No. 15-486

In the Supreme Court of the United States

DONNIKA IVY, ET AL., PETITIONERS

v.

MIKE MORATH,
TEXAS COMMISSIONER OF EDUCATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a private, for-profit educational institution operates a "service[], program[], or activit[y] of a public entity," within the meaning of Title II of the Americans with Disabilities Act, where the private educator is in a regulated industry and provides an education that allows its students to be examined for a state license.

TABLE OF CONTENTS

Page

Introduction 1
Jurisdiction 3
Statement 3
A. State-law background 3
B. Factual and procedural background 8
Summary of argument 12
Argument 15
I. This case is moot and should be dismissed 15
A. This case is moot. 15
B. This case should be dismissed without vacating the court of appeals' judgment. 20
II. The court of appeals' judgment is correct. 27
A. Private education of drivers is not an activity of the State. 28
1. The ADA's text and structure provide that Title II covers only state action. 28
2. Driver education is the activity from which petitioners allege wrongful exclusion. 30
3. The driver education at issue is not state action under any of this Court's tests. 32
a. Ownership and operation 33
b. Exclusive state function 34
c. State compulsion 37
d. Joint enterprise with state officials 38

B. Petitioners' claim that Title II compels state enforcement of private driving schools' federal obligations presents constitutional concerns that should be avoided. 42
C. Title II regulations do not help petitioners. 46
D. Petitioners' interpretation of Title II would create many practical problems by massively expanding the amount of conduct that qualifies as state action. 49
Conclusion 55

TABLE OF AUTHORITIES

Cases:

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 37
Alsbrook v. City of Maumelle,
184 F.3d 999 (8th Cir. 1999) 32-33
Alvarez v. Smith,
558 U.S. 87 (2009) 23, 24
Am. Mfrs. Mut. Ins. Co. v. Sullivan,
526 U.S. 40 (1999) 39, 50
Blum v. Yaretsky,
457 U.S. 991 (1982) 30, 37, 39, 40, 42
Burton v. Wilmington Parking Auth.,
365 U.S. 715 (1961) 38-39, 40
Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016) 19
Camreta v. Greene,
563 U.S. 692 (2011) 16, 22, 23

Cases—continued:

Chevron, U.S.A., Inc. v. NRDC, Inc.,
467 U.S. 837 (1984) 49
City of El Paso v. Heinrich,
284 S.W.3d 366 (Tex. 2009) 25
Cnty. of Riverside v. McLaughlin,
500 U.S. 44 (1991) 18, 20
Cruz v. Farquharson,
252 F.3d 530 (1st Cir. 2001) 18
Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 49
Estades-Negroni v. CPC Hosp. San Juan Capestrano,
412 F.3d 1 (1st Cir. 2005) 34
Flagg Bros. v. Brooks,
436 U.S. 149 (1978) 35, 38
Fontenot v. McCraw,
777 F.3d 741 (5th Cir. 2015) 18
Forbes v. St. Thomas Univ., Inc.,
768 F. Supp. 2d 1222 (S.D. Fla. 2010) 52
Frame v. City of Arlington,
657 F.3d 215 (5th Cir. 2011) 32
Frisby v. Schultz,
487 U.S. 474 (1988) 45
Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 15, 17-18, 19
Gerstein v. Pugh,
420 U.S. 103 (1975) 18, 20
Harvey v. Harvey,
949 F.2d 1127 (11th Cir. 1992) 34

Cases—continued:

Hensley v. Eckerhart,
461 U.S. 424 (1983) 25
Holstein v. City of Chicago,
29 F.3d 1145 (7th Cir. 1994) 18
Jackson v. Metro. Edison Co.,
419 U.S. 345 (1974) ..... *passim*
Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982) 33, 53
Lusardi v. Xerox Corp.,
975 F.2d 964 (3d Cir. 1992) 18
Miller v. Johnson,
515 U.S. 900 (1995) 49
NCAA v. Tarkanian,
488 U.S. 179 (1988) 39
Nebbia v. New York,
291 U.S. 502 (1934) 35
New York v. United States,
505 U.S. 144 (1992) 44, 45, 46
Noel v. N.Y.C. Taxi & Limousine Comm'n,
687 F.3d 63 (2d Cir. 2012) 48-49
Olmstead v. L.C.,
527 U.S. 581 (1999) 49
Paxton v. State Dep't of Tax & Revenue,
451 S.E.2d 779 (W. Va. 1994) 40
Penn. Dep't of Corr. v. Yeskey,
524 U.S. 206 (1998) 33, 35
PGA Tour, Inc. v. Martin,
532 U.S. 661 (2001) 46
Powe v. Miles,
407 F.2d 73 (2d Cir. 1968) 35

Cases—continued:

Preiser v. Newkirk,
422 U.S. 395 (1975) 15
Printz v. United States,
521 U.S. 898 (1997) 44
Rendell-Baker v. Kohn,
457 U.S. 830 (1982) 34, 48
Richardson v. McKnight,
521 U.S. 399 (1997) 54
San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.,
483 U.S. 522 (1987) 34, 36, 41-42, 48
Sosna v. Iowa,
419 U.S. 393 (1975) 16, 20
Tennessee v. Lane,
541 U.S. 509 (2004) 32, 35
Tucker v. Phyfer,
819 F.2d 1030 (11th Cir. 1987) 18
Tyler v. City of Manhattan,
849 F. Supp. 1429 (D. Kan. 1994) 49
U.S. Bancorp Mort. Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994) 20, 21, 22, 23, 24, 26
U.S. Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 17, 18, 20
United States v. Jin Fuey Moy,
241 U.S. 394 (1916) 45
United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 20
Walling v. James V. Reuter, Inc.,
321 U.S. 671 (1944) 20

Cases—continued:

Winborne v. Va. Lottery,
677 S.E.2d 304 (Va. 2009) 39, 40
Ex parte Young,
209 U.S. 123 (1908) 7

Constitutional provisions, statutes, and rules:

U.S. Const.:
amend. XIV 30, 32
amend. XIV, § 5 32
20 U.S.C. ch. 28, subch. IV 52
28 U.S.C. § 1254(1) 3
29 U.S.C.:
§ 794(a) 8, 31, 32
§ 794(b) 32
42 U.S.C.:
§ 1983 53
§ 12131(1) 29
§ 12131(2) 29
§ 12132 ..... 1, 28-29, 30, 31
§ 12134 10
§ 12181(7) 34
§ 12181(7)(F) 51
§ 12181(7)(J) 1, 24-25, 29
§ 12182 ..... 1, 24-25
§ 12182(a) 29
§ 12188 ..... 1, 25
§ 12201(a) 31
§ 12205 25

Statutes and rules—continued:

Ariz. Rev. Stat.:
§ 32-3001 53
§ 32-3022(A) 53
§ 32-3022(B) 53
§ 32-3022(C) 53
Cal. Vehicle Code:
§§ 11100-11116 35
§ 12814.6(a)(3) 35
Fla. Stat.:
§ 322.08(6) 35
§ 322.095 35
625 Ill. Comp. Stat.:
5/6-107(b) 35
5/6-401 to 5/6-424 35
Md. Code, Transp.:
§§ 15-701 to 15-710 35
§ 16-105(d)(2)(ii) 35
Minn. Stat.:
§ 136A.62(3) 53
§ 136A.63 53
§ 136A.65 53
Mo. Stat.:
§ 302.130 36
§ 302.178(1)(4) 36
Neb. Rev. Stat. § 60-4,120.01(2) 36
Okla. Stat.:
tit. 47, § 6-105(C)(1) 36
tit. 70, §§ 19-113 to 19-121 36
Or. Rev. Stat. § 807.065 37

Statutes and rules—continued:

S.C. Code:
§ 56-1-180(A) 36
§ 56-23-10 36
S.D. Codified Laws § 32-12-17 37
Tenn. Code § 55-50-311(b)(1)(D) 37
Tex. Educ. Code:
§ 29.902 5
§ 1001.001(6) 5
§ 1001.001(7) 4, 5
§ 1001.001(8) 4
§ 1001.001(12) 4
§ 1001.002 5
§ 1001.053 5
§ 1001.055 ..... 5, 41
§ 1001.055(a-1) 5
§ 1001.101(b) 4
§ 1001.1015 4
§ 1001.102 4
§ 1001.1025 4
§ 1001.105 4
§ 1001.107 4
§ 1001.108 4
§ 1001.110 4
§ 1001.112 5
§ 1001.201 5
§ 1001.204(b)(1)-(3) 6
§ 1001.204(b)(4) 6
§ 1001.204(b)(5) 6
§ 1001.204(b)(7) 6

Statutes and rules—continued:

§ 1001.204(b)(8) 6
§ 1001.204(b)(10)-(12) 6
§ 1001.204(b)(13) 6
§ 1001.251 5
Tex. Fin. Code tit. 3 51
Tex. Gov't Code:
§ 81.011 3
§ 81.102 3
§ 81.113 3
§ 411.174(a)(7) 50
§ 411.190 50
Tex. Health & Safety Code ch. 241 51
Tex. Ins. Code:
chs. 1951-1954 50
tit. 6 51
Tex. Occ. Code:
§ 203.252 50
§ 203.254 50
§ 455.053 51
§ 455.156 51
§ 1101.301 51
§ 1101.356 51
§ 1301.404(b)-(d) 3
§ 1602.303 50
Tex. Penal Code art. 45.0511(b) 4
Tex. Transp. Code:
§ 521.001(1-a) 5
§ 521.021 4
§ 521.141 5

Statutes and rules—continued:

§ 521.142 4
§ 521.142(d) 5
§ 521.143(a) 50
§ 521.1601 ..... 4, 19
§ 521.161 4
§ 521.205 19
§ 601.051 50
§ 601.053(a)(2) 40
§ 601.071 50
§ 601.081(b) 40
Va. Code:
§ 46.2-323(D) 36
§ 46.2-1701 36
W. Va. Code § 17B-2-3a(d)(C) 37
Ariz. Sup. Ct. R. 34(b)(1)(D) 51
28 C.F.R.:
§ 35.130 46
§ 35.130(b)(1) 48
§ 35.130(b)(6) 47
§ 36.104 34
§ 41.51 46
29 C.F.R.:
§ 1926.1427(b) 3
§ 1926.1427(j) 3
34 C.F.R. §§ 600.2-600.6 52
Fed. R. App. P.:
43(a) 7
43(b) 7

Rules—continued:

Fed. R. Civ. P.:
12(b)(6) 9
25(c) 7
62.1 19
Minn. R. for Admission to the Bar
4(A)(3)(a) 51
Sup. Ct. Rule 35.3 7
16 Tex. Admin. Code:
§ 84.100(1) 5, 41
§ 84.100(12) 5, 41
§ 84.106(b) 4
§ 84.106(b)(1) 4
§ 84.106(b)(2) 4
§ 84.106(b)(1)(A) 19
§ 84.118 4
§ 84.119(d)(16) 5
§ 84.119(d)(17) 5
§ 84.700 4
22 Tex. Admin. Code:
§ 365.14(a) 3
§ 365.14(b) 3
Tex. R. Governing Admission to the Bar:
I(a)(4) 51
III(a)(1) 51
Tex. State Bar R.:
Art. XII, § 2(F) 3
Art. XII, § 4(A) 3
Art. XII, § 6(A) 3

