No. 15-486

IN THE

Supreme Court of the United States

DONNIKA IVY, ET AL.,

Petitioners,

v.

MIKE MORATH, TEXAS COMMISSIONER OF EDUCATION,

Respondent.

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

BRIEF OF THE PARALYZED VETERANS OF AMERICA, THE EPILEPSY FOUNDATION, THE NATIONAL FEDERATION FOR THE BLIND, AND TEN OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Interests of the *Amici Curiae*[1]

Amici curiae are the Paralyzed Veterans of America; the Epilepsy Foundation; the National Federation for the Blind; the American Association of People with Disabilities; the Arc of the United States; the Autistic Self Advocacy Network; the Center for Public Representation; the Disability Rights Education & Defense Fund, Inc.; the Judge David L. Bazelon Center for Mental Health Law; Mental Health America; the National Alliance on Mental Illness; the National Council for Independent Living; and the National Disability Rights Network. The people with disabilities represented by *amici* have a strong interest in preventing disability-based discrimination in public services, programs, or activities, regardless of whether those services are provided by a public entity directly or by a private entity. People with disabilities depend on such services in areas such as education, employment services, and supported housing and other services necessary for independent living. Moreover, people with disabilities often encounter difficulty gaining access to even routine government services and benefits, like driver's licenses. Specific interests of *amici* are set out in the Appendix.

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[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of the brief. All parties have consented to the filing of this brief.

Summary of Argument

When the state administers a program of issuing an important public benefit – here, a driver's license – by conditioning that benefit on participation in a service or program operated by a private entity, it has a Title II obligation to ensure that people with disabilities are not excluded from the program and thus the benefit. In this case, deaf Texans were unable to obtain driver's licenses because:

- Texas requires people under age 25 to complete a state-approved driver education course and present a "certificate of completion" before obtaining a driver's license;

- under Texas law, private entities operate the driver education courses under the administration of the Texas Education Agency ("TEA");

- the TEA took no steps to ensure that the network of private entities on which the state was relying made the courses accessible to young adult deaf drivers;

- as a result young deaf Texans were unable to obtain driver's licenses.

Petitioners sued the TEA under Title II of the ADA and Section 504 of the Rehabilitation Act. The TEA contended that it had no responsibility for the fact that deaf young adults could not get driver's licenses, because private entities, not the TEA, provided the required driver education courses. The Fifth Circuit

agreed, reasoning that the TEA only "provides the licensure and regulation of driving education schools, not driver education itself" and there was no "agency or contractual relationship" between the TEA and the private entities. *Ivy v. Williams*, 781 F.3d 250, 255, 257 (5th Cir. 2015).

In so holding, the Fifth Circuit expressed a concern that holding the state responsible here would open the floodgates to all manner of claims that the state is liable for the ADA compliance of private entities based solely on licensure or regulation of such entities. If the TEA's regulation and supervision of driver education gives rise to Title II liability, the Fifth Circuit reasoned, that would lead to an "extreme" result: "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." *Id.* at 257-8. Respondent likewise has suggested that holding it liable here would require the state "to police ADA compliance by all heavily regulated, licensed industries, such as massage parlors and tattoo artists," in what the dissent termed a "typical 'parade of horribles' frequently advanced by desperate public defendants." *Id.* at 263 (Wiener, J., dissenting).

The Fifth Circuit holding disregarded the clear language of the ADA and Rehabilitation Act, as well as the Attorney General's regulations implementing the ADA. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs,

or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. By its terms, the statute prohibits more than just "discrimination by" the state; it also prohibits disability-based discrimination in public "services, programs, or activities." *Id.*

As *amici* show in this brief, states have experimented with a variety of arrangements to deliver public services and carry out public programs and activities through private entities. When the states' administration, policies, directives, or actions lead to or allow disability-based discrimination in those public services, programs, and activities, the plain text of the statute holds the "public entity" responsible. And the regulations – the content of which was expressly directed by Congress, *id.* § 12134(b) – make clear that a public entity's obligations extend not just to those services and benefits it provides "directly," nor even just to programs, services, or activities operated by private entities "through contractual . . . arrangements" with the state, but also to state programs, services, and activities that enlist private entities through "licensing, or other arrangements." 28 C.F.R. § 35.130(b)(1).

The Fifth Circuit was correct that the mere fact that a state licenses or regulates certain private entities does not in and of itself mean that the state is responsible for the actions of those entities. *See id.* § 35.130(b)(6). But in suggesting that the public entity retains its Title II obligation to avoid disability-based discrimination in those public services, programs, and activities only when it has a

"contract or agency" relationship" with the private entity, *Ivy*, 781 F.3d at 257, the Fifth Circuit ignored the language of the statute and regulations, and further ignored the many ways in which a state can administer public services, programs, and activities by giving a key role to private entities in delivering and operating them. If adopted by this Court, the Fifth Circuit's limited view of Title II liability would require a different result in numerous previous cases in which lower courts have found Title II liability in various circumstances; provide an incentive for states and local governments to structure private entity participation in a way that avoids Title II responsibility; and increase the potential for disability-based discrimination in a wide variety of public programs, services, and activities.

The Fifth Circuit also disregarded the significant ways in which this case goes beyond mere licensing and regulation. Here, the state enlisted private entities, subject to extensive public administration and regulation, as gatekeepers for an important state benefit. As the Fifth Circuit candidly conceded, "the benefit provided by driver education schools – a driver education certificate – is necessary for obtaining an important governmental benefit – a driver's license." *Id*. at 258. "[I]t would be extremely troubling if deaf young adults were effectively deprived of driver's licenses," the court further recognized, "simply because they could not obtain the private education that the State of Texas has mandated as a prerequisite for that important government benefit." *Id*.

Argument

I. To fulfill the ADA's broad mandate, public entities must avoid discrimination in public programs, services, or activities that are implemented by private entities

A. Title II requires a public entity to comply with the ADA when providing "a service, program, or activity" through a private entity

Congress intended that the ADA, including Title II, apply broadly to protect the rights of people with disabilities and ensure that states and local governments cannot avoid their responsibility under the law regarding discrimination by farming out services, programs, or activities to a private entity. Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA's mandate is broad, comprehensive, and sweeping, in response to the "compelling need" recognized by both houses of Congress "to eliminate[e]discrimination against individuals with disabilities, and to "integrat[e] them into the economic and social mainstream of American life." S. Rep. No. 116, 101st Cong., 20 (1990); H.R. Rep. No. 485(II), 101st Cong. 2d Sess., at 50 (1990); *accord PGA Tour Inc. v. Martin*, 532 U.S. 661, 675 (2001).

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be

denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. By its terms, therefore, the statute prohibits more than just "discrimination by" the public entity; it also prohibits disability-based exclusion from participation in or denial of the benefits of public "services, programs, or activities." *Id.* The legislative history indicates, moreover, that Congress intended Title II to cover "all programs, activities, and services provided *or made available* by state and local governments." *See* H.R. Rep. 101-485, pt. 2, at *84 (1990) (emphasis added). Accordingly, Title II prohibits disability-based discrimination in all public programs, services, and activities "*without* any exception." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998).

