No. 15-486

In the Supreme Court of the United States

DONNIKA IVY, ET AL., PETITIONERS

v.

MIKE MORATH, TEXAS COMMISSIONER OF EDUCATION

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the prohibitions against disability discrimination in Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12132, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), apply to a Texas agency's involvement in the distribution of driver education certificates.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, establishes a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). It targets both private and public disability discrimination. Title III of the ADA, 42 U.S.C. 12181-12189, generally prohibits discrimination in public accommodations, including "place[s] of education," operated by private entities. 42 U.S.C. 12181(7)(J); see 42 U.S.C. 12182. Title II of the ADA, 42 U.S.C. 12131-12165, addresses discrimination by "public entit[ies]" such as state agencies, 42 U.S.C.

12131(1)(B). It provides that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132.

Congress has "instructed the Attorney General to issue regulations implementing provisions of Title II, including § 12132's discrimination proscription." *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 591 (1999) (citing 42 U.S.C. 12134(a)). Those regulations specifically forbid various forms of disability discrimination by a public entity "in providing any aid, benefit, or service," whether it does so "directly or through contractual, licensing, or other arrangements." 28 C.F.R. 35.130(b)(1). The Department of Justice's interpretive guidance explains that "[i]n many situations * * * public entities have a close relationship to private entities that are covered by title III, with the result that certain activities may be at least indirectly affected by both titles." Dep't of Justice, *The Americans with Disabilities Act: Title II Technical Assistance Manual* § II-1.3000, http:/www.ada.gov/taman2.html (last visited May 19, 2016) (*Title II Manual*).

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, imposes another, potentially overlapping, prohibition against disability discrimination, applicable to recipients of federal funding. Specifically, Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assis-

tance." 29 U.S.C. 794(a). The term "program or activity" includes "all of the operations of * * * a department, agency, special purpose district, or other instrumentality of a State * * * any part of which is extended Federal financial assistance." 29 U.S.C. 794(b)(1)(A). Like the regulations implementing Title II, the regulations implementing Section 504 broadly prohibit disability discrimination in "providing any aid, benefit, or service," either "directly or through contractual, licensing, or other arrangements." 28 C.F.R. 41.51(b)(1); see 42 U.S.C. 12134(b) (requiring that Title II and Section 504 regulations be "consistent").

2. Petitioners are Texas residents with hearing disabilities. Pet. App. 3; D. Ct. Doc. 77, ¶¶ 4-8 (Sept. 16, 2013) (Compl.). They allege that Texas has administered a driver education program in a manner that violates both Title II and Section 504.

Texas law requires anyone below the age of 25, as a prerequisite to receiving a driver's license from the Department of Public Safety (DPS), to first obtain a driver education certificate. Tex. Transp. Code Ann. § 521.1601 (West Supp. 2015); see Pet. App. 2. The distribution of such certificates is under the jurisdiction of the state government, which licenses private driver education schools and, for a fee, provides certificates (or, equivalently, unique certificate numbers) for licensed schools to give to graduates. Tex. Educ. Code Ann. § 1001.055 (West Supp. 2015) (certificates); see *id.* §§ 1001.201-1001.204, 1001.301, 1001.303 (licensing of schools); *id.* §§ 1001.251, 1001.2511-1001.2514, 1001.253-1001.256, 1001.302, 1001.304 (licensing of instructors). A state agency has "jurisdiction over and control of" those schools, *id.* § 1001.051; establishes or approves statewide curriculum requirements for driv-

er education, *id.* §§ 1001.101(a), 1001.1015(a); implements various statutory directives prescribing specific curriculum requirements, *id.* §§ 1001.102, 1001.1025, 1001.107-1001.110; designates the educational materials to be used, *id.* §§ 1001.101(a), 1001.1015(a); ratifies, as part of the licensing process, the particular curriculum of each school, *id.* § 1001.204(b)(13); credentials each school's individual instructors, *id.* §§ 1001.251, 1001.2511-1001.2514, 1001.253-1001.256; and approves the hiring of a school's key staff members, 16 Tex. Admin. Code § 84.104(c) (2016). By regulation, a driver education certificate "is a government record." *Id.* § 84.100(1) and (12).

