No. 22-40225

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

YOUNG CONSERVATIVES OF TEXAS FOUNDATION,
Plaintiff-Appellee

v.

NEAL SMATRESK, PRESIDENT OF THE UNIVERSITY OF NORTH TEXAS;
SHANNON GOODMAN, VICE PRESIDENT FOR ENROLLMENT
OF THE UNIVERSITY OF NORTH TEXAS,
Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of Texas, Sherman Division
No. 4:20-CV-973-SDJ

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

The University of North Texas Officials request oral argument. The district court issued an unprecedented ruling that eliminated out-of-state tuition for out-of-state U.S. citizen students at the University of North Texas. In concluding that Texas's out-of-state tuition scheme is preempted by federal law, the district court's construction of the federal statute conflicts with the Tenth Circuit's construction of the identical statute in *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007). Oral argument would aid the Court in understanding whether the federal statute, which limits certain aliens' eligibility for educational benefits, preempts a state statute that requires out-of-state students to pay out-of-state tuition and if the district court's permanent injunction immediately enjoining the UNT Officials from charging out-of-state tuition was justified.

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JURISDICTIONAL STATEMENT

Because the Plaintiff's claim arises under the U.S. Constitution and a federal statute, the district court's subject-matter jurisdiction rested on 28 U.S.C. § 1331. *See* ROA.386. The district court, however, lacked jurisdiction because the Plaintiff lacked standing.

A final judgment was entered on April 8, 2022. ROA.1079 (R.E.3). Neal Smatresk, President of the University of North Texas, and Shannon Goodman, Vice President for Enrollment of the University of North Texas, perfected a timely appeal on April 10, 2022. ROA.1082 (R.E.4). This Court has appellate jurisdiction. *See* 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Does 8 U.S.C. § 1623(a) expressly or impliedly preempt Texas Education Code § 54.051(d), which requires out-of-state students at Texas institutions of higher education to pay out-of-state tuition when:

   a. Section 1623(a) lacks explicit language preempting out-of-state tuition and issues no directives regarding U.S. citizen students?

   b. Section 1623(a)'s restriction on alien eligibility for education benefits does not conflict with Section 54.051(d)'s imposition of an out-of-state tuition rate on out-of-state students because they concern disparate subject matters?

   c. Alternatively, even under the district court's misreading of Section 1623(a), Section 1623(a) does not conflict with the state tuition statute because qualification for Texas in-state tuition is not "on the basis of residence" (a condition under Section 1623(a)) when graduation from a Texas high school is also required?

2. Did the district court err in permanently enjoining the UNT officials from charging U.S. students from outside Texas out-of-state tuition when it mistakenly concluded that the state statute was preempted and superficially considered the other prerequisites for an injunction?

3. Do out-of-state students have standing to contest out-of-state tuition when their obligation to pay exists independently of Section 1623(a) and the district court could not award them in-state tuition?

STATEMENT OF THE CASE

I. Procedural History

A. Nature of the case

On behalf of two of its members, the Young Conservatives of Texas Foundation ("YCT") sued the University of North Texas, the University of North Texas System, UNT President Neal Smatresk, and UNT Vice-President for Enrollment Shannon Goodman ("UNT Defendants") in Texas state court, seeking a declaration that 8 U.S.C. § 1623(a) (a statute restricting postsecondary education benefits for certain alien students, and part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996) (R.E.5), preempts Texas Education Code Section 54.051(d) (a statute imposing out-of-state tuition rates on out-of-state students) (R.E.6). ROA.30, 33, 214, 952, 956. YCT sought a permanent injunction barring enforcement of Section 54.051(d). ROA.38.

B. Course of proceedings

The UNT Defendants removed the case. ROA.15. YCT sought a remand, which was rejected. ROA.391-92 (recognizing federal-question jurisdiction).

The UNT Defendants moved to dismiss for lack of standing and failure to state a claim, arguing that Section 1623(a) provided no vehicle for U.S. citizen out-of-state students to obtain in-state tuition. ROA.311-12, 315-16. The district court

concluded that YCT had both associational standing and an implied cause of action in equity under *Ex parte Young*. ROA.455.

YCT moved for summary judgment and sought a permanent injunction prohibiting the UNT Defendants from charging Section 54.051(d)'s out-of-state tuition rate to U.S. citizens who do not reside in Texas. ROA.233. In a cross-motion for summary judgment, the UNT Defendants contended that YCT had no cause of action and lacked standing, and Section 1623(a) did not preempt Section 54.051(d). ROA.698.

The district court granted the UNT Defendants' cross-motion as to UNT and the UNT System, dismissed them as improper defendants for an *Ex parte Young* claim, and denied the remainder of the cross-motion. ROA.1039 (R.E.2). The court then granted YCT's summary-judgment motion as to Smatresk and Goodman ("UNT Officials"), concluding that (1) YCT had standing and an *Ex parte Young* cause of action, and (2) Section 1623(a) preempts Section 54.051(d). *Id.*

The district court issued a permanent injunction the same day, April 8, 2022, enjoining the UNT Officials "immediately and permanently" from "applying the tuition rates prescribed by Section 54.051(d)…to United States citizens." ROA.1080 (R.E.3).