The implementing regulations – the content of which was directed by Congress[2] – further direct that a public entity cannot avoid its Title II obligations by acting through a private entity:

- The public entity cannot discriminate "in providing any aid, benefit, or service … directly *or through contractual, licensing, or other arrangements*, on the basis of disability…" 28 C.F.R. § 35.130(b)(1) (emphasis added).

[2] Congress not only directed the Attorney General to promulgate the Title II regulations, it also dictated their content, directing that they be consistent with existing Section 504 regulations. *See* 42 U.S.C. § 12134(a), (b).

- The "public entity may not *administer* a licensing or certification program" in a manner that discriminates against individuals with disabilities, nor may it "establish requirements for the programs or activities of licensees or certified entities" that discriminate against individuals with disabilities. *Id.* § 35.130(b)(6) (emphasis added).

This language makes clear that a public entity's obligations extend not just to the services and benefits it provides "directly," nor even just to programs, services, or activities operated by private entities "through contractual . . . arrangements" with the state, but also to state programs, services, and activities that enlist private entities through "licensing, or other arrangements" and programs, services, and activities "administer[ed]" by the state. *Id.* § 35.130(b)(1), (b)(6), (d). Similarly, the Rehabilitation Act provides in the statute itself that "services, programs, or activities" include all "operations" of any "instrumentality" of a state or local government. 29 U.S.C. § 794(b).

Moreover, the Department of Justice ("DOJ") – the agency charged with interpreting and enforcing Title II – applies its own regulations to a wide variety of circumstances in which public entities involve private entities in providing services, programs, or activities. The DOJ's technical assistance manual, which provides ADA guidance for state and local government, explains that Title II may apply to activities where the "public entities have *a close relationship to* private entities." Dep't of Justice,

The Americans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services (1993) § II-1.3000, available at http://www.ada.gov/taman2.html.

The regulations and DOJ guidance thus confirm that there is no basis for the Fifth Circuit's suggestion that Title II applies *only* when the public entity has a "contractual or agency" relationship with the private entity. *Ivy*, 781 F.3d at 257. The regulations provide that a state retains Title II liability when it has a "contractual, *licensing, or other*" relationship with a private entity, 28 C.F.R. § 35.130(b)(1) (emphasis added), while the Guidance directs that liability may arise from a "*close relationship*" between them, Title II Technical Assistance Manual, *supra*, § II-1.3000 (emphasis added). Neither mentions a bright-line "contract or agency" limitation.

The regulations also protect against the "parade of horribles" that the Fifth Circuit described, because they make clear that a state does *not* assume Title II liability for private entity conduct because the state only licenses or regulates the private entity: "The 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).[3]

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[3] Amici do not suggest that when Title II applies to circumstances in which the state involves a private entity, that means that Title II applies to all aspects of all facilities and activities of the private entity, or that each entity must be completely accessible by all people with disabilities. Rather,

In sum, the ADA and its implementing regulations require courts to apply the ADA, including Title II, to a broad range of activity conducted by both private and public entities, so that states and local governments will not be able to avoid Title II by enlisting a private entity.

B. Title II applies to a variety of settings in which a state enlists private entities to provide services, programs, or activities

States and other public entities routinely rely on private entities to provide services, programs, or activities, including those that benefit people with disabilities. There are many reasons why the state may choose to partner with private entities. A public agency may seek to achieve efficiencies and cost savings. *See* Kent Rowey, *Public-Private Partnerships Could Be a Lifeline for Cities*, N.Y. Times, July 15, 2013 ("Gaining much needed cash and operating efficiency are prime incentives for

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once it is established that Title II applies because there is a public program, service, or activity irrespective of private entity involvement, then the substantive standard affecting the public entity's obligations, and thus the private entities' conduct, is supplied by existing law and will differ depending on the service, program, or activity at issue. *See*, *e.g.*, 28 C.F.R. § 35.130(d) (public entities must "administer" services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities); *id.* § 35.151(a)(1) (newly-constructed facilities must be designed and constructed so that the facility or part of the facility is readily accessible to and usable by individuals with disabilities); *id.* § 35.130(b)(1) (when an aid, service, or benefit is provided, people with disabilities must have an equal opportunity to obtain the same result as people without disabilities).

municipalities to undertake such transactions."). It also may seek to use specialized private-sector expertise or private infrastructure already in place.

There are also a variety of ways in which states may structure the involvement of private entities. For instance, the public entity may administer a program in which it selects and enlists private entities to perform some or all of the services involved; it may contract with a private entity to perform services; or it may (as here) condition a public benefit on completion of a program provided by a private entity; among many other potential structures.

Among the government activities increasingly undertaken by private entities are: operating schools, Dep't of Education, Nat'l Ctr. for Educ. Evaluation and Reg'l Assistance, *The Evaluation of Charter School Impacts* (June 2010) available at http://ies.ed.gov/ncee/pubs/20104029/pdf/20104029.pdf; providing employment training, *e.g.*, Tex. Lab. Code §§ 302.001 *et seq.*; 40 Tex. Admin. Code §§ 800-804; providing community and long-term housing and care services to people with disabilities, *Disability Advocates, Inc. ("DAI") v. Paterson*, 598 F. Supp. 2d 289, 313 (E.D.N.Y. 2009); operating prisons, Dep't of Justice, *Prisoners in 2014* (Sept. 2014), at 13 available at http://www.bjs.gov/content/pub/pdf/p13.pdf.; administering low-cost housing, *e.g.*, Tex. Admin. Code § 5.802; providing criminal defense services, N.Y. County Law § 722 (McKinney); providing guardian and advocacy services for children at risk, Wash. Rev. Code Ann. § 2.72.020 et seq. (West); Cal. Civ. Pro. Code §§ 372-

73; D.C. Mun. Regs. Tit. 24 §§ 4700 *et seq.*; operating shelter programs**,** Tex. Loc. Gov't Code § 244.021; providing services during natural disasters, Dep't of Justice, *ADA Best Practices for State and Local Governments Toolkit*, Ch. 7, available at https://www.ada.gov/pcatoolkit/chap7emergency mgmt.htm; providing technology platforms, Tex. Gov't Code § 2157.068; selling lottery tickets, *e.g.*, *Equal Rights Ctr. v. District of Columbia*, 741 F. Supp. 2d 273 (D.D.C. 2010); providing transportation and infrastructure, *see e.g.*, Tex. Transp. Code §§ 223.001-.210, 366.401-366.409, Tex. Gov't Code §§ 2267-2268; engaging in real estate development and urban renewal, *see* Steven J. Eagle, *The Perils of Regulatory Property in Land Use Regulation*, 54 Washburn L.J. 1, 30 (2014); traffic and parking law enforcement, *see* Rowey, *supra*; operating water systems, waste disposal, or other utilities, *id.*; and many others. *See generally*, *e.g.*, D.C. Code Ann. §§ 2.271.01–2.275.01 (establishing Office of Public-Private Partnerships to encourage public use of private entities).[4]