Rules—continued:

Tex. State Bar, Texas MCLE Regulations:
§ 6.1 3
§§ 10.1.1-10.1.7 3

Miscellaneous:

Act of May 19, 1967, 60th Leg. R.S., ch. 332, 1967 Tex. Gen. Laws 794 35
Act of May 29, 2009, 81st Leg., R.S., ch. 1253, 2009 Tex. Gen. Laws 3981 4
Act of May 30, 2009, 81st Leg., R.S., ch. 1413, 2009 Tex. Gen. Laws 4459 4
Act of May 27, 2015, 84th Leg., R.S., ch. 1044, 2015 Tex. Gen. Laws 3624 7
Am. Bar Ass'n, *ABA Standards and Rules of Procedure for Approval of Law Schools* (2016) 52
General Appropriations Act for the 2016-17 Biennium, 84th Leg., R.S., ch. 1281, VIII-27, 2016 Tex. Gen. Laws 4343 8
House Comm. on Highways & Roads, Bill Analysis, H.B. 568, 60th Leg., R.S. (1967) 35
House Research Org., Bill Analysis, Tex. H.B. 1786, 84th Leg., R.S. (2015) 6
Tex. Dep't of Public Safety, Driver License Div., *Texas Driver Handbook* (Jan. 2016) 30
40 Tex. Reg. 5471-74 (Aug. 28, 2015) 8
U.S. Dep't of Educ., Specialized Accrediting Agencies (Sept. 22, 2016) 52

Miscellaneous—continued:

U.S. Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual:*
§ II-1.3000 29
§ II-3.7200 47-48
U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, *ADA Update: A Primer for Small Business* (2011) 25
7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* (3d ed. 2007) 7

INTRODUCTION

The Court lacks jurisdiction and cannot reach the question presented because this case is moot. Petitioners concede that their individual claims are moot. And the existence of class allegations in petitioners' complaint is inconsequential, as the United States correctly notes, because petitioners never moved for class certification despite having ample time to do so. U.S. Br. 11-13. Therefore, as the United States agrees, no basis exists to remand for a class-certification motion. U.S. Br. 14. The only remaining matter is whether the Court should vacate the court of appeals' judgment or instead just dismiss the case. Dismissal without vacatur is appropriate here. Mootness caused solely by petitioners' actions does not entitle them to vacatur of a judgment with which they disagree.

In all events, the court of appeals' judgment is correct: the driver education provided by private, for-profit schools is not state action under Title II of the Americans with Disabilities Act (ADA).

At the outset, it is important to understand what this case is not about. It is not about whether private driving schools can exclude the deaf. Title II of the ADA covers only state action. 42 U.S.C. § 12132. But Title III separately requires inclusion of the disabled by any place of public accommodation, including a privately-run school. *Id.* §§ 12181(7)(J), 12182. It is undisputed that both the federal government and individuals can obtain judicial relief against private driving schools that violate their Title III obligations. *Id.* § 12188.

Nor is this case about whether Texas's Department of Public Safety (DPS) will grant a driver's license to deaf applicants who cannot obtain otherwise-required driver education due to their disability. As the Fifth

Circuit noted, Title II may require DPS to modify or excuse the driver-education requirement for obtaining a driver's license if the required education cannot be completed on account of a disability. Pet. App. 17-18. But petitioners have not sued any DPS official or alleged that DPS would not grant an exemption. *See* Pet. App. 18.

Instead, this case is about petitioners' attempt to commandeer a different state agency into doing what petitioners and the federal government can already do—enforce private driving schools' compliance with federal ADA Title III obligations. Petitioners allege that, although these private schools have a "federal . . . obligation not to discriminate on the basis of disability," the accused state agency "refuses to enforce it or issue formal regulations that would make schools show evidence of ADA compliance." J.A. 90 (operative complaint); *see* J.A. 92-93 (request for injunctive relief).

Petitioners try to characterize the education delivered by private entities as an activity of the State itself. But that driver education does not fall within any of this Court's tests for state action. The State does not hire instructors, own the buildings and vehicles needed for education, interact with students, deliver hands-on instruction, or receive tuition from students. Nor is driver education traditionally an exclusive state function. Contrary to some amici's "privatization" label, private driver education existed before Texas began regulating the industry in 1967.

At base, petitioners' interpretation would radically expand Title II's scope, it conflicts with this Court's guiding principles on state action, and it poses serious constitutional and practical problems.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), but the Court lacks jurisdiction because the case is moot, *see infra* Part I.

STATEMENT

A. State-Law Background

1. Government agencies often require, as a condition of being licensed to engage in some activity, the completion of training that can be obtained from a private educator. Under such a regime, the government agency must specify what type of education suffices for licensure.

For example, the federal government specifies the nature of the training and testing that must be delivered by private crane-operator schools in order to certify their students to operate a crane at a construction site. 29 C.F.R. § 1926.1427(b), (j). Likewise, the Texas State Board of Plumbing Examiners defines the course materials and training that must be offered by individuals, businesses, or associations in order to be approved as a course provider whose training will satisfy the continuing-education requirements to keep a plumbing license. Tex. Occ. Code § 1301.404(b)-(d); 22 Tex. Admin. Code § 365.14(a), (b). And maintaining a Texas law license requires annual completion of education courses that can be delivered by private entities that must meet standards specified by the Texas State Bar, which is an administrative agency of the Texas Judicial Branch. Tex. Gov't Code §§ 81.011, 81.102, 81.113; Tex. State Bar R., Art. XII, §§ 2(F), 4(A), 6(A); Tex. State Bar, Texas MCLE Regulations §§ 6.1, 10.1.1-10.1.7.

Texas follows that same model for a license to drive. In addition to passing a driver's-license examination,

see Tex. Transp. Code § 521.161, an applicant under age 25 must also complete a course of driver education.[1] *Id.* § 521.021 (license required to drive); *id.* § 521.1601 (driver education required).[2] Minimum standards for the driver education required to get a license before age 25 are set by statute and regulation. Tex. Educ. Code §§ 1001.102, 1001.1025, 1001.107, 1001.108, 1001.110; 16 Tex. Admin. Code §§ 84.106(b), 84.700. Courses offered only to adults require 6 hours of in-class instruction and may be offered online. Tex. Educ. Code § 1001.1015; 16 Tex. Admin. Code § 84.106(b)(2). Courses offered to minors require 32 hours of in-class instruction, which may be offered in certain online environments, and 44 hours of behind-the-wheel instruction. Tex. Educ. Code § 1001.101(b); 16 Tex. Admin. Code §§ 84.106(b)(1), 84.118.

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[1] Training required to get a driver's license is called "driver education," as distinguished from a "driving safety course," which is geared towards existing drivers and allows them to dismiss traffic tickets or get better insurance rates. Tex. Educ. Code §§ 1001.001(7), (12), 1001.105; Tex. Penal Code art. 45.0511(b). The term "driver training" refers to driver education and driving safety courses collectively. Tex. Educ. Code § 1001.001(8).

[2] The Texas Transportation Code has two sections 521.1601, enacted by separate laws passed in the same legislative session. Act of May 30, 2009, 81st Leg., R.S., ch. 1413, § 3, 2009 Tex. Gen. Laws 4459, 4459-60; Act of May 29, 2009, 81st Leg., R.S., ch. 1253, § 10, 2009 Tex. Gen. Laws 3981, 3983. After 2015 amendments removed a minor discrepancy noted by the Fifth Circuit, *see* Pet. App. 2 n.1, the two sections 521.1601 are substantively identical except that one applies to persons under age 21 and the other applies to persons under age 25. Because all persons under age 21 are also under age 25, this brief cites the age-25 version of section 521.1601. It likewise cites the age-25 version of section 521.142.

Graduates of driver-education courses receive from the educator a completion certificate with "an identifying certificate number provided by [a state agency] that may be used to verify the authenticity of the certificate with the driver education school" or course provider. Tex. Educ. Code § 1001.055(a-1). Under a regulation, these completion certificates are considered "government record[s]." 16 Tex. Admin. Code § 84.100(1), (12). The State charges educators a $1 fee for each certificate or certificate number. *Id.* § 84.119(d)(16), (17). Instruction in driving skills that does not prepare students for Texas's driver-license examination is not a course of "driver education" that can result in such a certificate or that must be licensed and meet minimum curricular standards. Tex. Educ. Code §§ 1001.001(6) (definition), 1001.055 (authorization requirement to issue specified certificates or certificate numbers).

A course that does teach "driver education" can be delivered in three main ways: by licensed instructors at a licensed driver-education business, *id.* §§ 1001.001(7), 1001.201, 1001.251; by certified instructors at a public school, *id.* § 29.902; or by a recipient's parent (or like person) if that person meets certain requirements, *id.* § 1001.112. Other entities can also teach and certify the completion of driver education in limited situations. *Id.* § 1001.002 (covering, for example, free courses sponsored by employers for their employees).

2. The Texas Department of Public Safety (DPS) handles applications for driver's licenses. Tex. Transp. Code §§ 521.001(1-a), 521.141, 521.142(d). The Texas Department of Licensing and Regulation (TDLR), in contrast, licenses and regulates enterprises that wish to operate a driver-education school. Tex. Educ. Code § 1001.053. The State requires these licensed schools to

have appropriate curriculum and records, adequate space, and qualified instructors. *Id.* § 1001.204(b)(1)-(3), (5), (13). Licensure further requires schools to demonstrate that they have consumer-protection safeguards and are financially sound. *Id.* § 1001.204(b)(4), (8), (10)-(12). And licensure requires that the school satisfies "all county, municipal, state, and federal regulations, including fire, building, and sanitation codes and assumed name registration." *Id.* § 1001.204(b)(7). Accordingly, licensed driver-education schools must attest under oath that "[p]rospective students will not be denied admission on the basis of race, religion, color, national origin, sex, handicap, or age (except where age, sex, or handicap constitutes a bona fide occupational qualification necessary to proper and efficient administration)." J.A. 107.

The question here, however, is not whether *state* law requires TDLR to undertake some particular effort to monitor licensed schools' compliance with ADA regulations. Rather, petitioners claim that *federal* law requires TDLR to enforce federal ADA regulations in a way "effective" to "ensure" that private driver-education schools do not fail to accommodate a disability. J.A. 93 (complaint).

