No. 15-486

In the Supreme Court of the United States

DONNIKA IVY; BERNARDO GONZALEZ; TYLER DAVIS, AS NEXT FRIEND OF JUANA DOE, A MINOR; ERASMO GONZALEZ; ARTHUR PROSPER, IV,

Petitioners,

v.

COMMISSIONER MIKE MORATH, TEXAS COMMISSIONER OF EDUCATION,

Respondent.

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

BRIEF FOR LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are law professors whose scholarship, teaching, and practice have focused on statutory and constitutional rights to equal treatment under the law. Accordingly, they have a specialized knowledge of and interest in the constitutional and statutory interests at issue in this case.[1]

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[1] The parties have consented to the filing of this brief. Counsel for Petitioners and Respondent have informed counsel for *Amici Curiae* that they have filed or are in the process of filing a letter providing blanket consent to the filing of *amicus* briefs in this case. No party or party's counsel authored this brief in whole or in part and no person or entity other than the amici curiae, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

Petitioners should prevail for reasons arising directly from the statutory scheme governing the treatment of people with disabilities. Privatization of governmental services provided to people with disabilities does not excuse or allow non-performance with applicable law. This Court's historical treatment of public entities seeking to avoid federal law through privatization is relevant to this case, supports the Petitioners' positions, and warrants consideration by the Court.

ARGUMENT

I. *The Privatization Problem*

Amici submit that Petitioners should prevail for reasons arising directly from the statutory scheme governing the treatment of people with disabilities.[2] Rather than repeat Petitioners' arguments, the merits of which are clear, *Amici* will instead focus on the dangers privatization of governmental service presents to those, like Petitioners, who rely upon the government to provide public services in accordance

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[2] *See Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then . . . [the] 'judicial inquiry is complete.'" (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))); *see, e. g.*, *United States v. Ron Pair Enters., Inc.*, 489 U. S. 235, 241-42 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810).

with applicable laws such as the Americans with Disabilities Act (the "ADA").[3]

For many decades, our state and federal governments have increasingly relied on private companies to provide public services. In recent years, however, the practice of privatizing public services has grown to include services that many consider to be "traditional governmental functions." Privatization now pervades the provision of many core governmental functions including, for example, certain operations of our military, management of our public schools, and administration of welfare and public benefits.

The prevalence of government outsourcing raises serious issues with the accountability of the government to its citizens. While contracting out government services to private companies may make financial sense, it can have material unintended consequences. That is the case here. The unintended consequence of privatizing the administration of driver's education courses in Texas is to unlawfully compromise the statutory rights of deaf citizens. The statutory protections of the ADA cannot be avoided simply because a government service, as here, is privatized.[4]

Petitioners are the very citizens who are to be protected under the governing statutory scheme.

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[3] Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 1210-12213 (2013) (amended 2008).

[4] The "breadth" of Title II of the ADA was also stressed in the Court's unanimous decision in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), which applied Title II to private prisons.

Respondent's conduct, including by privatizing a governmental function, serves to disadvantage, rather than protect, deaf citizens in Texas. This violates both the letter and spirit of the applicable statute. It also creates an absurd result which cannot be squared with governing law.

Perhaps the most well-known example of the negative implications of government outsourcing is privatized incarceration. Just last week, the United States Department of Justice (the "DOJ") announced that it would begin to phase out the use of private for-profit prisons to house federal inmates. The DOJ outlined its decision in a memorandum to the federal Bureau of Prisons (the "BOP"). U.S. DEP'T OF JUSTICE, MEMORANDUM FOR THE ACTING DIRECTOR FEDERAL BUREAU OF PRISONS, REDUCING OUR USE OF PRIVATE PRISONS (Aug. 18, 2016), *available at* https://www.justice.gov/opa/file/886311/download.