When states' policies or directives, or actions by the private entities, lead to disability-based

[4] *Amici* do not suggest that public-private partnerships are always beneficial, but rather that there are many circumstances in which states and localities have relied on and may wish to continue to rely on private entities in providing such services. Such reliance does not always lead to ideal results, as some *amici* have argued in other contexts. For instance, the Department of Justice has recently announced its decision to stop relying on private prison operators because of demonstrated issues with the services provided. *See* Dep't of Justice, Memorandum from Sally Q. Yates (August 18, 2016), available at https://www.justice.gov/opa/file/886311/download.

discrimination in public services, programs, and activities, the plain text of the implementing regulations hold the public entity responsible under Title II. The Fifth Circuit's suggested bright-line "contract or agency" limitation is not only inconsistent with this governing language, *see supra* Section I.A, but could have substantial real-world adverse effects on the level of discrimination and exclusion faced by people with disabilities, given the variety of services, programs, and activities for which states enlist private entities and the potential benefits of such arrangements to states that likely will lead to their continued use.

Many of the areas in which states involve private entities to provide public services, programs, and activities are critical to ensuring that people with disabilities are able to live independently within the community, receive educational and employment opportunities, and (as here) not be denied access to basic government services and benefits. There are a number of important areas in which courts considering Title II claims have held, or the DOJ has directed, that the state does not abrogate Title II obligations by involving a private entity. These courts and the DOJ have not applied a rule that there *must* be a contract or agency relationship, but rather correctly apply the governing language from the statute and regulations to specific and varied factual circumstances in a way that results in people with disabilities receiving the protection intended by Congress in the ADA. Some such areas include:

Correctional facilities and related programs. State governments have a long history of relying on

private entities to perform particular functions in state correctional systems, including medical services, food preparation, vocational training, inmate transportation. More recently, states have allowed private entities to operate entire correctional facilities, including not only prisons but juvenile correctional facilities, local jails, and halfway houses. *See* Dep't of Justice, *Correctional Populations in the United States, 2014*, at 22 Table 5 (Jan. 21, 2016), available at http://www.bjs.gov/content/pub/pdf/cpus14.pdf. In addition, states have relied on private entities to run private diversion or other rehabilitation programs. Am. Civ. Liberties Union, *Testimony for the Senate Judicial Proceedings Committee: SB 793 – Task Force to Study the Use of Private Diversion Programs* (February 21, 2013), available at http://www.aclu-md.org/uploaded_files/0000/0387/sb_793-private_diversion_programs.pdf.

In Texas, for example, the state may contract with "a private vendor … for the financing, construction, operation, maintenance, or management of a secure correctional facility," with conditions including a maximum inmate population, types of prisoners, programs offered (at least the level provided in state-owned facilities), assumption of and insurance for liabilities, and cost level (the private prison must result in a savings of at least ten percent). Tex. Gov't Code §§ 495.001-.003, .007. Prisoners housed in private prisons "remain[] in the legal custody of" the state, *id.* § 495.002, and the state must "compute inmate release and parole eligibility dates; award good conduct time; approve an inmate for work, medical, or temporary furlough or for preparole transfer; or classify an inmate or place an inmate in

less restrictive custody than the custody ordered by the institutional division. *Id.* § 495.004. The state also monitors to, *inter alia*, maintain acceptable health, safety, and welfare of inmates. *Id.* § 495.008. If the private entity fails to maintain standards, the state may replace it. *Id.*

A substantial number of people with disabilities are imprisoned in private correctional facilities. Private facilities contain five to seven percent of the state prison population nationwide, up to twenty to fifty percent in some states. Dep't of Justice, Office of Justice Programs, *Prisoners in 2014* (Sept. 2014), at 13. About thirty percent of prisoners in state prisons reported disabilities. Dep't of Justice, *Disabilities Among Prison and Jail Inmates, 2011–12*, at 1 (Dec. 2015) available at http://www.bjs.gov/content/pub/pdf/dpji1112.pdf. An estimated 15% of State prisoners and 24% of jail inmates reported symptoms that met the criteria for a psychotic disorder. *Id.*

A prisoner with a disability likely will have no options *other* than the service at issue. If the private company running the prison fails to provide people with disabilities with health care or support services or accessibility appropriate to their needs, they are stuck, often with no effective means of communicating what is happening to the outside world.

As the Ninth Circuit explained when it found that a prison could not avoid ADA liability under Title II by sending inmates to do required labor at private companies, "Title II's obligations apply to public

entities regardless of how those entities [choose] to provide or operate their programs and benefits." *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 910 (9th Cir. 2013) ("[t]he law is clear—the State Defendants may not contract away their obligation to comply with federal discrimination laws").

Community services and institutional care. States also often rely on private entities to provide community-based residential and supportive services, as well as institutional care, in administering state systems of services for individuals with disabilities. New York, for example, administers a service system that combines public facilities, private for-profit corporations, and non-profit organizations to provide housing and treatment services for individuals with mental disabilities. *See*, *e.g.*, *DAI*, 598 F. Supp. 2d 289. New York's group homes and many of its mental health treatment facilities are operated by for-profit corporations, and most of its community-based mental health services, such as supported housing, are run by private non-profit organizations. *Id.* Most states rely on private companies to provide nursing home or institutional care to people with disabilities. *See Rolland v. Cellucci*, 52 F. Supp. 2d 231, 237 (D. Mass. 1999) (applying Title II); *Steward v. Janek*, No. 5:10-cv-1025-OG, 2016 WL 3960919 (W.D. Tex. 2016) (same) *Joseph S. v. Hogan*, 561 F. Supp. 2d 280 (E.D.N.Y 2008).

In these circumstances, the state generally establishes the types of services that will be provided, through regulation, policy, and the private vendors it chooses. It also largely controls placement

and discharge of individuals. Under federal law governing the Medicaid program (the primary funder of nursing home care), for instance, a person with a mental illness or intellectual disability cannot be placed in a nursing home unless the state has first determined that "the individual requires the level of services provided by a nursing facility." 42 U.S.C. § 1396r(b)(3)(F). In New York, the state made a "policy decision" to serve people with disabilities in institutional "adult homes," and a state statute provided that state hospitals and state-licensed psychiatric facilities could refer to adult homes for discharge purposes. *DAI*, 598 F. Supp. 2d at 315-16 (citing N.Y. Mental Hyg. L. § 29.15). The state had a "formal application" process for people who wished to receive services in a more integrated setting (i.e., move out of an adult home to community-based supported housing), under which the state approved eligibility and the level of services to be provided. *Id.* at 305. New York also monitors, licenses and certifies adult homes and the services provided in them, and "provides treatment services directly inside some adult homes." *Id.* at 315-16.

These services and how they are provided can make the difference between living independently in the community or being unnecessarily warehoused in an institution. Needless institutionalization "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999).