Petitioners allege that they were unable to obtain necessary driver education certificates because they live in areas with no licensed driver education schools that accommodate their disabilities. Pet. App. 3-4 & n.2 (assuming petitioners can obtain certificates only from a licensed private driver education school); Compl. ¶¶ 10-11. An advocate brought the accommodation issue to the attention of the Texas Education Agency (TEA), a state agency that receives federal financial assistance, which at that time had jurisdiction over driver education certificates. Pet. App. 4; see Compl. ¶ 9. The TEA refused to take any steps to ensure that people with hearing disabilities have access to such certificates. Compl. ¶ 14. The TEA told the advocate instead to file a complaint with the federal Department of Justice, which could enforce the ADA against any licensed private driver education schools engaging in disability discrimination. Compl. Ex. 2.

The advocate did thereafter file a complaint with the United States Department of Justice, but against

the TEA itself, rather than particular driver education schools. Compl. ¶ 15. The complaint was referred to United States Department of Education's Office for Civil Rights, *ibid.*, and was handled by that component's Dallas office. That regional office dismissed the complaint, on the view that the TEA did not have an affirmative obligation to enforce individual driving schools' compliance with federal laws prohibiting disability discrimination. See *ibid.*

3. Petitioners subsequently filed suit in federal court under Title II and Section 504 against the state official in charge of the TEA. Pet. App. 4; Compl. ¶ 9. Their complaint sought declaratory and injunctive relief, on behalf of themselves and a putative class of similarly situated people, that would require the TEA to ensure access to driver education courses and certificates for people with hearing disabilities. Pet. App. 4-5; Compl. ¶¶ 52-56. The district court denied a motion to dismiss. Pet. App. 5, 33-55. The court of appeals, on interlocutory review, reversed. *Id.* at 1-18.

a. The court of appeals agreed with the district court that petitioners had standing to bring the suit. Pet. App. 5-8. It held, however, that petitioners' claims lacked substantive merit, concluding that Title II and Section 504 did not impose any requirements on the TEA in this context. *Id.* at 9-18.

The court of appeals characterized the "key question" under both statutes as "whether [petitioners] have been 'excluded from participation in or . . . denied the benefits of the services, programs, or activities' of [the TEA]." Pet. App. 9 (second set of brackets in original) (quoting 42 U.S.C. 12132); see *ibid.* (concluding that the legal analysis under Title II and Section 504 is effectively identical). Describing the

issue as "close," the court reasoned that no such exclusion or denial had occurred, because "driver education" was not "a service, program, or activity of the TEA." *Id.* at 9-10.

Looking first to Title II, the court of appeals observed that in *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), this Court had applied Title II to the "'programs, services, or activities' * * * *provided* by" a state prison. Pet. App. 10. Noting that the TEA did "not teach driver education, contract with driver education schools, or issue driver education certificates to individual students," the court of appeals viewed "the TEA's program" to "provide[] * * * not driver education itself," but instead only "the licensure and regulation of driving education schools." *Ibid.*

The court of appeals' view that "the TEA d[id] not operate or perform driver education" also led it to opine that "driver education seems to fall outside of the ambit of the Rehabilitation Act's definition of 'program or activity,'" which includes "'all the operations of'" a covered entity. Pet. App. 10-11 (quoting 29 U.S.C. 794(b)). And the court's belief that "the TEA does *not* provide driver education" likewise informed its conclusion that the Title II regulation forbidding disability discrimination "'in providing any aid, benefit, or service'" did not impose any requirements on the TEA under these circumstances. *Id.* at 12 (quoting 28 C.F.R. 35.130(b)(1)). The court instead found instructive a section of the Department of Justice's interpretive guidance explaining that Title II imposes no liability on a State for the independent discrimination of a company, such as a transportation company,

that is merely the recipient of a state license. *Id.* at 12-13 (citing *Title II Manual* § II-3.7200).