The DOJ explained that while "[p]rivate prisons served an important role during a difficult period, . . . time has shown that they compare poorly" to government-run facilities. *Id.* at 1. Citing to a damning report by the Office of Inspector General,[5] the DOJ found that privately run prisons provide fewer correctional services and are less safe, but do not produce substantial savings. *Id.* The DOJ also

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[5] *See* OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS (Aug. 2016), *available at* https://oig.justice.gov/reports/2016/e1606.pdf. Among other things, the Inspector General's report concluded that a pool of 14 privately contracted prisons reported more incidents of inmate contraband, higher rates of assaults, and more uses of force than facilities run by the federal Bureau of Prisons.

found that the BOP's rehabilitative services—such as educational programs and job training—"have proved difficult to replicate and outsource." *Id.* For these reasons, the DOJ directed BOP officials not to renew existing contracts or to "substantially reduce" their scope, with the goal of "reducing—and ultimately ending—[the] use of privately operated prisons." *Id.* at 2.

The decision to limit federal incarceration to publicly operated prisons was applauded by those who had long questioned the constitutionality of the government's abdication of one of its most fundamental roles. Because of government outsourcing, federal inmates housed in private facilities faced unique hardships, including a limited ability to seek redress for violations of their constitutional rights.

The criminal justice system is just one of many arenas where government "outsourcing" has become the norm. Still, the plight of federal inmates demonstrates that the consequences of privatization can be both negative and far reaching—particularly when the underlying public function implicates important services or fundamental rights. In the prison context, the seemingly arbitrary decision to place a federal inmate in a private prison rendered that inmate worse off than his counterpart placed in a government-run prison. Here, TEA's seemingly innocuous decision to outsource its driver education program to privately run schools has a similarly deleterious effect.

Delegation to private entities should not become a means for any government to avoid its obligations

under federal law, whether that obligation is owed to prisoners or deaf citizens of Texas. Indeed, the law is clear that state agencies "may not contract away their obligation to comply with federal discrimination laws." *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 910 (9th Cir. 2013); *see also Hunter v. District of Columbia*, 64 F. Supp. 3d 158, 168 (D.D.C. 2014) ("Regulations promulgated by the DOJ make clear that public entities cannot escape liability by contracting away the provision of services to a private entity." (citing 28 C.F.R. § 35.130(b)(1))); *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1074 (9th Cir. 2010) ("[A] State cannot avoid its obligations under federal law by contracting with a third party to perform its functions."); *Kerr v. Heather Gardens Ass'n*, Civil Action No. 09-cv-00409-MSK-MJW, 2010 WL 3791484, at *11 (D. Colo. Sept. 22, 2010) ("[A] public entity, who contracts with another entity to perform its duties, remains liable to ensure that the other entity performs those duties in compliance with Title II."); *cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form"); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1401 (2003) ("Adequately guarding against abuse of public power requires application of constitutional protections to every exercise of state authority, regardless of the formal public or private status of the actor involved.")

Accordingly, The Texas Education Agency (the "TEA") should not be allowed to avoid compliance

with the ADA simply because it privatized its drivers education courses in Texas.

II. *The History of the Public/Private Distinction*

This is not the first time that this Court has confronted a public entity seeking to avoid federal law by privatizing essential social services. The historical context of this issue therefore informs the merits of the arguments presently before the Court. *See Mullaney v. Wilbur*, 421 U.S. 684, 692 (1975) (noting that the Court's "analysis may be illuminated if this issue is placed in historical context.").

The modern trend of public entities seeking to avoid their obligations under federal law through privatization begins with *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, the appellant, a Jehovah's Witness, attempted to exercise her fundamental right to freedom of religion by distributing religious literature on a sidewalk near the local post-office in Chickasaw, Alabama. *Id.* at 503. Although Chickasaw was owned by a private company, the town and its shopping district were accessible to and freely used by the public in general. *Id.* at 502-03. The appellant was arrested because the company posted "private property" and "no solicitation" signs in the town stores, and she declined to leave the sidewalk and the town after being told that she could not distribute the literature. *Id.*

In analyzing the constitutionality of the state statute as applied, the Court began by pointing out that, had title to the town of Chickasaw belonged to a municipality instead of a private company, "it

would have been clear that appellant's conviction must be reversed." *Id.* at 504. The State argued, however, that because a private company held legal title to property in Chickasaw, the company had the right to deprive the residents and visitors of Chickasaw of their First Amendment rights. *Id.* at 505. The Court rejected the State's argument, finding that—regardless of who owns or possesses a town—the public has an identical interest in the functioning of the community. *Id.* at 507. The Court held that the company's property rights did not justify the State permitting the company to govern a community of citizens so as to restrict their fundamental rights and liberties. *Id.* at 509. In other words, the Court rejected the notion that a state can skirt federal law by delegating its traditional governance duties to a private entity based on a public/private distinction.