Title II's implementing regulations require, and this Court has unequivocally confirmed, that a "public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities" 28 C.F.R. § 35.130(b)(6), (d); *Olmstead*, 527 U.S. at 596. Courts have consistently recognized that Title II requires integration even though the public agency has chosen to "administer" a program by relying on private entities to provide the actual housing or care. New York, for instance, claimed that it had no Title II liability, even though it had made a conscious policy decision to place people in segregated, institutional adult homes and controlled when and whether they could move into appropriate community-based options, because private entities ran the adult homes. *DAI*, 598 F. Supp. 2d at 292. The court rejected that argument, noting that New York was required by law to develop a "comprehensive, integrated system of treatment and rehabilitative services" for people with mental illness, that it planned what services would be provided, administered and funded the system, and oversaw, monitored, inspected, licensed, regulated, and certified the private providers. *Id.* at 313. In these circumstances, the court reasoned, it was "immaterial" that services were provided in private facilities. *Id.* at 317. When "[t]he statutory and regulatory framework governing the administration, funding, and oversight of New York's mental health services including the allocation of State resources for the housing programs at issue here –involves [state] 'administration' … [t]he State cannot evade its obligation to comply with the ADA by using private entities to deliver some of those services." *Id*

at 318. *Accord Hahn ex rel. Barta v. Linn Cty.*, 191 F. Supp. 2d 1051, 1054 n.2 (N.D. Iowa 2002) (Title II applied to group home "because of the close contractual nature" of the relationship between the private entity operating the home and the public entity subject to Title II); Title II Technical Assistance Manual, *supra* (when "[a] private, nonprofit corporation operates a number of group homes under contract with a State agency for the benefit of individuals with mental disabilities," the state agency must ensure that the homes are operated in accordance with title II").

Courts also consistently reject claims that states may avoid Title II liability by over-relying on institutions, including privately-owned and -operated institutions, to provide care to people with disabilities. The state's Title II obligation to "administer" programs "in the most integrated setting possible" "does not hinge upon whether the setting in question is owned or run directly by the State." *Martin v. Taft*, 222 F. Supp. 2d 940, 946, 981 (S.D. Ohio 2002). *Accord Rolland*, 52 F. Supp. 2d at 237 (immaterial to Title II claim that state was unnecessarily housing people with intellectual disability and developmental disabilities in privately-operated nursing homes); *Joseph S.*, 561 F. Supp. 2d 280 (private nursing home operators were not necessary parties to claim under Title II, even though they performed evaluations and made placement decisions that affected whether people with mental illnesses were institutionalized, because such evaluations and decisions were ultimately the state's responsibility); *Steward*, No. 5:10-cv-1025-OG, 2016 WL 3960919 (same); *Kerr v. Heather*

Gardens Ass'n, Civ. A. No. 09-cv-00409-MSK-MJW, 2010 WL 3791484, at *9 (D. Colo. Sept. 22, 2010) (privately-operated senior living facility; "if a public entity allows others to provide services, programs and activities, the public entity remains obligated to ensure compliance with Title II.").

Employment services. States also rely on private entities to provide employment services. The overwhelming majority of state work programs intended specifically for people with disabilities occur at private businesses rather than public entities. *See*, *e.g.*, Okla. Dep't of Rehab. Servs., Website, at "Seven Steps in the VR Process," available at http://www.okrehab.org/job-seekers/7steps (describing state process for helping people with disabilities find work in the private sector and supporting them once employed); Nat'l Disability Rights Network, *Segregated & Exploited: The Failure of the Disability Service System to Provide Quality Work* 55 (January 2011), available at http://www.ndrn.org/images/Documents/Resources/Publications/Reports/Segregated-and-Exploited.pdf.

States also use private firms to offer employment training in programs not specifically directed to people with disabilities. For example, Texas establishes Local Workforce Development Boards – public entities – to create and administer job training centers and monitor the success of different programs. *See* Tex. Lab. Code §§ 302.001 *et seq*.; 40 Tex. Admin. Code §§ 800-804. These public entities solicit applications from private entities to provide and run job training programs. 40 Tex. Admin. Code §§ 841.38-841.47. They also adopt standards for the

private providers, measure performance, and determine whether the provider will retain its certification. *Id.*

People with disabilities are employed at a far lower rate and paid significantly less than people without disabilities. *See* Bureau of Labor Statistics, Economic News Release, Table A-6, available at http://www.bls.gov/news.release/empsit.t06.htm . (percentage of people with disabilities in the workplace about one-third of people without disabilities); U.S. Census Bureau, Random Samplings, The Occupations of Workers with Disabilities (Mar. 14, 2013), available at http://blogs.census.gov/2013/03/14/the-occupations-of-workers-with-disabilities/ (describing earnings gap). Employment services can be critical, therefore, to allow people with disabilities to gain job experience, achieve economic and social independence, and simply earn a living.

However, when such services keep people with disabilities isolated from other workers in "sheltered" or segregated settings, that may harm, rather than benefit, the employees, by allowing them to be exploited by private companies who use their low-cost labor solely to make profits without providing beneficial services. *See* Nat'l Disability Rights Network, *Segregated & Exploited: The Failure of the Disability Service System to Provide Quality Work*, 55 (January 2011). In many such programs, the private employer is permitted to pay a person with a disability a sub-minimum wage. Dep't of Labor, Wage and Hour Division, Field Operations Handbook § 64b00 (describing sheltered workshops

and similar programs); *Segregated & Exploited*, *supra*, at 15-16.

Title II applies in that circumstance even when the services are operated by private entities. Oregon, for instance, administered a program in which private entities ran "segregated employment settings that employ [only] people with disabilities or where people with disabilities work separately from others" rather than receiving supported employment services in integrated settings. *Lane v. Kitzhaber*, 841 F. Supp. 2d 1199 (D. Or. 2012). There, the court held that Title II applied because the plaintiffs were not just seeking employment from a private entity but were denied public services "which would make it possible for them to become and remain competitively employed in the community." *Id.* at 1202. *Accord* Letter of Jan. 6, 2014 from Jocelyn Samuels, Acting Assistant Attorney General for Civil Rights, to Marc DeSisto, re *United States' Title II ADA Investigation of Employment, Vocational, and Day Services for Individuals with Intellectual and Developmental Disabilities in Rhode Island,* available at https://www.ada.gov/olmstead/documents/ri_lof.docx. .

Rescue, housing, and care during emergencies and natural disasters. A "primary responsibility[y]" of state and local governments is to "protect residents and visitors from harm, including assistance in preparing for, responding to, and recovering from emergencies and disasters." *See* Dep't of Justice, ADA Best Practices for State and Local Governments Toolkit, Ch. 7, available at https://www.ada.gov/pcatoolkit/chap7emergencymgm

t.htm. Typically, public entities develop emergency plans and coordinate emergency responses. But they often rely on private actors to perform the services needed by people affected by the disaster, such as emergency shelters, evacuation and transportation, clean-up, remediation, and rebuilding. *Id.*

Here, disability-based discrimination can affect people with disabilities when they and their families may be in physical danger, threatened with losing homes and possessions, or recovering after a devastating event. The National Council on Disability, an independent federal agency, has found repeated and pervasive discrimination against persons with disabilities in emergency preparedness, response, recovery, and mitigation. *See* Nat'l Council on Disability, *Effective Emergency Management: Making Improvements for Communities and People with Disabilities* 13, 21 (Aug. 12, 2009). *Accord* Nat'l Council on Disability on Hurricane Katrina Affected Areas I (Sept. 2, 2005).

