. Supp. 2d at 636.

In *Disability Advocates, Inc. v. Paterson*, state law required that the State of New York develop a “comprehensive, integrated system of treatment and rehabilitative services for the mentally ill.” 598 F. Supp. 2d at 313 (quoting N.Y. Mental Hyg. L. § 7.01). At issue in that case was whether the State of New York, in utilizing privately owned and operated group homes to house and care for patients in accordance with the legislatively-created public mental health service system, was required to follow the ADA. In holding that the state was obligated to follow the ADA, the court focused on the administration of the state mental health program, as opposed to the ownership of the homes themselves. *Id.* at 318-19. The health care system at issue in *Disability Advocates* was created by state statute and, by design, was to be a public health system administered by the state. Thus, the provision of care under that program, including services connected to such care, would properly be

considered a core governmental function, even though the homes were privately owned and operated. Here again, though, that does not mean that regulation by a state or local government of purely private group homes not fairly considered part of the state public health system should subject those public entities to the obligation of ensuring that the private operators comply with the ADA.

In sum, where private persons perform core governmental functions, such as the activities at issue in the *Paulone* and *Disability Advocates* cases, the public entity should be required to ensure that the private persons performing those functions comply with the ADA.

B. A private person may fairly be said to be implementing a service, program or activity of a public entity where the public entity uses the private person to implement an activity engaged in by the public entity for its own benefit.

The second category of circumstances in which a private person may fairly be said to be implementing a service, program or activity of a public entity is where the public entity uses the private person to implement an activity engaged in by the public entity for its own benefit.

The state lottery programs in *Paxton v. State Department of Tax & Revenue*, 451 S.E.2d 779 (W. Va. 1994), and *Winborne v. Virginia Lottery*, 677 S.E.2d 304 (Va. 2009), are instructive. At issue in both cases was whether the state lottery departments were required to ensure ADA compliance by their private lottery retailers—*i.e.*,

licensees. In both cases, the courts held that they were. *See Paxton*, 451 S.E.2d at 785 (holding that the Lottery Commission had a legal duty to require its lottery retail licensees to comply with the ADA); *Winborne*, 677 S.E.2d at 308 (finding the selling of lottery tickets to be a program or activity within the meaning of the ADA).

Both the Virginia and West Virginia Supreme Courts cited the revenue-producing function of the state lotteries operated as public programs. The Virginia Supreme Court in particular emphasized that the “Virginia Lottery was established to produce revenue to be used for public purposes” and, to accomplish the statutorily-stated purpose to produce revenue, the Virginia Lottery must sell tickets as part of its operation. *See id.* at 305, 307. Although private lottery retailers operate the day-to-day ticket sales, that operation is still part of the overall Virginia Lottery. *Id.*

The West Virginia Supreme Court rejected the argument that the state lottery was only engaged in a licensing arrangement with private persons. The court cited the revenue-producing function of the West Virginia lottery as a governmental program, noting that the “Lottery Commission does more than merely license lottery locations. It controls and obtains substantial monies from the lottery system.” *See Paxton*, 451 S.E.2d at 785.

Thus, although the Virginia and West Virginia state lotteries are administered by private persons through ticket sales at private retailers, the lotteries are nonetheless programs of a public entity because the states operate the lotteries for their own benefit

as a governmental program, collecting the profits from ticket sales as state revenue.

The relationship between state and local governments and certain forms of gambling provides another example of the distinction between the government engaging in an activity for its own benefit and the government regulating private conduct. In particular, a state or local government could permit private persons to operate a bingo hall or race track as private businesses, but regulate the business extensively. Nothing in the language or intent of the ADA would support treating those private businesses as providing services, programs or activities of a public entity because they were tightly regulated.

By contrast, if the state were to establish its own race track or bingo hall, similar to a state lottery, the enterprise could fairly be characterized as a state program. The fact that the day-to-day operations of the state's race track or bingo hall were delegated to private persons would not change the analysis: those private persons would be operating the state's own enterprise. In those circumstances, the bingo hall or race track may fairly be said to be implementing a program of the state.⁴ Accordingly, the state would be required in those circumstances to

⁴ Under Section 504 of the Rehabilitation Act, a "program or activity" of a public entity includes "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)(1)(A). While the language of the Rehabilitation Act is broad, it is consistent with the core principle that public entities must ensure compliance with the ADA in their own operations, not when they regulate private conduct.

ensure that the private persons operating *its own* bingo hall or race track complied with the ADA.