3. When this suit was filed in 2011, the authority to regulate private driver-education schools was assigned to the Texas Education Agency (TEA). *See* J.A. 17. In 2013, the Texas Sunset Advisory Commission proposed moving the authority to regulate driver education from TEA to TDLR, to better align TEA's duties with its core competencies and take advantage of TDLR's expertise in regulating businesses. House Research Org., Bill Analysis at 4-5, Tex. H.B. 1786, 84th Leg., R.S. (2015), http://www.hro.house.state.tx.us/pdf/ba84r/hb1786.pdf.

In 2015, the Texas Legislature accepted that proposal and moved driver-education regulatory authority from TEA to TDLR. Act of May 27, 2015, 84th Leg., R.S., ch. 1044, 2015 Tex. Gen. Laws 3624. The Legislature also moved regulation of parent-taught driver education from DPS to TDLR. *Id.* §§ 26, 70.[3] Reflecting those changes, the driver-education regulations issued

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[3] This brief uses "the state agency" to mean the agency that licenses driver-education schools, which was originally TEA and is now TDLR. *See* Br. 2 n.1 (noting that TDLR is now the relevant agency). But given that respondent, TEA Commissioner Morath, no longer has authority to take the regulatory actions that petitioners allege federal law requires, it appears that petitioners (were their claims not moot) would need to substitute the TDLR executive director, the commissioners governing TDLR, or some combination of these as the defendant or defendants. *See Ex parte Young*, 209 U.S. 123, 160 (1908) (sovereign immunity from a prospective-relief action is avoided when the *defendant's* acts are said to conflict with supreme federal law). Substitution does not appear to be automatic under either of two rules. First, Federal Rule of Civil Procedure 25(c) provides: "If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party." But this dispute is not over "an interest." *Cf.* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1958 (3d ed. 2007) ("[Rule 25(c)] applies to ordinary transfers and assignments, as well as to corporate mergers."). Rather, the parties are disputing the use of state *authority*. Second, this Court's Rule 35.3 provides for automatic substitution of a "successor in office" when a public officer "dies, resigns, or otherwise ceases to hold office." But TEA Commissioner Morath continues to hold office. Federal Rule of Appellate Procedure 43(b) therefore appears to provide the substitution procedure: "If a party needs to be substituted for any reason other than death, the procedure prescribed in Rule 43(a) applies." But such a substitution is not automatic; it requires a motion identifying the new party. *See* Fed. R. App. P. 43(a).

by TEA and DPS have been moved and assigned to TDLR's control. 40 Tex. Reg. 5471-74 (Aug. 28, 2015).

TDLR is not budgeted to receive federal funds, although that does not rule out the possibility of a federal grant or contract. *See* General Appropriations Act for the 2016-17 Biennium, 84th Leg., R.S., ch. 1281, VIII-27, 2016 Tex. Gen. Laws 4343, 5120; *cf.* Pet. Br. ("Br.") 27 n.5. And a Rehabilitation Act claim does not lie against an entity that does not receive federal funds. *See* 29 U.S.C. § 794(a); J.A. 91-92; Pet. App. 9 (noting federal-funding prerequisite for such a claim). This potential new basis for dismissal of the Rehabilitation Act claim only confirms the need for properly identified defendants, *see supra* p.7 n.3, were the case not moot, *see infra* Part I.

B. Factual and Procedural Background

1. Petitioners are five deaf individuals who sought driver education in Texas while under age 25. J.A. 66-70. They allege that they were unable to find a driver-education school that would provide a sign-language interpreter or other aid. J.A. 66-70.

Petitioner Ivy sought help from Heather Bise, a deafness resource specialist at the Texas Department of Assistive and Rehabilitative Services, and Bise brought the complaint to TEA's attention. J.A. 20, 71, 95. TEA responded that it relies on the federal government to pursue whether a commercial entity such as a driving school is out of compliance with the federal ADA, and TEA thus gave Bise information on how to forward her complaint to the U.S. Department of Justice (DOJ). J.A. 101.

Bise then filed a complaint with DOJ on behalf of Ivy and others. J.A. 72. DOJ referred the matter to the U.S. Department of Education's Office of Civil Rights.

J.A. 72. According to the United States, the Office of Civil Rights "dismissed the complaint on the view that the TEA did not have an affirmative obligation to monitor individual driver education schools' compliance with Title II of the ADA or the Rehabilitation Act." U.S. Br. 5; *see* J.A. 72.

2. In 2011, Ivy sued the TEA Commissioner as well as ABC Driving School, a privately-operated driving school that she alleged refused to provide her an interpreter. J.A. 15-32. Ivy claimed that TEA violated Title II of the ADA (and like obligations under the Rehabilitation Act, *see* Pet. App. 9), and that ABC Driving School violated Title III of the ADA. J.A. 16.

Ivy later dismissed her Title III claim against ABC Driving School. *See* J.A. 3. Its owner provided Ivy an affidavit stating that he had been unaware of his obligation to provide a sign-language interpreter but would provide interpreters in the future. J.A. 108. At that point, Ivy, joined by four new named plaintiffs, filed her third amended complaint and added class allegations. J.A. 33-63.

Respondent moved to dismiss petitioners' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that private driver education is not a "service[], program[], or activit[y] of a public entity" covered by Title II. Pet. App. 49. The district court denied the motion, stating that developing driver-education requirements was a "core function" of TEA, Pet. App. 52, and noting that TEA regulates driver-education schools and provides them with unique certificate numbers or with certificates bearing those numbers to allow authentication of course completion. Pet. App. 52-53. The district court certified its order for interlocutory appeal. Pet. App. 55.

3. The Fifth Circuit granted permission to appeal and reversed, concluding that driver education—as opposed to driver licensing—is not a service, program, or activity of the state agency under ADA Title II. Pet. App. 2, 18. The court first recognized that the state agency does not provide, operate, or perform driver education, so driver education is not subject to ADA Title II or the Rehabilitation Act under a plain-meaning interpretation of those statutes. Pet. App. 10-11. By way of contrast, the court gave the example of prison recreational activities and medical services, which are operated by the prison itself. Pet. App. 10.

The court of appeals next observed that regulations issued by the U.S. Attorney General to implement ADA Title II, *see* 42 U.S.C. § 12134, "simply beg the ultimate question here" by drawing the line at whether a state agency "provide[s]" a service. Pet. App. 11-12. The court also referenced a DOJ guidance manual stating that a governmental agency is not responsible under the ADA for the practices of companies that it licenses if those practices are not the result of requirements or policies set by the agency. Pet. App. 12-13. The court noted that any violation of ADA Title III by the driving schools was not the result of a requirement or policy of the State. Pet. App. 13.

In surveying case law, the court of appeals found significant the lack of a contractual or principal-agent relationship between the state agency and private driver-education schools. Pet. App. 14-16. The court also rejected petitioners' contention that the State's "pervasive" regulation of driver-education schools transforms the schools into agents of the State. Pet. App. 16-17. That argument, the court explained, implies that "states and localities would be required to ensure the ADA

compliance of every heavily-regulated industry, a result that would raise substantial policy, economic, and federalism concerns." Pet. App. 16.

The court of appeals recognized that petitioners sued only the TEA Commissioner to require him to force an *accommodation* in the provision of driver education—and did not sue DPS for an *exemption* from the driver-education requirement to get a driver's license before age 25. Pet. App. 17-18. Accordingly, the court of appeals reserved the question whether Title II obligates DPS to make such an exemption when a driver-education course cannot be completed because of a disability. Pet. App. 18.

Judge Wiener dissented for many of the same reasons given by the district court. Pet. App. 23-28. The court of appeals denied rehearing en banc. Pet. App. 56-57.

SUMMARY OF ARGUMENT

I. A. This case is moot because the five petitioners no longer have a personal stake in the outcome. Four petitioners completed a driver-education course and obtained a completion certificate. The final petitioner moved out of the State. That extinguishes petitioners' personal stake in this dispute. And no entity with a legal status separate from petitioners' interests exists because the district court never certified a class. Nor did petitioners move to certify a class, despite ample opportunity. So there is nothing to which any future certification ruling could relate back. This Court has never let a plaintiff move to certify a class after the plaintiff's own stake in the outcome of the case expired.

B. Because this case is moot, the only remaining matter is whether to simply dismiss the case or also vacate the court of appeals' judgment. Petitioners have not carried their burden to show equitable grounds for the extraordinary relief of vacatur. This case was mooted solely by petitioners' own actions, not happenstance. As the Court's precedents make clear, when mootness is caused by the voluntary actions of the party seeking relief from the judgment below, the case should be dismissed without vacatur.

Moreover, the public has an interest in the existence of judicial precedent. To suggest a competing public interest, petitioners say that the judgment below erects a roadblock to obtaining a driver's license. That is hyperbole. The judgment below does not hold that driving schools can exclude the disabled. ADA Title III undisputedly applies to such private schools. In fact, petitioner Ivy sued a driving school under Title III in this very case, and that school agreed to provide a sign-language interpreter. The federal government is also

authorized to enforce driving schools' obligation to accommodate the disabled. And the court of appeals specifically reserved the issue of DPS's possible duty under ADA Title II to excuse, in some contexts, the driver-education requirement for obtaining a driver's license before age 25.

Nothing about the judgment below adds to an equitable case for vacatur. Based on the mootness caused by petitioners' own actions, the case should be dismissed without vacatur.

II. Were the Court to reach the merits, it should affirm. The State requires individuals under age 25 to complete a driver-education course before obtaining a driver's license. But that does not make private driving education a service, program, or activity of the State. Petitioners' arguments should be rejected because this Court's tests for "state action" have not been met, petitioners' broad view of Title II would unconstitutionally commandeer the State to enforce federal law, federal ADA regulations do not show that driver education is a state activity, and petitioners' expansive view of Title II has significant problematic consequences.

A. This Court has formulated several tests for identifying state action. None of those tests place responsibility with the State for the challenged conduct of the driver-education schools here. First, those schools are owned and operated by private parties. Second, they do not perform any traditionally exclusive state function, as if the State were privatizing its role in law enforcement or running elections. Third, the State's licensing regime for private driver-education schools does not affirmatively order the discrimination alleged by petitioners or even encourage it. Petitioners can establish at most agency *inaction*, which this Court has rejected

as showing that private activity is the conduct of a state actor. Fourth, the State is not in any financially interdependent joint enterprise with private driving schools, as if it had hired them or established them as the State's retailers.

B. Petitioners' interpretation of ADA Title II creates serious concerns that the law unconstitutionally commandeers the State into regulating private parties according to federal directives. Petitioners wish to conscript the state agency here into using its regulatory authority to police private schools' compliance with their federal ADA obligations. But petitioners can seek redress against private driving schools under ADA Title III, as petitioner Ivy did earlier in this very lawsuit. There is no need to cross constitutional boundaries in order to provide petitioners with an effective remedy. The Court can avoid the serious concerns of unconstitutional commandeering by rejecting petitioners' broad interpretation of ADA Title II.