In such circumstances, Title II requires public entities to ensure that disaster planning incorporates and addresses the needs of people with disabilities. The DOJ's guidance documents make clear that Title II "applies to programs, services, and activities provided directly by state and local governments as well as those provided through third parties, such as the American Red Cross, private nonprofit organizations, and religious entities." *See* Dep't of Justice, ADA Best Practices for State and Local Governments Toolkit, Ch. 7, available at https://www.ada.gov/pcatoolkit/chap7emergencymgmt.htm (disaster services must be accessible to people

with disabilities, may not use criteria that screen out people with disabilities, must reasonably modify policies and procedures as necessary to avoid discrimination, and must include steps to ensure effective communication with people with disabilities). *Accord Communities Actively Living Independent and Free v. City of Los Angeles*, No. CV 09-0287 CBM (RZx), 2011 WL 4595993 (C.D. Cal. Feb. 10, 2011) (treating emergency preparedness program disaster planning process as a public program governed by Title II).

Privately-operated public schools. States and localities increasingly rely on privately-operated charter schools. *See*, *e.g.*, Dep't of Educ., *The Evaluation of Charter School Impacts* (June 2010). Although rules differ by state, a charter school is typically funded by the public agency granting its charter and cannot operate if its charter is revoked or expires. Anna David, *Public-Private Partnerships: the Private Sector and Innovation in Education* (July 1992) available at http://reason.org/files/4ae97ac25a110429ff7e542cfc47f857.pdf. Charter schools may serve a general student population (including students with disabilities) or may be targeted specifically at students with disabilities. *E.g.*, Westat, *Charter Schools and Students with Disabilities: A National Study* (2000), available at http://files.eric.ed.gov/fulltext/ED452657.pdf; Tex. Educ. Code § 12.1014. The public entity authorizing these schools remains responsible for ensuring that they comply with Federal civil rights laws. Catherine Lhamon, Assistant Secretary for Civil Rights, U.S. Dep't of Education, *Dear Colleague* Letter, May 14, 2014, at 7.

In Texas, for instance, the legislature authorized the Texas Commissioner of Education to "grant a charter on the application of an eligible entity for an open-enrollment charter school to operate in a facility of a commercial or nonprofit entity …." Texas Educ. Code § 12.101. The charter school is "part of the public school system" of the state. *Id.* § 12.105. It is funded by the state, *id.* § 12.106, may not charge tuition, *id.* § 12.108, and must remain open to students within its territory, *id.* § 12.065. It is subject to state standards and requirements for reading programs, accelerated instruction, high school graduation, special education, bilingual education, prekindergarten programs, extracurricular activities, discipline management, purchasing, conflicts of interest, nepotism, state immunity from suit, teacher retirement benefits, and providing transportation, among others. *Id.* §§ 12.104, .1054-.1057, .109. Curriculum, teachers, aides, and counselors must be approved by the state, and the state must establish performance frameworks, and evaluate charters based on student test scores, student attendance, students' grades, student discipline, and student and parent satisfaction. *Id.* §§ 12.1059, 118, .1181. Charters may be revoked for poor performance. *Id.* § 12.115. Day-to-day operations are run by "governing bodies" – which themselves can be either a private or public entity. *Id.* §§ 12.121, .101(a).

Charter schools serve fewer students with disabilities – eight to ten percent of students on average – than non-charter schools, which serve thirteen percent. *See* Gary Miron, *Charters Should Be Expected to Serve All Kinds of Students*,

EducationNext, Vol. 14, No. 4 (Fall 2014) available at http://educationnext.org/charters-expected-serve-kinds-students/ ; GAO Report to Cong. Requesters, *Charter Schools, Additional Federal Attention Needed to Help Protect Access for Students with Disabilities* 6-7 (2012), available at http://www.gao.gov/assets/600/591435.pdf. Parents of children with disabilities have reported that they are discouraged from applying for charter schools or turned down when they do apply. *See* Southern Poverty Law Center, *Students with disabilities encounter discrimination in New Orleans schools* (Mar. 2010), available at https://www.splcenter.org/news/2014/03/12/students-disabilities-encounter-discrimination-new-orleans-schools. Once a student with a disability is admitted, the charter school, like all public schools, must ensure the student can participate in academic and other activities that are available for students without disabilities. *See* Dep't of Justice and Dep't of Educ., *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, and Speech Disabilities in Public Elementary and Secondary Schools*, available at https://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.htm

A DOJ guidance on public schools' Title II responsibilities provides that "Title II applies to … all public charter schools…."). *Id.*; Title II Technical Assistance Manual, *supra*, at II.3.4200 ("where "magnet" schools, or schools offering different curricula or instruction techniques are available, the range of choice provided to students with disabilities must be comparable to that offered to other students"). Lower courts and litigants generally

simply assume that charter schools are subject to Title II. *See Schwarz v. The Vills. Charter Sch.*, No. 5:12-cv-177-Oc-34PRL, 2016 WL 787934 (M.D. Fla. Feb. 29, 2016) ("the Districts do not dispute that they are public entities"); *Scaggs v. N.Y. Dep't of Educ.*, No. 06-CV-0799, 2007 WL 1456221, *15-16 (E.D.N.Y. May 16, 2007) (plaintiffs had valid claim under Title II against public entities for alleged violations by charter school); *Berry v. Pastorek*, No. 2:10-cv-04049 (E.D. La. Mar. 25, 2015) (settlement with New Orleans schools providing procedures to ensure, among other things, that charter schools are available for students with disabilities).

Low-income housing services. Public entities often use private entities in programs providing affordable housing for low-income families. For instance, local public housing agencies, which are government entities, typically administer the federal housing voucher program. However, in a number of instances, private non- or for-profit entities have been enlisted to perform all or some of the functions generally performed by the public local housing agency. Such arrangements exist or have existed in Chicago, Baltimore, Memphis, Houston, Charlotte, Allentown, and Ventura, California, among others. *See* Quadel Consulting Webpage, "Operational Support," available at http://quadel.com/affordable-housing-services/housing-choice-voucher/operational-support/; *id.* at "Direct Management"; HUD, Regional Inspector General for Audit, *The Chicago Housing Authority Did Not Always Ensure That Section 8 Units Met HUD's Housing Quality Standards*, Feb. 19, 2009, at 5 (private corporation appointed to run the Chicago housing voucher

program in 1995, with the operation divided between two private entities in 2008). Private entities also perform services through partnerships with public agencies in connection with other low-income housing programs. such as HUD-assisted multifamily housing and public housing. *See* Quadel Consulting Webpage, "Performance Based Contract Administration (PBCA)," available at http://quadel.com/affordable-housing-services/hud-assisted-multifamily-housing/performance-based-contract-administration-pbca/ (private entity partnering with Indiana and North Carolina "to oversee owner compliance with Section 8 Housing Assistance Payments (HAP) Contracts totaling more than 50,000 affordable housing units"); *id.* at "Operational Support," available at http://quadel.com/affordable-housing-services/public-housing/operational-support/ (private entity directing or partnering with public housing programs in Illinois, Ohio, Connecticut, North Carolina, and Louisiana, among others).