II. Factual Background

A. YCT sought to obtain in-state tuition for its out-of-state members while leaving untouched alien students' eligibility for in-state tuition.

YCT brought its preemption challenge to the Texas statute that imposes out-of-state tuition on out-of-state students on behalf of two YCT members who chose to not take advantage of in-state tuition rates in their home states of California and Missouri, but to attend UNT instead. ROA.30-40, 952, 956.[1]

Because an element of Section 1623(a) is residency, YCT's preemption theory depends on a separate Texas statute that governs Texas residency. Under that statute, any student who graduates from a Texas high school after at least three years of living in Texas and who also lives in Texas for the year prior to university may establish Texas residency and qualify for in-state tuition. *See* TEX. EDUC. CODE § 54.052(a)(3). This opportunity is open to certain alien students as well as U.S. citizens.

But ***YCT expressly disclaimed any attempt to challenge in-state tuition for those alien students***. *See, e.g.*, ROA.449 ("UNT may continue to charge unlawfully present aliens whatever it wants."), 866 ("UNT may charge unlawfully present aliens

[1] For clarity, the UNT Officials use the terms "in-state" and "out-of-state" to describe students and tuition rates, but the Texas tuition statutes use the terms "resident" and "nonresident." *See* TEX. EDUC. CODE §§ 54.051, .052.

in-state tuition if it wants.").[2] Instead, YCT sought only to prohibit UNT from charging out-of-state tuition to out-of-state students. As a result, ***this litigation does not challenge alien students' eligibility for in-state tuition under Texas statutes defining "residents."*** Therefore, this litigation is unique and wholly unlike litigation in other states involving Section 1623(a) that has sought to curtail alien students' eligibility for in-state tuition.[3]

B. Texas statutes establish eligibility for in-state versus out-of-state tuition rates.

Section 54.051(d) of the Texas Education Code establishes the tuition rate for out-of-state students at Texas public universities. This rate is the average that Texas students pay to attend public universities in the five other most populous states:

> [T]uition for a nonresident student…is an amount per semester credit hour equal to the average of the nonresident undergraduate tuition charged to a resident of this state at a public state university in each of the five most populous states other than this state, as computed by the coordinating board[.]

TEX. EDUC. CODE § 54.051(d). Under this formula, the 2022-2023 out-of-state rate is $458 per semester credit hour. TEX. HIGHER EDUC. COORDINATING BD.,

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[2] *See also* Dist. Ct. Dkt. 72 at 4 n.3 ("YCT did not challenge or seek to enjoin the provisions of Texas law making aliens eligible for resident tuition. Rather, YCT challenged the actual provision that injures its members—§ 54.051(d).").

[3] *See Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007); *Equal Access Educ. v. Merten*, 305 F.Supp.2d 585 (E.D. Va. 2004); *Ariz. ex rel. Brnovich v. Maricopa Cnty. Cmty. Coll. Dist. Bd.*, 416 P.3d 803 (Ariz. 2018); *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855 (Cal. 2010).

Memorandum to Presidents & Chancellors-Public Universities, *et al.*, *Tuition Rate for Nonresident & Foreign Students for Academic Year 2022-2023* (Oct. 26, 2021), https://tinyurl.com/36wk9mvs.[4]

Texas residents have always paid a substantially lower rate. Currently, it is $50 per semester credit hour. TEX. EDUC. CODE § 54.051(c). In 1971, for example, the out-of-state rate was ten times that of Texas residents. Act of June 15, 1971, 62nd Leg., R.S., ch. 1024, art. 2, § 29, 1971 TEX. GEN LAWS 3072, 3353 (H.B. 1657), https://lrl.texas.gov/scanned/sessionLaws/62-0/HB_1657_CH_1024.pdf (codified at then TEX. EDUC. CODE § 54.051(c)).

A separate statutory provision explains who is a Texas resident for these purposes. "Resident" students include graduates of a Texas high school (or received the diploma equivalent) who lived in Texas for at least three years prior to graduating, including the year before enrolling at a Texas university. Specifically, a "resident" is:

> (3) a person who:
>
> > (A) graduated from a public or private high school in this state or received the equivalent of a high school diploma in this state; and
> >
> > (B) maintained a residence continuously in this state for:

[4] From its statutory beginning, in 1933, the out-of-state rate was tied to the rate charged to Texas students attending school outside Texas. *See* Act of June 3, 1933, 43d Leg., R.S., ch. 196, § 1(2), 1933 TEX. GEN. LAWS 596, 597 (H.B. 322), https://lrl.texas.gov/scanned/sessionLaws/43-0/HB_322_CH_196.pdf.

> (i) the three years preceding the date of graduation or receipt of the diploma equivalent, as applicable; and
>
> (ii) the year preceding the census date of the academic term in which the person is enrolled in an institution of higher education.

TEX. EDUC. CODE § 54.052(a)(3)(A)-(B) (R.E.7).