C. Petitioners' resort to federal Title II regulations is unavailing because those regulations do not adopt petitioners' proposed test. Rather, as the Fifth Circuit recognized, those regulations merely beg the ultimate question here.

D. Petitioners' interpretation of Title II would introduce significant uncertainty regarding when private conduct can be deemed state action. Their view creates questions in fields ranging from private insurance to private healthcare to private legal education. This is yet another reason to reject petitioners' interpretation of Title II, were this case not moot.

ARGUMENT

I. This Case Is Moot And Should Be Dismissed.

The Court lacks Article III jurisdiction because this case is now moot. Petitioners do not dispute that their individual claims are moot. And the fact that petitioners' complaint includes class allegations is irrelevant because they never moved to certify a class, despite having ample time to do so.

The only remaining question is whether the Court should simply dismiss the case or also vacate the court of appeals' judgment ruling for respondent. Because petitioners' own actions are the sole cause of the mootness—respondent did nothing to moot the case—petitioners are not entitled to the extraordinary relief of equitable vacatur. The case should be dismissed without vacatur.

A. This case is moot.

1. To sustain federal jurisdiction, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013).

In this suit, petitioners sought a declaration and injunction adopting their view that federal law requires the state agency to take actions said to allow petitioners to complete a driver-education course and therefore become eligible for a Texas driver's license before age 25. J.A. 64-65, 89, 92-93. Petitioners stipulate, however, that four of them have now obtained the required driver

education and that the fifth petitioner has moved out of Texas (in addition to turning 25 recently). *See* Br. 12-13, 16 & n.4.[4]

These facts make petitioners' claims moot, as the United States correctly explains. *Camreta v. Greene*, 563 U.S. 692, 710-11 (2011); *see* U.S. Br. 11-14. Petitioners do not contend otherwise. *E.g.*, Br. 21 (accepting that petitioners "had a live claim that became moot").

Petitioners do argue that "this *case* (as opposed to their individual claims)," Br. 23, is not moot because their complaint has class allegations. Br. 17-22. But the mere inclusion of class allegations in a complaint does not prevent a case from becoming moot when the named plaintiffs' claims become moot.

When a district court certifies a class, the class "acquire[s] a legal status separate from the interest asserted by" the named plaintiff. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). Consequently, an Article III controversy "may exist between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.* at 402. Here, however, no class was certified. Petitioners did not even move to certify a class. There is no entity in this case with claims sepa-

[4] The State has verified the representations of petitioner Ivy and of both Gonzalez petitioners. *See* Br. 12, 16 n.4. The fourth petitioner joined this action under the apparent alias Juana Doe and has not revealed her name despite no longer being a minor. *See* J.A. 35. The State accepts petitioner Doe's representation that she completed a driver-education course. Br. 12. Finally, the State has verified petitioner Prosper's representation that he turned 25 on September 23, 2016 and accepts his representation that he moved out of Texas during or before August 2016. *See* Br. 12-13.

rate from petitioners' now-moot claims. Hence, the case is moot.

2. The relation-back doctrine of *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), cannot assist petitioners here. *Cf.* Br. 19-20. *Geraghty* "merely hold[s] that when a District Court erroneously denies a procedural motion which, if correctly decided, would have prevented the action from becoming moot [by creating a class having separate legal status], an appeal lies from the denial and the corrected ruling 'relates back' to the date of the original denial." *Geraghty*, 445 U.S. at 406-07 n.11.

But petitioners did not move for class certification. If this case were remanded "for petitioners to seek class certification" for the first time, Br. 22, that original class-certification decision would come well after petitioners lost any personal stake in the case. *Geraghty* expressly held that such a case would be moot: "If the named plaintiff has no personal stake in the outcome at the time class certification is denied, relation back of appellate reversal of that denial *still would not prevent mootness of the action*." 445 U.S. at 407 n.11 (emphasis added).

This holding is important because *Geraghty* was already pushing the outer bounds of Article III jurisprudence. *Geraghty* included this limitation to address the dissent's concern that the judicial process "[would] become a vehicle for 'concerned bystanders.'" *Id.* (quoting dissent). And this limitation is no less important now than in justifying *Geraghty* in the first place.

The Court recently confirmed this fundamental aspect of *Geraghty*'s reasoning in *Genesis Healthcare*—a case petitioners fail to cite. There, a Fair Labor Standards Act plaintiff "had not yet moved for 'conditional

certification' when her claim became moot." 133 S. Ct. at 1530. That posture, the Court held, is one "foreclosing any recourse to *Geraghty*," because "[t]here is simply no certification decision to which respondent's claim could have related back." *Id.*; *see* U.S. Br. 12.

Circuit courts likewise have held that cases with class allegations should be dismissed as moot when the named plaintiffs' claims become moot before a class-certification motion is filed. *E.g.*, *Fontenot v. McCraw*, 777 F.3d 741, 749 (5th Cir. 2015); *Cruz v. Farquharson*, 252 F.3d 530, 533-34 (1st Cir. 2001); *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 975-78 (3d Cir. 1992); *Tucker v. Phyfer*, 819 F.2d 1030, 1034-35 (11th Cir. 1987).

3. Petitioners also raise (Br. 18) the mootness exception for claims so "inherently transitory" that the district court did "not have even enough time to rule on a motion for class certification" before the named plaintiffs' claim became moot. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991) (quoting *Geraghty*, 445 U.S. at 399) (allowing challenge to pretrial detention to proceed even though named plaintiffs were no longer in pretrial detention); *see Geraghty*, 445 U.S. at 398 ("When the claim on the merits is 'capable of repetition, yet evading review," the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation.") (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (holding a challenge to pretrial detention not moot even though the named plaintiffs were no longer in pretrial detention)).

But petitioners' claims do not fall within this exception because claims like theirs do not exist only sporadically and are not transitory in nature, as the United

States correctly notes. U.S. Br. 12-13. Driver education is required for anyone under age 25 to obtain a Texas driver's license, and driver education can be started as early as age 14. Tex. Transp. Code § 521.1601; 16 Tex. Admin. Code § 84.106(b)(1)(A). In the mine run of cases, including this case, that makes for years in which class certification can be sought before claims like petitioners' expire. The claims here are not of a "fleeting nature." *Genesis Healthcare*, 133 S. Ct. at 1531.[5]

Nor did anything else deny petitioners a "fair opportunity to show that certification is warranted." Br. 21 (quoting *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016)). As the United States observes, U.S. Br. 13, petitioners' class allegations were pending for eleven months before the district court certified an interlocutory appeal. J.A. 3, 7, 43-49. Petitioners identify no impediment that prevented them from moving for class certification during that time. Nor did they move for an indicative ruling on class certification during this appeal. *Cf.* Fed. R. Civ. P. 62.1. And contrary to their implication, *cf.* Br. 20, petitioners did not ask the Fifth

[5] Petitioners' proposed sub-class for only ages 16 and 17 does not satisfy the "inherently transitory" exception either. *Cf.* Br. 19. As the Fifth Circuit correctly noted, despite the parties' assumptions, the relevant statutes do not limit parent-taught driver education to individuals under 18. Pet. App. 3 n.2 (citing Tex. Transp. Code §§ 521.205, 521.1601). Because individuals over age 17 can take parent-taught driver education, there is no legally relevant distinction for creating a sub-class for ages 16 and 17 only. Regardless, petitioners' claim is about the failure to accommodate deaf individuals at private driver-education schools, so it is unclear why a possible sub-class based on the availability of parent-taught driver education would have any legal significance here. And even if such a sub-class could be justified, there would be ample time for a named plaintiff in that age range to move for class certification.

Circuit to remand for class-certification proceedings if it concluded that their claims were not viable.

Petitioners had ample opportunity to move for certification of a class that could have "a legal status separate from the interest asserted by" petitioners themselves. *Sosna*, 419 U.S. at 399. They chose not to. The Court has never recognized a mootness exception just because a complaint includes class allegations that the plaintiff could have pursued but did not pursue before his claims became moot. As the United States agrees, U.S. Br. 14, there is no justification for such an exception, which would exceed both *Geraghty*'s "relation back" rationale and the "inherently transitory" exception of *Gerstein* and *County of Riverside*. Article III does not allow a remand for petitioners to move for class certification now that they have lost any personal interest in the case.

B. This case should be dismissed without vacating the court of appeals' judgment.

Because this case is moot, the Court "may not consider its merits, but may make such disposition of the whole case as justice may require." *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944).

When this Court's review is "prevented through *happenstance*," the "established practice of the Court" based on that mootness is to vacate the judgment below with a direction to dismiss the case. *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39-40 (1950) (emphasis added). But this case was not mooted through happenstance. Instead, petitioners' voluntary actions were the sole cause of mootness. Br. 12-13.

And the Court's practice is different when mootness arises, not by happenstance, but by a petitioner's own actions. For example, in *U.S. Bancorp Mortgage Co. v.*

Bonner Mall Partnership, 513 U.S. 18 (1994), the Court refused to vacate the court of appeals' judgment after the parties settled their claim. *Id.* at 29. The Court explained that, in deciding whether to vacate the judgment below, "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 24. The Court held that allowing a party "who steps off the statutory path to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would . . . disturb the orderly operation of the federal judicial system." *Id.* at 27.

Here, petitioners are the parties "seeking relief from the status quo of the appellate judgment," and therefore they bear the burden "to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26. Petitioners have not done so.

1. This case became moot because of petitioners' actions, not the State's actions or happenstance. Four petitioners took a driver-education course and obtained the completion certificate they sought. Br. 12, 19. And the fifth petitioner, Prosper, moved out of Texas before turning age 25. Br. 12-13. This is not a case where petitioners all aged out of the driver-education requirement. Even today, three petitioners are still under age 25. *See* J.A. 34 (Gonzalez petitioners), 35 (petitioner Doe).

The vacatur analysis does not turn on whether a petitioner should be "faulted" (U.S. Br. 15) for preferring not to await the uncertain prospect of a future victory on appeal. The Court did not ask whether the petitioner in *Bancorp* could be "faulted" for that same preference. *See* 513 U.S. at 24-27. Rather, as in *Bancorp*, petitioners are not entitled to vacatur because the judgment

below is "unreviewed by [petitioners'] own choice." *Id.* at 25.

Petitioners do not deny that their own actions mooted their claims. *See* Br. 22-24. Petitioners' only allusion to causation quotes *Bancorp*'s "vagaries of circumstance" language out of context. Br. 23. *Bancorp* distinguished between (1) a case where "vagaries of circumstance" or the "unilateral action of the party who prevailed below" caused the mootness, and (2) a case where "the party seeking relief from the judgment below caused the mootness by voluntary action." 513 U.S. at 24, 25. That distinction, the Court noted, is "[t]he principal condition to which we have looked." *Id.* at 24. This case falls squarely within the latter fact pattern: petitioners are "seeking relief from the judgment below" and their own "voluntary action[s]" were what mooted the case. *Id.*

The circumstances here favor dismissal without vacatur even more than in *Bancorp*. There, the parties reached a settlement, meaning the respondent had taken some action contributing to mootness. *Id.* at 26. Here, the State took no action contributing to mootness.