These private firms perform the same operations as the public entity in operating the low-income housing systems at issue. In Texas, for instance, the Department of Housing and Community Affairs appoints "Local Operators," which can be *either* public or private entities, as "local administrators who perform unit inspections, provide client processing and perform other administrative duties on the Department's behalf." 36 Tex. Reg. 3177 (regulations as adopted May 11, 2011).[5] The local

[5] The regulations were amended in August 2016 . They no longer specifically provide that the Local Operator may be a

operator is responsible for, *inter alia*, ensuring compliance with federal regulations, *id.* § 5.802(c)(1); providing information about housing assistance, *id.* § 5.802(c)(3); increasing the number of private rental home owners willing to participate in the program, *id.* § 5.802(c)(4); assisting in issuing vouchers, *id.* § 5.802(c)(5); certifying rent reasonableness, *id.* § 5.802(c)(6); assisting in execution of vouchers, *id.* § 5.802(c)(7); assisting in annual re-determinations of eligibility and amounts of assistance, *id.* § 5.802(c)(8); inspecting properties for compliance with Housing Quality Standards, *id.* § 5.802(c)(9), (10); and assisting in processing changes in income and household, *id.* § 5.802(c)(12).

In low-income housing, people with disabilities depend on the ADA and Section 504 to ensure they are not subjected to different application or qualification criteria, rental fees or sales prices, and rental or sales terms or conditions than those required of or provided to persons who are not disabled. They depend also on availability of accessible properties. *See* 24 C.F.R. §§ 100 *et seq.*

Entities that administer and operate low-income housing programs are subject to Title II, including when they use private entities to carry out their programs. *See* Dep't of Justice, Press Release, *Justice Department Settles Disability Discrimination Lawsuit Against Housing Authority Of Baltimore City*, Sept. 29, 2004, available at https://www.justice.gov/archive/opa/pr/2004/Septemb

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private for-profit or nonprofit entity or a governmental entity, , but allow renewal of existing Local Operators. 10 Tex. Admin. Code § 5.802(d)(1).

er/04_crt_657.htm (announcing settlement under Title II and Section 504 resolving claims that Baltimore housing authority discriminated in its public housing and Section 8 voucher programs against low-income people with disabilities).

Urban renewal projects. Other public entities help provide low-income housing and other community resources by enlisting private developers in urban renewal-type projects. The public entity cannot avoid its Title II obligations by doing so. In *Independent Housing Services of San Francisco v. Fillmore Ctr. Assocs.*, for instance, Title II claims were permitted based on a housing development built by a private developer when a San Francisco agency had obtained title to land and cleared it for redevelopment and issued bonds to support the project. 840 F. Supp. 1328, 1344 (N.D. Cal. 1993) ("[A] disabled person *is* denied the benefit of … the funding and provision of low-income housing) if she or he is prevented from living in the low income housing because of his or her disability." *Id.* (emphasis in original). *Accord* Title II Technical Assistance Manual, *supra* (when "[a] city engages in a joint venture with a private corporation to build a new professional sports stadium," the city must ensure that the stadium is built to comply with Title II standards).

Other services, programs, and activities. There are numerous other areas in which courts have held or the DOJ has recognized that the state may not avoid Title II liability by involving a private entity, including:

- Private entities running homeless shelters as part of a public program to address homelessness. *E.g*, Settlement Agreement between the United States and the District of Columbia, Dec. 10, 2008, available at https://www.ada.gov/dc_shelter.htm (District must comply with Title II in its shelter program).

- Voting at privately-owned polling locations. *E.g.*, Dep't of Justice, Civil Rights Div., *Letter of Findings Regarding United States' Investigation of Augusta County Regarding Polling Place Accessibility*, May 13, 2015, available at https://www.ada.gov/briefs/augusta_lof.html (county required to ensure accessible polling locations including at privately-owned buildings).

- Public entities depending on privately-operated foster care, adoption agencies, or child welfare services to carry out public programs. Dep't of Justice, Civil Rights Div., *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts*, available at https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html (because a public entity may not "directly or through contract or other arrangements, engage in practices or methods of administration" that result in disability-based discrimination, "a child welfare agency could be responsible for the discriminatory actions of a private foster care or adoption agency with which it contracts," by, for

instance, screening out parents with disabilities).

- States using private entities to gather information for a public program for professional licensure. *E.g.*, Dep't of Justice, *Letter of Findings Regarding United States' Investigation of the Louisiana Attorney Licensure System*, Feb. 5, 2015, available at http://www.bazelon.org/LinkClick.aspx?fileticket=7fvtHYXZawM%3d&tabid=698 ("Using a private third party…to gather application information does not insulate the Louisiana Supreme Court from complying with the requirements of the ADA").

- Public entities using private entity technology. *E.g.*, *Dudley v. Miami Uni.*, Motion to Intervene and Proposed Complaint, available at https://www.ada.gov/enforce_current.htm (state university violated Title II by directing students with disabilities to use private technology platforms that were inaccessible).

- Privately-run concessions in state facilities. *See* Title II Technical Assistance Manual, *supra*, § II-3000.

- States using private entities to sell lottery tickets. *E.g.*, *Winborne v. Va. Lottery*, 677 S.E.2d 304 (Va. 2009).

In sum, courts and the Department of Justice applying Title II have regularly looked at the factual circumstances and, in particular, whether private

entities are carrying out public programs, services or activities. They have not adopted a bright line test, including one that requires a contract or agency relationship.[6] Nor would it be appropriate for them to do so – thus narrowing the protection against discrimination afforded by the ADA and its regulations. *Cf. Illinois v. Gates*, 462 U.S. 213, 232 (1983) ("rigid legal rules are ill-suited" to an area of diversity because "[o]ne simple rule will not cover every situation").