During the years immediately after the Court's landmark ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), many state and local governments experimented with various privatization strategies in an effort to avoid desegregation and federal law. One such iconic example is *Griffin v. County School Bd. of Prince Edward County*, 377 U.S. 218 (1964).

In 1951, a group of black school children living in Prince Edward County filed a complaint in the United States District Court for the Eastern District of Virginia alleging that they had been denied admission to public schools attended by white children and charging that Virginia laws requiring such school segregation denied them the equal protection of the laws in violation of the Fourteenth

Amendment. *Id.* at 220-21. The case was remanded after the Court's ruling in *Brown*, and in response Virginia's legislature implemented a "massive resistance" policy by enacting legislation to close all integrated public schools, defund those schools, and then pay tuition grants for white children to enroll in newly created private schools. *Id.* at 221-22. After the Virginia Supreme Court of Appeals held that these laws violated the state's constitution, however, the legislature abandoned its "massive resistance" strategy and turned instead to a so-called "freedom of choice" program. *Id.* Among other things, the Virginia legislature repealed compulsory attendance laws and instead made school attendance a matter of local option. *Id.* at 222.

In 1959, the United States Court of Appeals for the Fourth Circuit directed the federal district court to (1) enjoin discriminatory practices in Prince Edward County schools; (2) require the County's school board to take "immediate steps" toward admitting students without regard to race; and (3) require the board to make plans for admissions to elementary schools without regard to race. *Id.* at 222. Determined to avoid operating desegregated public schools, the Supervisors of Prince Edward County responded by refusing to levy school taxes, which led to the closure of all public schools in the county; public schools in other Virginia counties remained open. *Id.* at 222-23. A private foundation was then formed to operate private schools for white children in Prince Edward County, and state and local funding was provided to those private schools. *Id.* at 222-24.

In 1961, the black school children petitioners filed a supplemental complaint, seeking to enjoin County from paying public funds to help support private schools which excluded students on account of race. *Id.* at 224. The district court found that actions of the Prince Edward County Supervisors were designed to impermissibly preserve segregation and enjoined the County from paying tuition or giving tax credits so long as the public schools remained closed. *Id.* After the Fourth Circuit reversed the district court's judgment, this Court granted certiorari. *Id.* at 225.

In a unanimous decision, the Court held that the State and County's scheme to close the public schools and meanwhile finance private segregated white schools denied the school children equal protection of the laws guaranteed by the Constitution. *Id.* at 232. The Court pointed out the many facets of the State's involvement in the running of these "private" schools, including by providing grants and tax credits to make the county's program to deprive students of the same advantages enjoyed by children in every other part of Virginia possible. *Id.* at 223-24, 232-33. In short, "the *Griffin* case simply treated the school program for what it was—an operation of Prince Edward County schools under a thinly disguised 'private' school system actually planned and carried out by the State to the county to maintain segregated education with public funds." *Palmer v. Thompson*, 403 U.S. 217, 222 (1971) (summarizing *Griffin*).

Not surprisingly, strategies like the one employed by Prince Edward County were not limited only to education. For example, in the wake of *Brown* courts

were forced to confront numerous public entities improperly attempting to privatize other types of facilities—such as public parks and swimming pools—to avoid their obligations under federal law. *See e.g., Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (vacating district court's judgment dismissing discrimination complaint against city that contracted with a private corporation to operate its public amphitheater); *City of St. Petersburg v. Alsup*, 238 F.2d 830 (5th Cir. 1956) (rejecting city's argument that it was entitled to operate its public beach and swimming pools on a segregated basis because it was acting in a proprietary capacity to run the utilities as a private business); *Dep't of Conservation & Dev., Div. of Parks, Com. of Va. v. Tate*, 231 F.2d 615, 616 (4th Cir. 1956) (holding that state agency could not abridge citizens' right to use a public park free from racial discrimination by leasing the park to a private company); *Williams v. Rescue Fire Co.*, 254 F. Supp. 556 (D. Md. 1966) (rejecting argument that swimming pool constructed by city agency was a private club exempt from civil rights laws and thus could be operated as a segregated facility).