2. The United States wrongly argues that *Camreta*, 563 U.S. at 713, characterized facts like those here "as 'happenstance' that should not preclude vacatur." U.S. Br. 15 (referring to petitioner Prosper and the fact that he moved out of Texas and later turned 25). In *Camreta*, it was the *respondent*—not the petitioner—whose move out of state and upcoming graduation from high school rendered the case moot. 563 U.S. at 710-11 (stating that respondent would no longer be subject to being seized by state officials while in school). Because petitioner Camreta did not control the respondent's actions in moving out of state and graduating, the Court charac-

terized those actions as "happenstance" with relation to petitioner's request for vacatur once the Court could not review the judgment below. *Id.* at 713.

Camreta did not hold that mootness created by a petitioner's own actions is mere "happenstance" that allows vacatur. Petitioner Prosper's action of moving out of Texas is not "happenstance." Moreover, even if petitioner Prosper's conduct were deemed "happenstance," there are at least three petitioners (both Gonzalez petitioners and petitioner Doe) who remain in Texas, who are under the age of 25, and who could have proceeded with this lawsuit had they not chosen to complete a driver-education course. Their conduct cannot be considered happenstance.

This case also is not comparable to *Alvarez v. Smith*, 558 U.S. 87 (2009). *Cf.* U.S. Br. 15. There, six disputes regarding property seized by a State became moot where there was "no longer any actual controversy between the parties about ownership or possession of the underlying property." 558 U.S. at 92. The acts causing that mootness could not be attributed solely to the petitioner State ("the party seeking relief from the judgment below," *Bancorp*, 513 U.S. at 24) or the respondents whose property had been seized. Two respondents mooted their disputes by defaulting and conceding that the State could keep their seized cash; the State mooted three disputes by returning cars to those respondents; and the final dispute was settled by the parties agreeing that the State could keep some but not all of the cash at issue. 558 U.S. at 92. The Court therefore concluded that the mootness fell "on the 'happenstance' side of the line," noting that the disputes had "proceeded through a different court system" without "any procedural link"

to the federal civil-rights cases about the process due in seizing the property. *Id.* at 95.

In contrast to *Alvarez*, petitioners' actions here—and their actions alone—mooted this case. *See supra* pp.21-22. And petitioners' voluntary actions did not occur in response to cases that "proceeded through a different court system," as in *Alvarez*. 558 U.S. at 95. The legal significance of petitioners' actions is attributable only to this case, and those acts extinguished petitioners' ability to pursue the "ordinary processes of appeal" in this litigation. *Bancorp*, 513 U.S. at 25.

3. Lastly, "when federal courts contemplate equitable relief, [their] holding must also take account of the public interest." *Id.* at 26. Judicial precedents are "valuable to the legal community as a whole." *Id.* And although vacating a circuit court's judgment would create more room for future debate in that circuit, the Court has held that fact insufficient for vacatur: "debate *among* the courts of appeals sufficiently illuminates the questions that come before us for review." *Id.* at 27 (emphasis in original). "The value of additional intra-circuit debate," the Court explained, "seems to us far outweighed by the benefits that flow to litigants and the public from the resolution of legal questions." *Id.* Those benefits are strong here, where there is little circuit precedent on the ADA Title II question. *See* Pet. App. 10 (so recognizing).

Petitioners' only attempt at identifying a competing public interest rests on hyperbole. They assert that the judgment below places a "roadblock" in the path of deaf individuals seeking a driver's license. Br. 23; *see* U.S. Br. 15 (same "roadblock" characterization). But no "roadblock" exists. ADA Title III requires private schools to accommodate disabled students. 42 U.S.C.

§§ 12181(7)(J), 12182. Petitioners recognize as much. Br. 10 (recognizing the schools' "responsibility under Title III of the ADA"). *See generally, e.g.*, U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, *ADA Update: A Primer for Small Business* 7 (2011) ("It is a business's responsibility to provide a sign language [or] oral interpreter . . . .").

Nobody has told private driver-education schools not to accommodate disabilities. The Fifth Circuit did not even address Title III obligations other than to implicitly recognize their existence. *See* Pet. App. 16. And multiple enforcement mechanisms exist. For instance, Title III provides for enforcement actions by the U.S. Attorney General. 42 U.S.C. § 12188. The Fifth Circuit's judgment does not block this activity at all, and the federal government regularly engages in such enforcement activity.

Title III also affords a private right of action against noncompliant driving schools. *Id.* And the ADA provides for prevailing-party attorney's fees in such actions, *id.* § 12205, the very purpose of which is to "ensure effective access to the judicial process." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quotation marks omitted). Petitioner Ivy even brought a Title III private action against ABC Driving School, J.A. 15, which she resolved with the school's owner declaring that he would always provide a sign-language interpreter if requested in the future, J.A. 3, 108.

Finally, to the extent that Texas state law might require a state agency to condition a business license on an enterprise's ADA compliance and to determine that compliance through certain steps, state-law obligations can generally be enforced in state court. *See City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009) (allowing

suits for prospective relief against state officials alleged to be violating state-law obligations). Nothing in the judgment below blocks such a suit. And TEA has already explained circumstances in which it "may exercise its enforcement authority to either compel the school to come into compliance or remove a noncompliant school's ability to operate." J.A. 101.

The Fifth Circuit held that *federal* law does not compel the state agency to take regulatory action to ensure private driver-education schools' compliance with their existing federal obligations. Pet. App. 16. That holding is not a "roadblock" to accessing driver education. And the Fifth Circuit expressly reserved the question whether ADA Title II obligates Texas's DPS "to give exemptions to certain deaf individuals who cannot obtain driver education certificates, given that using these certificates as an eligibility criteria" might potentially "screen out" deaf people from obtaining driver's licenses without justification. Pet. App. 17-18. In short, no countervailing public policy outweighs the public's interest in judicial precedent, and petitioners have failed to carry their heavy burden "to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur" based on mootness that they caused. *Bancorp*, 513 U.S. at 26.

II. The Court of Appeals' Judgment Is Correct.

If the Court reaches the merits, it should affirm the court of appeals' judgment. Title III of the ADA applies to private schools, including those teaching driving skills. But the ADA does not conscript the States into enforcing these private entities' compliance with their federal Title III obligations.

Title II of the ADA applies to services, programs, and activities offered by state and local governments. Licensing drivers is one such state program. But the State's specification of criteria for a driver's license, such as getting certain insurance and education, does not mean that *the State* provides the services needed to meet those criteria.

The state agency here does not find locations to establish driving schools, own the premises and equipment used in education, enroll students and charge them tuition, or teach students and observe their progress. It never has done this. Nor does the State pay driving schools to do any of these things. Petitioners' broad view of Title II overlooks these important realities and ignores traditional limits on the concept of state action.

That the State specifies detailed educational requirements to obtain a driver's license says nothing about whether providing the required education is a state service. And the State's requirement that proof of qualifying education take a certain form (such as certificates bearing a unique identifying number) does not transform private education into state action.

Petitioners' argument essentially boils down to two propositions: driving is important, and driver-education schools are regulated thoroughly. But many important industries are regulated thoroughly and provide ser-

vices useful in obtaining a state license to do something important. That does not make those services state action. Adopting petitioners' theory would create significant practical problems.

None of this means that driver-education schools can exclude the disabled. ADA Title III separately requires that these private schools accommodate disabilities. A state agency, of course, can voluntarily choose to exercise its regulatory powers towards ensuring that end. And the State's Legislature can require an agency to do so through state law. But the court of appeals correctly rejected petitioners' attempt to use *federal* law to commandeer the State's regulatory apparatus into enforcing private actors' federal ADA obligations, by the unjustified labeling of private services as state action.

A. Private education of drivers is not an activity of the State.

The ADA's text and structure, as well as this Court's precedents defining state action, confirm that the driver education at issue here is private activity, not state activity within the meaning of Title II.

1. The ADA's text and structure provide that Title II covers only state action.

Title II of the ADA covers only governmental action. It provides:

> 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 (emphasis added).[6] A "public entity," in turn, means "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government," along with certain commuter authorities. *Id.* § 12131(1).

In contrast, Title III covers "private entities [that] are considered public accommodations," including any "private school, or other place of education." *Id.* § 12181(7)(J); *see id.* § 12182(a). As DOJ's Technical Assistance Manual explains, "[p]ublic entities are not subject to title III of the ADA, which covers only private entities. Conversely, private entities are not subject to title II." U.S. Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual* § II-1.3000, https://www.ada.gov/taman2.html.

It is undisputed that Title III of the ADA obligates private driver-education schools to accommodate the disabled. Br. 29 n.7; U.S. Br. 29. Title II of the ADA, in contrast, covers only the specified forms of state action. 42 U.S.C. § 12132.

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[6] There is a reasonableness qualification on this duty that comes from the definition of a "qualified individual with a disability," which means "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

2. Driver education is the activity from which petitioners allege wrongful exclusion.

The operative question here is whether petitioners' Title II claim against the state agency is viable because it alleges exclusion from the "services, programs, or activities of a public entity," as opposed to those of a private entity. *Id.* Answering that question requires first identifying precisely what petitioners allege they were "excluded from participation in" or "denied the benefits of." *Id.*; *cf. Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982) ("Faithful adherence to the 'state action' requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint.").

Petitioners' complaint is that they were excluded from *driver education courses*. J.A. 91 (seeking "access to approved driver courses"). The issue is not whether the State would examine petitioners for a driver's license. Licensing individuals to drive a motor vehicle on Texas highways is, of course, a state activity. The State is not "turn[ing] around" from its position that it has a sovereign interest in who is licensed to drive motor vehicles on Texas highways. *Cf.* Br. 28-29. But petitioners did not sue any official at the state agency that issues driver's licenses (DPS) or allege that DPS would fail to reasonably excuse a disabled person's inability to complete the educational prerequisite to be examined for a driver's license before age 25. Pet. App. 17-18 (court of appeals' opinion so noting). Petitioners' complaint is not that DPS fails to live up to its written policy of accommodation. *See* Tex. Dep't of Public Safety, Driver License Div., *Texas Driver Handbook* (Jan. 2016) ("ADA Accommodations" section located inside front cover),

https://www.txdps.state.tx.us/internetforms/Forms/DL-7.pdf.

Licensing and regulating the operation of driving schools is also a state activity. *See* Br. 27. But that is not what petitioners claim they were "excluded from participation in" or "denied the benefits of." 42 U.S.C. § 12132. Petitioners do not allege that they were unlawfully excluded from participation in deciding how to regulate driver-education schools, as if petitioners could not attend open meetings to comment on rulemaking. And petitioners are not school owners alleging that an unaccommodated disability keeps them from obtaining a license to do business.