II. The ruling below should be reversed

This Court should reverse the Fifth Circuit because Texas required deaf people to obtain a certificate from a private entity as a condition of obtaining a very important government benefit, the right to drive. Texas requires citizens under the age of 25 to

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[6] This Court has confirmed that a state cannot avoid its obligations by delegating responsibilities to private parties in a variety of other contexts: "[t]he State cannot avoid its constitutional responsibilities by delegating a public function to private parties." *Georgia v. McCollum*, 505 U.S. 42, 53 (1992); *see also Terry v. Adams*, 345 U.S. 461 (1953) (private political party's determination of qualifications for primary voters was state action); *Parker v. Brown*, 317 U.S. 341 (1943) (state supervised market sharing scheme was state action because it was authorized and supervised by the state.). This principle is important in the civil rights context, where this Court has attributed a private party's actions to the state when the private party performs an exclusive, traditional public function. *West v. Atkins*, 487 U.S. 42 (1988) (private doctor under contract with state to provide medical services at state hospital is a state actor); *Marsh v. Ala.*, 326 U.S. 501, 506-08 (1946) (acts occurring in company-owner town treated as state action); *Smith v. Allwright*, 321 U.S. 649 (1944) (primary election).

present a certificate of completion for a TEA-approved driver education program in order to obtain a driver's license. Tex. Transp. Code § 521.1601. Texas adopted this requirement for a compelling reason: "[d]rivers between 19 and 24 years of age have been dying in traffic crashes at a higher rate than 16-year-old or 17-year-old drivers. These statistics illustrate the need for mandates for all first-time driver's license applicants under the age of 25." Author's / Sponsor's Statement Of Intent, SB 1317 (enrolled).

The importance of obtaining a driver's license – particularly in a state like Texas where large portions of the state are rural and inaccessible to public transportation – is difficult to overstate. Denial of a license based on disability, like denial based on race, arguably could implicate other constitutional rights, like the due process right involving freedom to travel. *See Kent v. Dulles*, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law "). This Court has recognized that issuing driver's licenses is an important and exclusive public function, *see Dixon v. Love*, 431 U.S. 105 (1977); *Mackey v. Montrym*, 443 U.S. 1 (1979), as has Texas, in arguing to this Court that it has a "sovereign interest" in the way it chooses to issue driver's licenses, Br. for State Resps. at 24, *United States v. Texas* (No. 15-674). Moreover, a driver's license affects "important interests" and "may become essential in the pursuit of a livelihood." *Bell v. Burson,* 402 U.S. 535, 539 (1971).

The Fifth Circuit, despite recognizing the importance of driver's licenses and the ADA implications of denying licenses to deaf people because they are deaf, *Ivy*, 781 F.3d at 258, found no Title II violation. This reasoning ignores the actual benefit at issue, the driver's license. Petitioners want to drive legally; driver education is the state-mandated means to that end. The state indisputably issues driver's licenses. It has chosen to do so in a way that deprives deaf people of the ability to get them, requiring driver education but delegating the provision of that education to a network of private entities that is not available to deaf people. Under the principles and cases cited above, the state cannot avoid Title II responsibility simply because it uses private entities to carry out part of its public program of licensing drivers.

The Fifth Circuit's reasoning could substantially undercut the effectiveness of Title II. For example, a state or local government could condition eligibility for welfare benefits on completing a job training or vocational course from a network of private providers that deny access to people with disabilities. Or, to use an example provided by Respondent, Texas appears to have a program in which "private businesses … teach firearm safety courses needed to obtain a Texas concealed handgun license." *See* Resp. Br. To 5th Cir. at 36; Tex. Gov't Code §§ 411.174. Respondent offers this as an absurd result, but in fact the law precisely exemplifies a situation that *should* be subject to Title II. If the state requires completion of a firearm safety course as a prerequisite for obtaining a state-issued concealed carry permit, and enlists private

instructors to provide the courses, but no course is accessible to people with disabilities, that would present a Title II issue. How that issue is resolved would depend on the facts.

In short, if the state chooses to condition an important public benefit on participation in privately operated programs, services or activities that discriminate against people with disabilities, a Title II issue is raised. What obligations the state may have under Title will depend on which Title II regulations apply and the facts. Here, Title II does not require that the state ensure that each and every privately operated driver school be accessible to all individuals with disabilities, but only that the opportunity to obtain a driver's license be accessible to people with disabilities. *See DAI*, 598 F. Supp. 2d at 318 ("DAI does not challenge the conduct of adult homes licensed and certified by the State; instead, it challenges the manner in which Defendants administer New York's mental health service system").

Nor, given the unique nature of this system, will imposing Title II liability extend such liability to every licensed and regulated entity. For one thing, the ADA's regulations make clear that mere license or regulation alone does not carry with it Title II liability for the actions of the licensed or regulated entity. *See supra* Section I.A. Moreover, here the state has gone well beyond mere licensing and regulation by requiring completion of a privately-operated education course – after determining the course is necessary to reduce traffic fatalities – as a

prerequisite to obtaining a driver's license. Tex. Transp. Code § 521.1601.

As the Fifth Circuit dissent explained, there are "obviously meaningful differences between this particular public/private operation and virtually every other private operation that Texas licenses." 781 F.3d at 263 (Wiener, J. dissenting). The "TEA's role is not just about consumer protection, as is the focus of the several occupational codes cited by the state." *Id.* Rather, it closely administers and regulates an "indispensable entitlement [of driving private vehicles], and driving responsibly is a civic duty that the state seeks to promote with this unique regulatory scheme that it entrusts to TEA." *Id.*

Among other things, the TEA "administers" the driver education program, Tex. Educ. Code § 1001.053, including administering an "arrangement[]" for providing a state "benefit," 28 C.F.R. § 35.130(b), the certificates of completion that must be presented to the state to obtain a driver's license. Those certificates must conform to specific requirements and are official government records. Tex. Educ. Code § 1001.055; 16 Tex. Admin. Code §§ 84.100(1) and (12). The TEA also controls the following aspects of driver education: rules and minimum standards (Tex. Educ. Code § 1001.053); curriculum, including the specification that specific subjects such as motorcycle awareness, railway crossing safety, litter prevention, anatomical gifts, texting while driving (*id.* §§ 1001.101, 1025, .106-.109); the time that must be spent in behind-the-wheel instruction (*id.* § 1001.101); design of

textbooks and course materials (*id.* §§ 1001.101,.1015); licensing of instructors (*id.* §§ 1001.251-257); issuing certificates of compliance or numbers for them (*id.* §§ 1001.056); insurance (16 Tex. Admin. Code § 84.113); bonding (*id.* § 84.102); approval of facilities (*id.* § 84.212); requirements for desks and chairs (*id.* § 84.212); how many seconds, minutes, and hours are spent on different activities (*id.* § 84.106); detailed requirements and continuing education for instructors (*id.* § 84.206); security protocols (*id.* § 84.204); testing protocols (*id.* § 84.106); record-keeping protocols (*id.* § 84.115); timecard rules (*id.* § 84.115); investigation protocols (*id.* § 84.205); reporting obligations (including notification to state of any legal action) (*id.* § 84.202); rules on refunds to students (*id.* § 84.211); inspection obligations; components and disclosures that are required to be included in contracts with students (including the option of making a complaint to the TEA) (*id.* § 84.107); and events that will lead to school closure (*id.* § 84.211), among others. It also resolves complaints against the schools, visits schools, and reexamines them for compliance. Tex. Educ. Code §§ 1001.053, .206.