A critical point in these cases (similar to the current case) was the public entities' level of involvement in the plan or operation to provide governmental services through a supposedly "private" source. *Compare Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (finding a state agency, that owned the building in which a privately-owned restaurant operated and refused to serve non-white customers, had "insinuated itself into a position of interdependence" with the

restaurant such that "it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope" of federal law); *with Palmer*, 403 U.S. at 222-23 (noting the absence of evidence that the city was either directly or indirectly involved in the funding or operation of the private entity operating swimming pools).[6]

Against this historical backdrop, the evidence in the current case—including evidence of TEA's authority over the driver education schools' accreditation, staff, curriculum, and acquisition of certificates—reflects that the TEA's pervasive and substantial involvement with driver-education schools in Texas constitutes a service, program, or activity under Title II of the ADA. As in *Griffin* and *Burton*, the State here has insinuated itself into a position of interdependence with driver-education schools such that they must be considered joint actors in administering Texas's driver-education-certificate program. Indeed, the Solicitor General

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[6] *See also United States v. Guest*, 383 U.S. 745 (1966) (construing 18 U.S.C. § 241). In *Guest*, state and private actors allegedly collaborated in a scheme to deprive African-American citizens of equal rights. The Court noted that "[i]n a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation." *Id.* at 756-57. This case does not require the Court to make a constitutional pronouncement. However, in construing this statute, the history of state-private collaboration that operates to deprive people of rights is surely relevant.

agrees that the Fifth Circuit erred in holding that the ADA imposes no requirements on the TEA under these circumstances.[7] This Court, therefore, should put an end to the TEA's impermissible attempt to avoid its obligations under the ADA to ensure that the state-mandated driver education program, which it effectively controls, is accessible to people with disabilities. Or, as Judge Wiener put it:

> The State of Texas cannot legislatively mandate driver education, then evade ADA responsibility via a "flea-flicker" lateral from TEA to private licensees.

Amici do not suggest that the TEA, in partnering with licensees to administer its state-mandated driver education program, harbors the same nefarious intent as that held by past bad actors like the Prince Edward County School Board. Rather, the point is that: (1) the Court should consider the

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[7] The Solicitor General's Brief for the United States as Amicus Curiae correctly highlights numerous flaws in the Fifth Circuit's analysis. First, "the court of appeals misanalysed [sic] the relevant facts and circumstances of this case when it concluded that Texas's role in driver education is limited to 'licensure and regulation of driving education schools.'" U.S. AMICUS BR. at 11. Next, "[t]he court of appeals neglected to consider that, regardless of who performs the final handoff, the certificates are state records, subject to state tracking requirements." *Id.* In other words, "the schools effectively do serve as 'proxies' for the State in issuing those certificates." *Id.* Finally, the Solicitor General aptly concludes that the State's exertion of authority, not just over the schools' acquisition of certificates, but also over accreditation, staff, and curriculum leaves "no doubt that the State enjoys substantial legal control over the circumstances in which the certificates may be issued." *Id.* at 11-12.

relevant historical context in which this issue of public/private distinction has once again arisen; and (2) the unintended, but logical, consequence of the Fifth Circuit's ruling is that the door is nevertheless left open for public entities to shirk their responsibilities under federal law—a result that undoubtedly runs counter to the ADA's broad purpose of inclusion. *See* Findings and Purposes of ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, Sept. 25, 2008, 122 Stat. 3553 (stating that Congressional intent in enacting the ADA was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage.")

In sum, history validates the Petitioners' real and substantial concern that public entities, if not appropriately restrained, will again endeavor to "farm out" or privatize essential social programs/functions to, whether intentionally or not, avoid their obligations under federal law.

CONCLUSION

For all of the foregoing reasons, and for those presented by petitioners, the Fifth Circuit's decision should be reversed.

Respectfully submitted,

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