Instead, petitioners allege they "cannot complete the driver education courses" at issue. J.A. 65. The activity from which petitioners allege exclusion is a course of education offered by a licensed driving school. J.A. 91 (seeking "access to approved driver courses"). As the United States acknowledges, "The alleged discrimination is that *driver education schools* do not provide access to persons with hearing disabilities." U.S. Br. 31 (emphasis added). Only if those schools' services qualify as an activity, service, or program of the State can petitioners' Title II claim survive dismissal. Pet. App. 9-10 (so explaining).

The same allegation underlies petitioners' Rehabilitation Act claim. J.A. 91 (this claim rests on "the reasons stated above" in the ADA claim). The Rehabilitation Act, 29 U.S.C. § 794(a), is not significantly different from Title II in its accommodation obligations. Congress set Rehabilitation Act standards as the floor for ADA standards, 42 U.S.C. § 12201(a), and courts frequently treat the two statutes' standards as the same.

E.g., *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011).

The Rehabilitation Act defines a "program or activity" within its scope to mean "all the operations of" a public entity (if federally funded). 29 U.S.C. § 794(a), (b). As the court of appeals explained, that definition undermines petitioners' claim because TEA (like TDLR) does not "operate" courses. Pet. App. 10-11 ("operation" has dictionary definition of "a doing or performing" of action). Petitioners implicitly concede the distinction by referring to the state agency as "overseeing *those schools'* operations." Br. 28 (emphasis added).

Because of the Rehabilitation Act's congruence with the ADA, and because TDLR may not meet the federal-funding condition for the Rehabilitation Act to apply, *see supra* p.8, the remainder of this brief focuses on Title II of the ADA.

3. The driver education at issue is not state action under any of this Court's tests.

The undefined phrase "services, programs, or activities of a public entity" in Title II of the ADA should be understood with reference to the Fourteenth Amendment's concept of state action, as the Court has a significant body of precedent in that context defining what qualifies as a State's conduct.[7] The Court "has articu-

[7] This Court has reserved the question whether Congress's powers under § 5 of the Fourteenth Amendment allow a valid abrogation of the States' sovereign immunity from most ADA Title II suits, specifically distinguishing the "wide variety of applications" of Title II that "implicate only *Cleburne*'s prohibition on irrational discrimination" and application of Title II to cases "implicating the fundamental right of access to the courts." *Tennessee v. Lane*, 541 U.S. 509, 530, 532 n.20, 533-34 (2004); *see Alsbrook v. City of Maumelle*, 184 F.3d 999, 1009 (8th Cir. 1999) (holding Title II not

lated a number of different factors or tests in different contexts" in which state action is alleged. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). In particular, this Court's decision in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), touches on these four state-action tests in an instructive way that provides a roadmap for analyzing Title II's reach. *Jackson* held that a state-licensed private utility company's activities were not state action. *Id.* at 358-59. Likewise, the driver education at issue here is not state action under any of the four tests used in *Jackson*.

a. Ownership and operation

The Court's first consideration in *Jackson* was simply whether "the action complained of was taken by [an entity] which is privately owned and operated." *Id.* at 350. That was true of the state-licensed utility company there. *Id.* It is equally true of the state-licensed driver-education schools here.

As the Fifth Circuit noted, the state agency here "does not operate or perform driver education." Pet. App. 11. The agency does not teach driver education or contract with schools to do so. Pet. App. 11. Rather, private driver-education schools are owned by entrepreneurs who must assess the market need for these services, secure financing to run their business, select and maintain premises and equipment for the school, hire instructors, enroll students, collect tuition, and teach

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congruent and proportional to a relevant history of discrimination: "We do not think that the legislative record of the ADA supports the proposition that most state programs and services discriminate arbitrarily against the disabled."). This is not the question presented here. *Cf. Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998).

students. *See supra* pp.5-6. Petitioners concede that "instruction of students is performed by private entities." Br. 33 (capitalization altered).

The private operation of driver-education schools is a significant fact. It is what makes the schools subject to Title III and associated ADA regulations. 42 U.S.C. § 12181(7) ("The following *private entities* are considered public accommodations for purposes of this subchapter . . . .") (emphasis added); 28 C.F.R. § 36.104 ("Place of public accommodation means a facility *operated by a private entity* whose operations affect commerce and fall within at least one of . . . [twelve] categories") (emphasis added).

And the private operation of these schools sets a presumption that the services at issue are not state action: "It is 'only in rare circumstances' that private parties can be viewed as state actors." *Estades-Negroni v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 4 (1st Cir. 2005) (brackets omitted) (quoting *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992)). That baseline understanding here is not changed by any of the other tests for state action.

b. Exclusive state function

In determining whether a private party's activity qualifies as state action, the Court frequently examines whether the activity is "traditionally the exclusive prerogative of the State." *Jackson*, 419 U.S. at 353; *accord, e.g.*, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). *Jackson* gave the examples of judging elections, holding a public park in trust, and exercising the power of eminent domain. 419 U.S. at 352-53. Other examples this Court has given include operating courts, making zoning decisions, running a

penal system, and administering elections. *Lane*, 541 U.S. at 524-25; *Yeskey*, 524 U.S. at 209.

Jackson rejected the argument that this category includes all activities "affected with a public interest." 419 U.S. at 353 (quoting *Nebbia v. New York*, 291 U.S. 502, 536 (1934)). The Court explained that all manner of businesses provide "arguably essential goods and services," so this would be an "unsatisfactory test" for state action. *Id.* at 353-54 (quoting *Nebbia*, 291 U.S. at 536). And *Jackson* specifically made a corollary point: the fact that the government has engaged in an activity (such as education) does not mean that an individual entrepreneur in the same field is a state actor. *Id.* at 354 n.9; *see, e.g.*, *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968) ("Education has never been a state monopoly in this country, even at the primary or secondary levels . . . ."); *see also Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978) ("While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'").

Educating drivers is not "traditionally the exclusive prerogative of the State." *Jackson*, 419 U.S. at 353. Private driving schools existed in Texas well before the State began regulating them in 1967. *See* Act of May 19, 1967, 60th Leg. R.S., ch. 332, 1967 Tex. Gen. Laws 794; House Comm. on Highways & Roads, Bill Analysis, H.B. 568, 60th Leg., R.S. (1967) (noting that the schools "ha[d] never been under" supervision of the State). And many States have chosen to condition a license to drive on obtaining driver education that private entities provide.[8]

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[8] *E.g.*, Cal. Vehicle Code §§ 11100-11116, 12814.6(a)(3); Fla. Stat. §§ 322.08(6), 322.095; 625 Ill. Comp. Stat. 5/6-107(b), 5/6-401 to 5/6-424; Md. Code, Transp. §§ 15-701 to 15-710, 16-105(d)(2)(ii);

The dissent below argued that driver education in Texas is state action because it "achiev[es] public ends and public policy." Pet. App. 30. But such a test turning on activities "affected with a public interest" was rejected in *Jackson*. 419 U.S. at 353. The supply of electric power by the private party in *Jackson* achieved public ends and public policy. So does the training of individuals who operate construction cranes, perform plumbing, or practice law. *See supra* p.3. As this Court has already held, the fact that "a private entity performs a function which serves the public does not make its acts [governmental] action." *San Francisco Arts & Athletics*, 483 U.S. at 544.

Contrary to amici who express concerns about "privatization" of functions like imprisonment, *see* Law Profs. Br. 4-9, Texas has not "privatized" any traditional state function. The dissent below offered nothing more than speculation for its reasoning that, if all private driving schools were to exit the market for some reason, Texas itself would run equivalent driver-education schools across the State. Pet. App. 29-30 (attempting an analogy to traditionally exclusive state functions). The dissent cited no history or practice supporting that idea. And many States offer alternatives other than training in a driver-education school to ensure that driver's license applicants are qualified to operate a vehicle.[9]

Okla. Stat. tit. 47, § 6-105(C)(1), tit. 70 §§ 19-113 to 19-121; S.C. Code §§ 56-1-180(A), 56-23-10; Va. Code §§ 46.2-323(D), 46.2-1701.

[9] *E.g.*, Mo. Stat. §§ 302.130, 302.178(1)(4) (requiring only 40-hours of behind-the-wheel driving instruction supervised by a parent, legal guardian, or driving instructor); Neb. Rev. Stat. § 60-4,120.01(2) (permitting certification by a parent, guardian, or other appropriate adult of 50 hours of motor-vehicle operation in lieu of

Private driver education therefore is not an activity of the State under the exclusive-state-function test.

c. State compulsion

This Court has held "that a State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970). This state-compulsion test is demanding. It is met only when the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004. "Mere approval of or acquiescence in" private conduct "is not sufficient to justify holding the State responsible." *Id.*

Jackson explained that distinction in the context of a heavily regulated industry. State action does not exist just because a business "is subject to a form of extensive regulation by the State in a way that most other business enterprises are not," 419 U.S. at 358, and because the state regulator gave "approval for practices" in which it knew the business engaged, *id.* at 357. If the regulator "has not put its own weight on the side of the

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completing driver-safety course); Or. Rev. Stat. § 807.065 (allowing applicant to certify that he has had at least 50 hours of supervised driving experience in lieu of completing a traffic safety education course); S.D. Codified Laws § 32-12-17 (not requiring driver education course, but reducing the amount of time an applicant must first hold an instruction permit by 90 days if one is completed); Tenn. Code § 55-50-311(b)(1)(D) (requiring certification by a parent, legal guardian, or licensed instructor that the applicant has 50 hours of behind-the-wheel experience); W. Va. Code § 17B-2-3a(d)(C) (permitting certification by a parent, guardian, or other appropriate adult of 50 hours of motor-vehicle operation in lieu of completing driver-education course).

proposed practice by *ordering* it," approval of the business's operation "does not make its [challenged practice] 'state action.'" *Id.* (emphasis added).

Petitioners argue that licensed driving schools are heavily regulated by the State, which regulates details of their operation and specifies minimum curricular standards. Br. 4, 27-29, 33-35. But petitioners have never suggested that the private schools' alleged refusal to provide them sign-language interpreters or other aids was encouraged by the State, much less that the State "put its own weight on the side of the proposed practice by ordering it." *Jackson*, 419 U.S. at 357. To the contrary, petitioners acknowledge the state requirement that licensed schools "sign an affidavit to comply with all federal regulations, including the obligation not to discriminate on the basis of disability." J.A. 90.