Conclusion

A governmental entity cannot avoid its obligations under Title II by acting through a private entity. That will happen if this Court affirms the Fifth Circuit here. If the Court also adopts the Fifth Circuit's suggested "contract or agency" test, the results will also go beyond this particular case to

limit the broad protections Congress intended Title II to provide.

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Appendix: List of *Amici*

The American Association of People with Disabilities ("AAPD") is a convener, connector, and catalyst for change, increasing the political and economic power of people with disabilities. As a national cross-disability rights organization, AAPD advocates for full civil rights for the 50+ million Americans with disabilities by promoting equal opportunity, economic power, independent living, and political participation

The Arc of the United States ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities ("I/DD"). Through its legal advocacy and public policy work, The Arc promotes and protects the human and civil rights of people with I/DD and actively supports their full inclusion and participation in the community throughout their lifetimes. The Arc has appeared as amicus curiae in this Court in a variety of cases involving disability civil rights and has a vital interest in ensuring that all individuals with I/DD receive the appropriate protections and supports to which they are entitled by law.

The Autistic Self Advocacy Network ("ASAN") is a national, private, nonprofit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people

and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals to participate fully in community life and enjoy the same rights as others without disabilities.

The Center for Public Representation is a public interest law firm that has been assisting people with disabilities for more forty years. It is both a statewide and national legal backup center that provides assistance and support to public and private attorneys who represent people with disabilities in Massachusetts, and to the federally-funded protection and advocacy agencies in each of the fifty States. It has litigated systemic cases on behalf of person with disabilities in more than twenty states, and authored *amici* briefs to the United States Supreme Court and many the courts of appeals, in order to enforce the constitutional and statutory rights of persons with disabilities, including the right to be free from discrimination under the ADA.

The Disability Rights Education and Defense Fund, Inc. ("DREDF"), is a national law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF pursues its mission through education, advocacy and law reform efforts, fighting to ensure that people with disabilities are free from discrimination. Much of DREDF's work is

in the area of access to government services, particularly education and health care which is often carried out through various arrangements with private entities. DREDF is concerned that the increasingly prevalent trend to privatize the delivery of state benefits and services does not result in undermining the civil rights protections for people with disabilities.

The Epilepsy Foundation, a unified national non-profit since 1968 with 50 local organizations throughout the United States, leads the fight to overcome the challenges of living with epilepsy and to accelerate new therapies to find cures, stop seizures, and save lives. The Foundation carries out its mission through information & education, advocacy, research and community services and supports. There are nearly 3 million people in the United States with epilepsy, and one in 26 people will develop a seizure disorder in their lifetimes. Our goal is ensuring that all people with seizures are able to participate to the fullest in their communities. Because of the long history of stigma, myths, misconceptions and fears around epilepsy, the Foundation supports support laws and practices, including Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act, designed to ensure people with epilepsy and other disabilities are not denied access to public services, programs, or activities based on their disability or condition. We believe these laws are applicable to all public accommodations and services, regardless of whether those services are provided by the government agencies directly, or by a private entity working in behalf of the public entity to

implement the state's laws, services and responsibilities. Stigma and misconception surrounding epilepsy continue to fuel discrimination and isolate people with epilepsy from the mainstream of life. Despite great progress in recent years, epilepsy remains a formidable barrier to educational opportunities, employment, and personal fulfillment among older children and adults. Governed by the terms of state law, a driver's license is a passport to adulthood in the United States and many other countries, and a fundamental tool to accessing employment, community services, education, and individual freedom. In both rural and suburban areas, driving a motor vehicle is often essential for independence and employment. Even in many urban areas, driving is needed for some jobs or to get to certain places for work or pleasure. Most people with epilepsy can safely drive, and these individuals should have confidence that their state and local governments are providing them with fair, accessible, and nondiscriminatory access to state sponsored services as required by the ADA.

Founded in 1972 as the Mental Health Law Project, the Judge David L. Bazelon Center for Mental Health Law ("Bazelon Center") is a national nonprofit legal advocacy organization dedicated to preserving the rights of adults and children with mental disabilities. The Bazelon Center uses litigation, public policy advocacy, education, and training to advocate for equal opportunities in all aspects of life for people with mental disabilities, and has participated as *amicus* in numerous cases

involving the rights of people with disabilities heard by this Court.

Mental Health America ("MHA"), formerly the National Mental Health Association, is a national membership organization composed of individuals with lived experience of mental illnesses and their family members and advocates. The nation's oldest and leading community-based nonprofit mental health organization, MHA has more than 200 affiliates dedicated to improving the mental health of all Americans, especially the 54 million people who have severe mental disorders. Through advocacy, education, research, and service, MHA helps to ensure that people with mental illnesses are accorded respect, dignity, and the opportunity to achieve their full potential. MHA is concerned with ensuring that the protections from the Americans with Disabilities Act and the Rehabilitation Act are enforced and include all entities that provide services to individuals with disabilities - both public and private.

NAMI ("The National Alliance on Mental Illness") is the nation's largest grassroots mental health organization dedicated to building better lives for the millions of Americans affected by mental illness. A vital part of NAMI's mission is to promote and advocate for equal and non-discriminatory access to community living for people with mental illness and other disabilities.

The National Council for Independent Living ("NCIL") is America's oldest cross-disability, grassroots organization run by and for people with

disabilities. Founded in 1982, NCIL represents more than 700 organizations and individuals from every state and territory, including Centers for Independent Living ("CILs"), Statewide Independent Living Councils ("SILCs"), individuals with disabilities, and other organizations that advocate for the rights of people with disabilities throughout the United States. NCIL is committed to preserving and securing implementation of the protections of the ADA, including in Title II.

The National Disability Rights Network ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States

The National Federation of the Blind ("NFB") is the largest organization of blind and low-vision people in the United States. Founded in 1940, the NFB has

grown to over fifty-thousand members. The organization consists of affiliates and local chapters in every state, the District of Columbia, and Puerto Rico. The NFB devotes significant resources toward advocacy, education, research, and development of programs to integrate the blind into society on terms of equality and independence, and to remove barriers and change social attitudes, stereotypes and mistaken beliefs about blindness that result in the denial of opportunity to blind people. The NFB actively engages in litigation and advocacy to protect the civil rights of the blind under our nation's laws.

The Paralyzed Veterans of America ("PVA") is a national, Congressionally-chartered veterans service organization headquartered in Washington, DC. PVA's mission is to employ its expertise, developed since its founding in 1946, on behalf of armed forces veterans who have experienced spinal cord injury or dysfunction. PVA seeks to improve the quality of life for veterans and all people with spinal cord injury and dysfunction through its medical services, benefits, legal, sports and recreation, architecture and other programs. PVA advocates for quality health care, for research and education addressing spinal cord injury and dysfunction, for benefits based on its members' military service and for civil rights, accessibility and opportunities that maximize independence for its members and all veterans and non-veterans with disabilities. PVA has almost 20,000 members, all of whom are military veterans living with catastrophic disabilities. To ensure the ability of our members to participate in their communities, PVA strongly supports the opportunities created by and the protections

available through the Americans with Disabilities Act.