In sum, where state or local governments engage in services, programs or activities for their own benefit, regardless of whether a private person is tasked with the day-to-day administration of the service, program or activity, as in the case of the Virginia and West Virginia state lottery programs, the service, program or activity may fairly be said to be that of the public entity. Accordingly, the public entity in those circumstances is required to ensure ADA compliance by the private person administering the service, program or activity.

III. Under the test proposed by Amici, the Texas Education Agency is obligated⁵ to ensure compliance with the ADA by the private driver education companies it licenses to provide certificates required for certain classes of citizens to obtain a driver's license.

The Texas driver education program at issue here 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.⁶

⁵ The Texas Department of Licensing and Regulation is the agency currently in charge of driver education, replacing the TEA. *See* Act of April 30, 2015, 84th Leg., 2015 Texas House Bill No. 1786, § 72(b)(3). The change does not substantively affect the merits of this case.

⁶ Petitioners disclose in their brief that none of the plaintiffs is now subject to the requirement of obtaining a certificate from one of the licensed driver education schools in order to obtain a

Control of public roads and of the privilege of driving on those roads is generally regarded as a core governmental function. *See Selevan v. New York Thruway Auth.*, 584 F.3d 82, 93 (2d Cir. 2009) (noting the court’s “repeated observation that building and maintaining roads is a core governmental function”). Private persons do not license drivers to grant them permission to drive on public roads, governments do.

The Texas scheme at issue here makes obtaining a certificate from one of the licensed driver education schools an absolute requirement for obtaining a driver’s license for certain classes of citizens. Thus, it can fairly be said that obtaining a certificate from one of the schools—a certificate that accurately is characterized as a government record—is part and parcel of obtaining a driver’s license from the state. It is not optional and it is not merely useful; rather, for whole classes of citizens it is required. In other words, the certificate “program” is part of a core governmental function.

The extensive regulation and licensing of the driver education schools alone would not be sufficient to require the TEA to ensure the schools’ compliance with the ADA. Rather, the public entity’s obligation in this case stems from the fact that the schools must follow the extensive regulation laid out by the state agency in order to issue certificates upon successful completion of a driver education course. The dispositive fact is that a class of citizens cannot

license, and argue that the case is nonetheless not moot. Amici take no position on that issue.

obtain a driver's license without obtaining a certificate from one of the private schools.

Recognizing the significance of the certificate being required to obtain a license, the majority decision below observed that driver's licenses are not issued by the TEA, but rather by a different state agency that is not a party to the case. The majority speculated in that regard that the other state agency, in order to avoid violating the ADA, might well be required to provide exemptions to deaf individuals who could not obtain the required certificate from a driver education school. *See Ivy*, 781 F.3d at 258.

Amici respectfully submit that, in this limited context, distinguishing between state agencies in this way does not make sense. The State of Texas set up a system that includes obtaining a certificate from a licensed driver education school as a requirement for certain classes of citizens to obtain a driver's license. In evaluating whether the agency licensing the driver education schools is obligated to ensure that its licensees comply with the ADA, it is appropriate to look at the process mandated by the state for obtaining a driver's license as a whole. Because, on the face of the system created by the state, a whole class of citizens cannot be licensed to drive on public roads without a certificate from one of the driver education schools, the state agency responsible for licensing the schools should be required to ensure that the licensees comply with the ADA.

The majority's point is, however, a compelling one to the extent that it focuses attention on the critical fact that eligibility for a driver's license is contingent upon acquisition of a certificate from one of the driver education schools. As established, the

Texas driver education program, through the certificates, implements the core governmental function of control of public roads and driver licensing.

If Texas extensively regulated private driver education schools exactly as it does now, but did not require a certificate from one of its licensed schools in order to obtain a driver's license, it would not be required to ensure ADA compliance. In that scenario, the school would be a mere licensee heavily regulated by the state, and would not be implementing the state's driver's license program through the issuance of state-mandated certificates. That would not mean that the schools could discriminate based on disability, but rather merely that the state would not be obligated to take on the role of enforcing the ADA.

CONCLUSION

For these reasons, the Court should require state and local governments and other public agencies to ensure private persons' compliance with the ADA only where those private persons may fairly be said to be implementing a service, program or activity of the public entity itself. On the unusual, if not unique, facts of this case, that test is met and judgment of the Court of Appeals for the Fifth Circuit therefore should be reversed. In doing so, however, this Court should make clear that a state or local government or other public entity has no duty to ensure compliance with the ADA by private persons when it is licensing or otherwise regulating private conduct, no matter how extensive or detailed the regulation.

Respectfully submitted,

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