At most, petitioners can argue state-agency inaction or acquiescence to await a federal decision on schools' compliance with their Title III accommodation obligations. *See* J.A. 101 (agency's agreement that licensed schools cannot fail "to provide reasonable accommodations to people with disabilities" and statement of its enforcement practice). As *Jackson* holds, this comes far short of transforming a regulated private entity's conduct into state action. 419 U.S. at 357; *see also Flagg Bros.*, 436 U.S. at 164-65 (dismissing the notion that state action can be found "by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement'").

d. Joint enterprise with state officials

Lastly, in assessing whether private conduct qualifies as state action, the Court has looked for the presence of "the symbiotic relationship presented in *Burton v. Wilmington Parking Authority* [365 U.S. 715

(1961)]." *Jackson*, 419 U.S. at 357. In *Burton*, a private lessee who engaged in racial discrimination leased space from a state parking authority in a "single building," and, among other things, its operations ensured "the financial success" of the state agency. 365 U.S. at 724. The Court found such "interdependence" by the parking authority that it was a joint participant in the restaurant. *Id.* at 725. And *Jackson* explained that *Burton*'s reasoning "limit[s] the actual holding to lessees of public property." 419 U.S. at 358.

Here, in contrast, tuition for driver education is paid to the private educators that deliver it, and petitioners do not allege that the state agency's solvency depends on the operations of the private schools. Nor is the state agency leasing public property to the private schools. It may be that driver-education schools can be called "extensively" regulated. But *Jackson* and *Blum* held that "privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*." *Blum*, 457 U.S. at 1011; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 57 (1999) ("later cases have refined the vague 'joint participation' test"); *NCAA v. Tarkanian*, 488 U.S. 179, 196 (1988) (finding no state action where the defendant "cannot be regarded as an agent" of a public entity and did not have an arrangement "tantamount to a partnership agreement").

The two state-court lottery cases cited by the United States essentially use joint-enterprise reasoning that does not apply here. *Cf.* U.S. Br. 27. Those cases relied on the fact that each lottery system is used "to produce revenue" for States, *Winborne v. Va. Lottery*, 677 S.E.2d 304, 306 (Va. 2009), and "obtains substantial

monies" for States, *Paxton v. State Dep't of Tax & Revenue*, 451 S.E.2d 779, 785 (W. Va. 1994). Those cases further relied on the fact that the state lotteries used "contract vendors" to "conduct lottery sales," *id.*, or "retailers" to "sell lottery tickets," *Winborne*, 677 S.E.2d at 306. That financial dependency harkens back to the facts of *Burton*. Moreover, unlike driver education, each State "created the lottery system." *Paxton*, 451 S.E.2d at 783; *Winborne*, 677 S.E.2d at 305 ("established" by statute). So lottery services are more akin to services that only a State would "necessarily provide," *Blum*, 457 U.S. at 1011, whereas driver education is not an industry that the State established.

Petitioners also rely on Texas's requirement that the completion of qualifying driver education be documented either with a privately-created certificate bearing a unique identifying number generated by the State or with a state-provided certificate bearing such a number. *See* Br. 28, 32; U.S. Br. 19-20. But even if the provision of these certificates or numbers can be characterized as state action, that says nothing about whether the actual education services offered by private schools are state action. Texas also requires drivers to have proof of liability insurance, which by law must take a certain form. Tex. Transp. Code §§ 601.053(a)(2), 601.081(b). That does not mean that a private insurance company's interactions with its customers are state action. *Cf. Blum*, 457 U.S. at 1006-07 ("We cannot say that the State, by requiring completion of a form [documenting a private physician's decisionmaking in a heavily regulated industry], is responsible for the physician's decision.").

Petitioners gain nothing by labeling the completion certificates as a "second benefit." Br. 32 (quotation

marks omitted). Petitioners seek an accommodation that would allow them to take a driver-education course at a private driver-education school. J.A. 92-93. They do not seek an accommodation specific to the completion certificates, such as an interpreter or other aid to understand the certificates. Receipt of a completion certificate with a state-generated unique number does not transform the provision of private driver education into state action.

Petitioners next draw a distinction without a difference in noting that the completion certificates involve fraud-control protections. Br. 32; *see* Tex. Educ. Code § 1001.055 (unique numbers); 16 Tex. Admin. Code § 84.100(1), (12) ("government record" designation). If the State did not regulate the certificates and permitted each school to use its own design, that might delay processing of applications for driver's licenses as state workers took more time to authenticate application materials. But it would not change the nature of the education at all. That cannot be the difference that makes private services become state action.

This certificate requirement and the fee charged to driving schools for the paperwork may illustrate that driver education is heavily regulated. But petitioners do not identify a single decision of this Court relying on the detailed nature of a regulatory scheme to find state activity. Any such test would be hopelessly vague because there is no obvious or objective standard against which to measure when regulations are detailed enough to transform private conduct into state action. As this Court has consistently held, even regulation that can be called "extensive" does not transform private activity into state conduct. *E.g.*, *San Francisco Arts & Athlet-*

ics, 483 U.S. at 544; *Blum*, 457 U.S. at 1011; *Jackson*, 419 U.S. at 350.

B. Petitioners' claim that Title II compels state enforcement of private driving schools' federal obligations presents constitutional concerns that should be avoided.

Petitioners seek to conscript a state agency into using its state regulatory power to enforce private parties' compliance with their federal obligations. This presents serious concerns of unconstitutional commandeering, which this Court should avoid by rejecting petitioners' interpretation of Title II.

1. Petitioners contend that federal law requires *the State* to enforce private driving schools' federal ADA obligations by enacting and enforcing state regulations. Petitioners thus allege:

- "TEA is required" to "[i]ncorporat[e] ADA regulations in its program administration" and "[e]valuat[e] ADA compliance during initial licensing and license renewal." J.A. 80.

- "[TEA requires] driving schools to sign an affidavit to comply with all federal regulations, including the obligation not to discriminate on the basis of disability," but TEA "refuses to enforce it or issue formal regulations that would make schools show evidence of ADA compliance prior to licensing." J.A. 90.

- "[TEA violates federal law by] refusing to exercise its rule-making authority under the Texas Education Code." J.A. 86-87.

- "TEA has refused to enact regulations requiring accommodations for people with hearing disabilities." J.A. 79.
- "It is fully within [TEA's] authority to adopt and enforce rules that require the schools to provide disability accommodations" and to "deny and/or suspend the licenses of noncompliant schools." J.A. 87-88.
- "TEA could exercise its enforcement authority to either compel" compliance by a driving school with "TEA regulations mandating interpreters or other aids" or "remove a non-compliant school's ability to operate." J.A. 89.

All iterations of the complaint have asked that the state agency be forced to adopt regulations requiring private entities to comply with their federal ADA obligations and to enforce those regulations through state administrative procedures, such as withholding or suspending licenses. J.A. 30-31, 61-62, 87, 93; R.106, 214.[10]

Petitioners thus seek an injunction controlling the state agency's use of its authority to regulate driver-education schools. J.A. 79 (seeking a "permanent injunction requiring TEA to establish effective policies and programs providing for access for people with hearing disabilities" and "to enforce such policies and programs with licensed driver education schools"). And the agency's state-law authority to adopt regulations and revoke licenses is how petitioners established the redressability component of standing. Pet. App. 6-8.

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[10] "R." cites the electronic record on appeal in the Fifth Circuit.

The use of state regulatory authority inheres in all aspects of petitioners' claim. Petitioners do suggest certain internal agency actions, J.A. 88-89, but petitioners' arguments all ultimately entail the agency also using its regulatory authority. For instance, if the ADA requires the agency to create model course videos in sign language on the theory that private driver education is state action, J.A. 88, that theory would necessarily require the agency to also exercise its regulatory authority to require that private driving schools actually use those videos. That is why petitioners argue that the agency must "mandate [by rule] that schools provide interpreters or other aids" and deny or suspend the licenses of those that do not comply. Br. 36; *accord* Br. 5 (arguing that "TEA's regulations" must require a "showing that those schools will deal with the special conditions of students with disabilities").

2. To arrive at their desired result, petitioners argue that driver education provided by private, for-profit schools is state action subject to Title II of the ADA. That interpretation is unfounded. *See supra* Part II.A. But even if there were ambiguity in the statute, that ambiguity must be resolved in the State's favor to avoid difficult constitutional questions.

Petitioners' expansive interpretation of Title II creates constitutional concerns because the Constitution "has never been understood" to allow the federal government to "compel state governments to regulate pursuant to federal direction." *New York v. United States*, 505 U.S. 144, 162, 177 (1992); *accord Printz v. United States*, 521 U.S. 898, 925 (1997). That constitutional prohibition extends to both an express federal order to exercise state authority and to a federal law making a State liable for controlling something that is not state

action—which is "indistinguishable from an Act of Congress directing the States to assume the liabilities" of private citizens. *New York*, 505 U.S. at 175. Either type of federal law "would 'commandeer' state governments into the service of federal regulatory purposes." *Id.*

Consequently, when a federal law like ADA Title II purports to create state liability for certain conduct, the further that law strays from addressing clear state action for constitutional purposes, the more serious the concern of unconstitutional commandeering. If it is ambiguous whether certain conduct is state action, therefore, Title II should be interpreted narrowly to exclude that conduct from its reach. *See United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."). The language of Title II leaves sufficient room for application of this avoidance canon, and its application is particularly appropriate given that Congress regulated private entities separately in Title III. Resort to the "well-established principle that statutes will be interpreted to avoid constitutional difficulties," *Frisby v. Schultz*, 487 U.S. 474, 483 (1988), evades serious concerns that a broader view of Title II unconstitutionally commandeers States into enforcing federal law against private parties.

The policies animating the anti-commandeering doctrine apply with full force here. That doctrine exists to ensure a correct assignment of electoral accountability, consistent with the Constitution's system of federalism. *New York*, 505 U.S. at 168-69. Petitioners' legal position in this case implicates not just the fact-specific question whether driving schools must hire sign-language interpreters, but the full scope of the ADA's mandate to

make "reasonable" accommodations "necessary" for a disabled individual. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 684 n.38 (2001) (describing standards). In applying these general standards, situations often present shades of gray, not straightforward choices. *See id.* at 690 n.53 ("nowhere in [the statute] does Congress limit the reasonable modification requirement only to requests that are easy to evaluate"). Questions can arise, for instance, about how much money an establishment must spend to change some aspect of its premises in a way that would accommodate a disability.

When such issues are decided in federal-court actions against a private enterprise, electoral accountability for any unpopular result rests with Congress. *See id.* at 689 n.51 ("petitioner's questioning . . . [is] more properly directed to Congress"). But if a state agency is also conscripted into revoking state licenses of private businesses because they do not comply with potentially unpopular standards set by Congress, "the accountability of both state and federal officials is diminished." *New York*, 505 U.S. at 168. Such a practice is intolerable in a system of dual sovereigns.

C. Title II regulations do not help petitioners.

Federal regulations issued under ADA Title II do not help petitioners for two reasons. First, the regulations do not set forth the test that petitioners advocate and ultimately only beg the question here. Second, the regulations would not be entitled to deference even if they adopted petitioners' test.[11]

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[11] No appreciable difference exists between the regulations for the Rehabilitation Act and the ADA. *Compare* 28 C.F.R. § 41.51 (Rehabilitation Act regulation), *with* 28 C.F.R. § 35.130 (ADA regulation). For simplicity, this brief focuses on ADA regulations.