The court of appeals again relied on the view that the TEA "merely license[d] driver education schools," and did not "provide any portion of driver education" in finding case law cited by petitioners to be inapposite. Pet. App. 14. The court also reasoned from the case law, and from the Department of Justice's interpretive guidance, that "the lack of a contractual or agency relationship between driver education schools and the TEA cuts strongly against holding that driver education is a program of the TEA." *Id.* at 16; see *id.* at 14-16. The court held that "the mere fact that the driver education schools are heavily regulated and supervised by the TEA does not make these schools a 'service, program, or activity' of the TEA." *Id.* at 16. And it concluded that "provision of * * * sample course materials and blank [driver education] certificates is simply not enough to turn the schools into proxies for the TEA." *Id.* at 17.

The court of appeals acknowledged that this case was "complicated" by the state-law requirement to obtain a driver education certificate in order to receive a driver's license. Pet. App. 17. "Given the broad remedial purposes of the ADA," the court explained, "it would be extremely troubling if deaf young adults were effectively deprived of driver's licenses simply because they could not obtain the private education that the State of Texas has mandated as a prerequisite for this important government benefit." *Ibid.* But the court opined that this concern was "partly resolved" by the possibility of a suit against the DPS (the state agency that issues driver's licenses), seeking an exemption from the prerequisite. *Id.* at 17-18.

b. Judge Wiener concurred in part and dissented in part. Pet. App. 18-32. He agreed that petitioners had standing, but had "the firm conviction that TEA's involvement in driver education in Texas does constitute a service, program, or activity under Title II of the ADA." *Id.* at 18.

4. After the court of appeals issued its decision, and denied rehearing, the Texas legislature passed a law that shifted authority in the sphere of driver education away from the TEA. 2015 Tex. Gen. Laws 3624-3647 (H.B. 1786); see Reply Br. 1-2; Br. in Opp. 1-2 & n.1, 6. That authority, which appears to be largely unchanged as a substantive matter, is now vested in the Texas Commission of Licensing and Regulation and the Texas Department of Licensing and Regulation. See H.B. 1786; see also Reply Br. 1-2; Br. in Opp. 1-2 & n.1, 6. Relevant portions of the Texas Administrative Code, however, have not yet been updated and still refer to the TEA. See 16 Tex. Admin. Code. Ch. 84.

DISCUSSION

This case does not warrant this Court's review. The government disagrees with the court of appeals' conclusion that Title II and Section 504 imposed no requirements on the TEA in the particular context of this case. But the decision below is fact-dependent and does not conflict with any decision of this Court, another federal court of appeals, or a state court of last resort. Further review of petitioners' challenge to Texas's unique system for the distribution of driver education certificates is not necessary to provide guidance to the lower courts or for any other reason.

A. The Court Of Appeals Misevaluated Texas's Scheme

Title II of the ADA and Section 504 of the Rehabilitation Act broadly prohibit disability discrimination in the "services, programs, or activities" of public entities, 42 U.S.C. 12132, and "all the operations of" federally-funded entities, 29 U.S.C. 794(b). Although a regional agency office initially believed otherwise, see p. 5, *supra*, the view of the federal government, upon further consideration of the circumstances, is that those antidiscrimination prohibitions apply to a federally-funded state agency in the context of administering Texas's driver-education-certificate program. In holding to the contrary, the court of appeals misapprehended the nature of the Texas scheme.

The court of appeals recognized that "the ADA tasks the Attorney General with promulgating regulations that implement Title II," which are "eligible for * * * deference" under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-844 (1984). Pet. App. 11 & n.6; see 42 U.S.C. 12134(b). It also recognized that 28 C.F.R. 35.130(b) "provides that a public entity cannot discriminate against qualified individuals with disabilities 'in providing any aid, benefit, or service,' whether the state acts 'directly, or through contractual, licensing, or other arrangements.'" Pet. App. 11 (quoting 28 C.F.R. 35.130(b)(1)); see 28 C.F.R. 41.51(b)(1) (similar regulation implementing Section 504). The court concluded, however, that the regulation did not control the outcome of this case, because "the TEA's program provides the licensure and regulation of driving education schools, not driver education itself." Pet. App. 10; see *id.* at 11-12.

That was a misconception of the Texas scheme. Taken as a whole, the scheme is more properly viewed

as a state-run "arrangement[]" for the provision of a state "benefit," 28 C.F.R. 35.130(b), 41.51(b)—namely, driver education certificates. The certificates are official state records whose form and content must conform to specific state requirements. Tex. Educ. Code Ann. § 1001.055; 16 Tex. Admin. Code § 84.100(1) and (12). They signify graduation from a state-accredited school, where state-certified teachers use state-sanctioned materials to provide instruction from a state-approved curriculum, which is required to include specific state-prescribed elements. Tex. Educ. Code Ann. §§ 1001.101, 1001.1015(a), 1001.102, 1001.1025, 1001.107-1001.110, 1001.204(b)(13), 1001.251, 1001.2511-1001.2514, 1001.253-1001.256. And the acquisition of a certificate is a prerequisite for people under age 25 to obtain a further state benefit—a driver's license. Tex. Transp. Code Ann. § 521.1601; see Pet. App. 2.

The court of appeals correctly observed that, under the Department of Justice's interpretive guidance, simply licensing a commercial activity, such as transportation services or liquor sales, does not in itself make a state agency responsible for ensuring that people with disabilities have access to that activity. Pet. App. 12-13; see *Title II Manual* § II-3.7200 ("The State is not accountable for discrimination in the * * * practices of [a licensee], if those practices are not the result of requirements or policies established by the State."); see also, *e.g.*, *Noel* v. *New York City Taxi & Limousine Comm'n*, 687 F.3d 63, 68-74 (2d Cir. 2012) (Title II inapplicable to taxi licensing); *Tyler* v. *City of Manhattan*, 849 F. Supp. 1429, 1441-1442 (D. Kan. 1994) (Title II inapplicable to liquor licensing and building permitting). The court of ap-

peals also appreciated that the discriminatory actions of a private industry do not necessarily transform into state activity subject to Title II (or Section 504) simply because the industry is "heavily regulated." Pet. App. 16. But the court of appeals misanalyzed the relevant facts and circumstances of this case when it concluded that Texas's role in driver education is limited to "licensure and regulation of driving education schools," *id.* at 10.

The court of appeals emphasized that the schools themselves, rather than a state agency, "issue driver education certificates to individual students." Pet. App. 10. But a state benefits program may be subject to regulation under Title II even where the State does not provide the benefit "directly." 28 C.F.R. 35.130(b)(1), 41.51(b)(1). The court of appeals neglected to consider that, regardless of who performs the final handoff, the certificates are state records, subject to state tracking requirements. See Tex. Educ. Code Ann. § 1001.055(a-1)-(a-2); 16 Tex. Admin. Code §§ 84.100(1) and (12), 84.117. Contrary to the court of appeals' impression (Pet. App. 17), the schools effectively do serve as "proxies" for the State in issuing those certificates. Although the schools pay a fee for each certificate (see *ibid.*), they undoubtedly recoup that fee from the tuition they are able to charge as the conduits for state records whose very existence, and primary utility, is a creature of state law. And while the distribution of the certificates may not be governed by the formal law of agency or contract, see *id.* at 16, there can be no doubt that the State enjoys substantial legal control over the circumstances in which the certificates may be issued. As previously discussed, the State exerts authority not only over

schools' acquisition of the certificates, but also over the schools' accreditation, staff, and curriculum. See pp. 3-4, 10, *supra*.