1. The cited regulations do not adopt the test that petitioners advocate. Petitioners rely on the detailed nature of some state-agency regulations and the importance of driving to argue that private driver education is a state service, activity, or program under Title II. Br. 27-31, 33-35. But the federal Title II regulations petitioners cite do not turn on the detailed nature of state regulations. Nor do the federal Title II regulations take into account the importance of an ultimately desired activity.

If anything, the federal Title II regulations suggest that private driver education is not state action. They recognize the distinction between a state program licensing businesses and the operation of the businesses themselves:

> A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability[, but] . . . *[t]he programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.*

28 C.F.R. § 35.130(b)(6) (emphasis added). In other words, TDLR cannot discriminate against those who seek licenses to operate driver-education schools, but the activities of the schools themselves are not covered by the Title II regulations.

DOJ's Technical Assistance Manual confirms that, "[a]lthough 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." U.S. Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual*

§ II-3.7200. Consequently, a state licensing entity like TDLR "is not accountable for discrimination in the employment or other practices of [a private] company, if those practices are not the result of requirements or policies established by the State." *Id.* This test appears to echo the state-compulsion test for state action, which is not met here. *See supra* pp.37-38.

Petitioners rely (Br. 37) on 28 C.F.R. § 35.130(b)(1), which provides that 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 . . . [d]eny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service." But that regulation only helps petitioners if one first concludes that TDLR provides the services in dispute. And it does not. *See supra* pp.32-42. Pointing out that an individual was denied driver education does nothing to establish that driver education is a state benefit or service.

This regulation "simply beg[s] the ultimate question here," Pet. App. 12, by depending on one's prior conclusion about whether TDLR provides driver education. *Cf.* Br. 32, 37 (circular reasoning assuming that conclusion); U.S. Br. 22-23 (same). As noted above, state regulation of private enterprises is not enough to make those private parties' conduct state action; instead, the Court has looked to whether the conduct is traditionally the exclusive prerogative of the State or was ordered by the State. *San Francisco Arts & Athletics*, 483 U.S. at 544; *Rendell-Baker*, 457 U.S. at 842; *Jackson*, 419 U.S. at 353. Multiple lower courts have recognized that state licensing and regulation does not make an activity one for which the State is liable under Title II regulations. *E.g.*, *Noel v. N.Y.C. Taxi & Limousine Comm'n*, 687

F.3d 63, 69-70 (2d Cir. 2012); *Tyler v. City of Manhattan*, 849 F. Supp. 1429, 1441-42 (D. Kan. 1994). And despite petitioners' contentions that the State is "farming out" driver education, Br. 34, driver education is not and has never been an exclusive function of the State. *See supra* pp.34-37.

2. Regardless, the Title II regulations are not entitled to deference resolving any statutory ambiguity. *Cf. Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-44 (1984). As the United States concedes, this Court has never held that Title II regulations warrant *Chevron* deference. U.S. Br. 22-23; *Olmstead v. L.C.*, 527 U.S. 581, 598 (1999). And the Court has "rejected agency interpretations to which [it] would otherwise defer where they raise serious constitutional questions." *Miller v. Johnson*, 515 U.S. 900, 923 (1995) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988)). Regulations endorsing petitioners' legal position in this case would present serious constitutional concerns of commandeering state authority, as explained above. *See supra* Part II.B. Any ambiguity in the scope of Title II should be resolved by refusing to apply Title II to conduct other than clear state action.

D. Petitioners' interpretation of Title II would create many practical problems by massively expanding the amount of conduct that qualifies as state action.

Petitioners' position would introduce significant uncertainty about whether traditionally private conduct is state activity when it is heavily regulated and needed to obtain a state license or other important benefit. Moreover, declaring driver education (or any other regulated

services) to be a state activity or program could have substantial collateral consequences in other areas of the law.

Focusing on the ability to drive, petitioners' interpretation of the ADA threatens to sweep in Texas's insurance industry. In addition to submitting proof of driver education in order to get a driver's license, an applicant must also submit "evidence of financial responsibility" or assert that he does not own a vehicle for which evidence of financial responsibility is required. Tex. Transp. Code § 521.143(a). That evidence may be provided as a motor-vehicle liability insurance policy in a particular form. *Id.* § 601.051. To write such a policy, an insurance company must be licensed by the State, *id.* § 601.071, and Texas's Insurance Code contains four chapters dedicated to regulating motor-vehicle insurance, Tex. Ins. Code chs. 1951-1954. Motor-vehicle insurance is not a state service, program, or activity. *Cf. Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 58 (holding that workers' compensation insurance company was not a state actor). But these regulated insurance companies play the same role that private driver-education schools do—providing individuals with a service required by state law to obtain a driver's license.

The State also regulates other private educators who provide the education necessary to obtain a state license. For example, the State certifies instructors who teach handgun proficiency courses necessary to obtain a license to carry a handgun. Tex. Gov't Code §§ 411.174(a)(7), 411.190. In order to obtain a cosmetology license in Texas, an individual must complete a certain number of hours of training at schools licensed by TDLR. Tex. Occ. Code § 1602.303. Other examples abound. *E.g.*, *id.* §§ 203.252, 203.254 (midwifery educa-

tion); *id.* §§ 455.053, 455.156 (massage-therapy schools); *id.* §§ 1101.301, 1101.356 (real-estate courses). Petitioners offer no principled reason why the education necessary to obtain these licenses would fail to qualify as state action under their interpretation of ADA Title II.

Petitioners argue that driver education is important because it allows getting a license to drive, but the importance of a service does not answer whether it is covered by ADA Title II. Private hospitals that are extensively regulated by States, *e.g.,* Tex. Health & Safety Code ch. 241, undeniably perform an important function with significant implications for public policy. Yet the importance of their hospital services, combined with the State's regulation of hospitals, does not transform them into instrumentalities of the State. *Cf.* 42 U.S.C. § 12181(7)(F) (private hospitals are covered by ADA Title III). Likewise, the banking and insurance industries are similarly important and heavily regulated, *see* Tex. Fin. Code tit. 3 (governing banks and other financial institutions); Tex. Ins. Code tit. 6 (regulating insurance companies), but are not considered state actors.

Petitioners cannot limit the consequences of their position to this case by pointing to the detailed nature of state-agency regulation of driving schools. For instance, many state agencies regulating the practice of law require applicants lacking minimum years of practice elsewhere to have completed education at a school of law meeting detailed accreditation criteria set out by the American Bar Association (ABA). *E.g.*, Ariz. Sup. Ct. R. 34(b)(1)(D); Minn. R. for Admission to the Bar 4(A)(3)(a); Tex. R. Governing Admission to the Bar I(a)(4), III(a)(1). Those criteria govern the schools' operation in extensive detail, including the financial conditions of schools (Standard 202), the tenure of the dean

(Standard 203), the minimum hours of instruction required in particular courses (Standards 303-304), how credit hours are calculated (Standard 310), how many credit hours are required to graduate (Standard 311), the instructional role of faculty (Standard 403), required disclosures to students (Standard 509), the role of the required library director (Standards 602-603), and minimum facility requirements (Standard 702), including that facilities are reasonably accessible to the disabled.[12]

Even though States have these intricate requirements for the legal education that makes a graduate eligible to be examined for a license to practice law, education at one of the many private law schools is not deemed a state service, program, or activity. Complaints about whether a private law school has made adequate accommodation for the disabled are brought in Title III lawsuits against the school, not Title II lawsuits against a State. *E.g.*, *Forbes v. St. Thomas Univ., Inc.*, 768 F. Supp. 2d 1222 (S.D. Fla. 2010).

Moreover, States such as Arizona and Minnesota go further than Texas by requiring licensure or registration of private post-secondary educational institutions,

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[12] Am. Bar Ass'n, *ABA Standards and Rules of Procedure for Approval of Law Schools* (2016), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf. The federal government also uses those same detailed criteria to determine when a law school's students can access federal financial assistance for their education. *See* 20 U.S.C. ch. 28, subch. IV (funding programs under Title IV of the Higher Education Act of 1965); 34 C.F.R. §§ 600.2-600.6 (eligibility definitions); U.S. Dep't of Educ., Specialized Accrediting Agencies (Sept. 22, 2016), http://www2.ed.gov/admins/finaid/accred/accreditation_pg7.html#law (ABA is the sole accrediting body recognized for legal education).

and state approval to operate a private law school turns on whether its curriculum and operations meet the same ABA standards required by that State for the school's graduates to be eligible for a state law license.[13] Under petitioners' theory, those regulated private law schools are offering an education for which the State is responsible under the ADA. Petitioners have never identified any principled limit on their reasoning that would avoid that remarkable and unprecedented conclusion.

Holding that private driver education is a state service, program, or activity under Title II could have significant consequences in other areas of law as well. For example, 42 U.S.C. § 1983 applies to those who act "under color" of state law, which this Court has equated with "state action" under the Fourteenth Amendment. *Lugar*, 457 U.S. at 928. If private driver education is state action, then section 1983 would expose driver-education schools and instructors to liability under numerous federal statutes and constitutional provisions. Furthermore, the Court would have to decide whether

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[13] *See supra* p.51 (noting law-license requirement); Ariz. Rev. Stat. §§ 32-3001 (definitions), 32-3022(A) (state license required for private school offering higher-education degrees to operate), 32-3022(B) (state license to operate a degree program requires accreditation by accrediting agency recognized by the U.S. Department of Education, which for law schools is only the ABA, *see supra* p.52 n.12), 32-3022(C) (provisional license to operate a degree program requires applying for accreditation with the same body within a specified time frame); Minn. Stat. §§ 136A.62(3) (definition of "school" includes private postsecondary education institutions), 136A.63 (requiring registration of all schools within Minnesota), 136A.65 (prohibiting a school from registration unless accredited by an agency recognized by the U.S. Department of Education, which is only the ABA for law schools).

those schools and instructors are entitled to assert sovereign or qualified immunity possessed by state actors. *See, e.g.*, *Richardson v. McKnight*, 521 U.S. 399 (1997) (considering whether guards at a private prison were entitled to qualified immunity in a section 1983 suit). The State, in turn, could be called upon to defend and indemnify driver-education schools and instructors if they are deemed state actors. The Court should avoid these collateral questions and consequences by properly limiting the scope of Title II.

Petitioners offer no objective, administrable test for when government regulations become so extensive that they transform licensed activity into state action subject to ADA Title II. Nor do they account for the potential consequences of their theory in other areas of law. Petitioners' argument threatens to radically expand the concept of state action and should be rejected.

CONCLUSION

The case should be dismissed because it is moot. Were the Court to reach the question presented, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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