B. Further Review Of The Court Of Appeals' Fact-Dependent Determination Is Unwarranted

The court of appeals' fact-specific misunderstanding of the idiosyncratic Texas scheme at issue in this case does not warrant this Court's review. See Sup. Ct. R. 10. Petitioners are mistaken in contending that the decision below sets forth an erroneous bright-line rule of law. They also fail to identify a conflict between the decision below and any decision of another court of appeals or of a state court of last resort. The petition for a writ of certiorari should accordingly be denied.

1. Petitioners assert (Pet. 7-8) that, under the decision below, "nothing short of entering into a contract * * * that expressly states that [a] private entity provides services on behalf of the state * * * could subject state agencies to Title II liability in a public/private arrangement." Although that assertion is consistent with the dissent's description of the majority opinion, see Pet. App. 20, it is far from clear that a future circuit panel would interpret the court of appeals' decision that way.

The decision did attach "importance" to the presence or absence of "a contractual or agency relationship." Pet. App. 15. It observed that "cases that have held a public entity liable for a private actor's inaccessibility involved * * * situations where the private actors had a contractual or agency relationship with the public entity" and that, inversely, "[i]n the absence of such a contractual or agency relationship, courts have routinely held that a public entity is not liable for

a licensed private actor's behavior." *Id.* at 14-15. The court also cited a section of the Department of Justice's Title II interpretive guidance that provides a few examples "of a private actor's activities being covered by Title II because of the 'close relationship' between the private actor and a public entity." *Id.* at 15-16 (citing *Title II Manual* § II-1.3000). The court believed that each of those examples, including one that simply refers to a "'joint venture'" between public and private entities, all "involve some form of contractual or agency relationship." *Id.* at 16 (quoting *Title II Manual* § II-1.3000).

But the court of appeals did not appear to view the presence or absence of a contractual or agency relationship, in itself, as dispositive of Title II's or Section 504's applicability. Instead, focusing on the particular facts of this case, it ultimately "conclude[d]" only "that the lack of a contractual or agency relationship between driver education schools and the TEA cuts strongly against holding that driver education is a program of the TEA." Pet. App. 16. Had the court in fact believed that the case could be conclusively resolved through the application of a simple bright-line legal rule, it presumably would not have viewed the case as presenting "a close question." *Id.* at 10.

2. The court of appeals' resolution of that "close question" against petitioners does not conflict with any decision of another court of appeals or of a state court of last resort.

Petitioners' diffuse assertions of "confusion" in the lower courts, *e.g.*, Pet. 18-24, do not provide a sound basis for granting certiorari. See Sup. Ct. R. 10. Petitioners identify only a handful of cases—many of which involve only nonprecedential district-court

decisions—that they view to be related to this one, suggesting that such matters do not arise with great frequency. Petitioners also do not contend that any case, other than this one, has reached an incorrect result. And potential inconsistencies in the approaches taken by different courts, if any, can be ironed out if and when further opportunities for appellate review arise.

To the extent that petitioners allege an actual conflict, they focus on two state-supreme-court decisions requiring state lottery commissions to ensure that the actions of private ticket sellers do not exclude people with disabilities from buying lottery tickets. See, *e.g.*, Pet. 12 (citing *Winborne* v. *Virginia Lottery*, 677 S.E.2d 304 (Va. 2009); *Paxton* v. *State Dep't of Tax & Revenue*, 451 S.E.2d 779 (W. Va. 1994)). The court of appeals in this case, however, expressed no legal disagreement with those decisions. It instead accepted them as correct and distinguished them on the facts. Pet. App. 13-14.

The court of appeals pointed to "two important differences" that it perceived between the state-lottery cases and this one. Pet. App. 14. One difference was the presence of agency relationships between the public and private entities in those cases and the absence of such a relationship here. *Ibid.* For reasons just discussed (see pp. 12-13, *supra*), the court of appeals did not appear to view that factor, standing alone, as outcome-determinative. The other difference perceived by the court of appeals was that in the state-lottery cases, "it was clear that the lottery commissions were running lotteries, not just licensing lottery agents," whereas in this case, "the TEA just as clearly does not provide any portion of driver educa-

tion; it merely licenses driver education schools." Pet. App. 14. As explained in Part A, *supra*, the government disagrees with that characterization of the TEA's activities. But the characterization reflects the court of appeals' view of the facts of this case, not its view of the law governing Title II or Section 504 cases more generally.

3. The court of appeals' misapprehension of the Texas scheme is not in itself sufficiently important to warrant this Court's review. Petitioners do not identify any similarly structured schemes in Texas or other States. And they lack foundation for their concern (Pet. 8) that States will use the decision below as a "roadmap" for widespread disability discrimination in the provision of state services.

Nor is the decision below the last word on the issue of Texas driver education certificates. As the court of appeals indicated (Pet. App. 17-18), people with hearing disabilities who lack access to such certificates could potentially secure, through a Title II suit against the Texas DPS, a reasonable modification to the requirement to obtain a certificate before receiving a driver's license. See, *e.g.*, 28 C.F.R. 35.130(b)(7); see also 28 C.F.R. 35.130(b)(1)(i) and (8). They can also sue driver education schools directly under Title III of the ADA. See p. 1, *supra*; see also Pet. 8 (acknowledging this possibility). Although an individual suit against every school may be unduly burdensome, a successful test case establishing a right to an accommodation could have widespread salutary effects. Indeed, state law forecloses a driver education school from receiving state accreditation unless it is determined that the school "complies with all * * * federal regulations," Tex. Educ. Code Ann. § 1001.204(b)(7),

presumably including Title III requirements, see Pet. App. 7 & n.5.

4. Should the Court nevertheless be inclined to grant immediate review of the question presented, neither of the vehicle concerns raised by respondent seems likely to preclude, or unduly impede, such review.

First, respondent suggests that petitioners lacked standing to bring this suit, because their injury was caused by the private driver education schools and was thus neither traceable to the actions of the TEA nor redressable by relief against the TEA. See Br. in Opp. 19-22 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). That suggestion is misplaced, as it mistakenly collapses the merits and standing inquiries. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (explaining that a court generally "has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the * * * laws of the United States are given one construction and will be defeated if they are given another") (internal quotation marks and citation omitted). If petitioners' claim on the merits that they are being denied equal access to a state program in violation of Title II and Section 504 is correct, then their injury is traceable to the state agency's operation of the program. And it is likewise redressable by relief directed at the appropriate state agency.

Second, respondent highlights (Br. in Opp. 8) the recent transfer of the relevant administrative responsibilities from the TEA. Respondent does not, however, suggest that this development renders the case moot. See *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am.* v. *City of Jacksonville*,

508 U.S. 656, 661-663 (1993) (voluntary cessation of challenged conduct by repeal or amendment of law does not moot case). And other than the shift in agencies, which could presumably be handled by a substitution of parties at an appropriate point in the litigation, respondent does not identify any significant differences between the previous and current versions of state law.

One wrinkle, unmentioned by respondent, might arise from the substitution of parties. It is not clear that either the Texas Commission of Licensing and Regulation or the Texas Department of Licensing and Regulation currently receives federal financial assistance. If they do not receive such assistance, then those agencies, unlike the TEA, are not subject to Section 504. They are, however, subject to Title II, and both the court of appeals and the parties have treated the Title II and Section 504 inquiries as functionally identical. See Pet. App. 9. Accordingly, review by this Court of the decision below—while unwarranted for the reasons stated above—would appear to have continuing practical implications for this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2016