Two additional routes to "resident" status are available. A student who "established a domicile" in Texas one year before enrolling in university, and also "maintained that domicile continuously" for that year, qualifies as a resident. *Id.* § 54.052(a)(1).[5] "Resident" also includes a dependent of a parent who "established a domicile" in Texas at least a year before the student enrolls, provided the parent "maintained that domicile continuously" for the prior year. *Id.* § 54.052(a)(2).[6]

Any student may attempt to show Texas residency status. *See* TEX. EDUC. CODE § 54.053; TEXAS HIGHER EDUCATION COORDINATING BOARD, *Core Residency Questions*, https://tinyurl.com/5eanjskt (July 2021); *see also* ROA.819, 821-32. Under Section 54.052(a) and the administrative rules, unlawfully present aliens can apply for Texas residency, but only through Section 54.052(a)(3)—the high-school-plus-three-years'-residency option. *See* TEX. EDUC. CODE § 54.052(a)(3); 19 TEX. ADMIN CODE § 21.24(d) (permitting only lawfully present aliens to qualify as

[5] From the time of the 1933 Texas statute setting an out-of-state tuition rate, residency was defined to require at least one year's residency in Texas. *See* 1933 TEX. GEN. LAWS at 597 (§ 1(2)).

[6] "Domicile" is "[a] person's principal, permanent residence to which the person intends to return after any temporary absence." TEX. EDUC. CODE § 54.0501(3).

residents under the two one-year avenues in Section 54.052(a)(1) and (2)). Through Section 54.052(a)(3), the Texas Legislature expanded access to in-state tuition. *See* Act of June 16, 2001, 71st Leg., R.S., ch. 1392, 2001 TEX. GEN. LAWS 3582, 3582-83, (H.B. 1403), https://lrl.texas.gov/scanned/sessionLaws/77-0/HB_1403_CH_1392.pdf; Act of June 17, 2005, 79th Leg., R.S., ch. 888, 2005 TEX. GEN. LAWS 3000, 3000-08 (S.B. 1528), https://lrl.texas.gov/scanned/sessionLaws/79-0/SB_1528_CH_888.pdf.

C. The federal statute at issue targets only alien eligibility for education benefits.

The federal statute on which YCT's lawsuit is based—Section 1623(a)—is part of Title 8, Chapter 14 of the United States Code, entitled "Restricting Welfare and Public Benefits for Aliens." *See* 8 U.S.C. ch. 14. Chapter 14's central purpose is to "significantly restrict the eligibility of noncitizens lawfully in the United States to receive welfare benefits" from the federal government, and from state and local governments. *See City of Chi. v. Shalala*, 189 F.3d 598, 600 (7th Cir. 1999) The statute includes exceptions for federal programs, 8 U.S.C. § 1612(a)(2), and grants states and local governments limited authority to determine aliens' eligibility for state and local benefits. 8 U.S.C. §§ 1622, 1624.

Section 1623(a), the provision at issue here, restricts states' ability to extend education benefits to alien students not lawfully present in the United States. *See* 8

U.S.C. § 1623(a). Relying on these state and federal statutes, YCT contends that Section 1623(a) preempts Texas's out-of-state tuition statute.

D. UNT is a major research institution with a substantial presence in the Dallas-Fort Worth area, educating over 42,000 students and employing over 10,000 faculty and staff.

UNT—a major Texas university—educates over 42,000 students through 244 degree programs, employs over 10,000 staff and faculty, and serves as a Tier 1 research institution. *University of North Texas*, CARNEGIE CLASSIFICATION OF INSTS. OF HIGHER EDUC., https://tinyurl.com/zj93ecy6 (last visited July 20, 2022); Appellants' Mot. for Stay, Addendum-6 ¶3 (June 24, 2022); *It's a 3-peat: UNT grows again, enrolls 42,372 to defy national trend*, UNT NEWS SERVICE, Sept. 10, 2021, 8:23 AM, https://news.unt.edu/news-releases/its-3-peat-unt-grows-again-enrolls-42372-defy-national-trend; *Rankings and Recognitions*, UNT, https://www.unt.edu/rankings (last visited July 20, 2022). UNT's commitment to educational quality, student advancement, and professional and academic preparation is unquestioned.

UNT's global alumni network has 461,000 members, with 314,000 alumni in the Dallas-Fort Worth area. *Id.* UNT has an annual economic impact of $1.65 billion. *Id.*

E. The district court permanently enjoined the UNT Officials from charging out-of-state tuition to out-of-state U.S. students.

In ruling on cross-motions for summary judgment, the district court reformulated Section 1623(a) into what it called "a simple rule." ROA.1061. But that rule dramatically differs from Section 1623(a)'s actual text:

Section 1623(a)	District Court's "simple rule"
"[A]n alien who is not lawfully present in the United States ***shall not be eligible*** on the basis of residence…for any postsecondary education benefit ***unless*** a citizen or national of the United States is eligible for such a benefit…without regard to whether the citizen or national is such a resident." 8 U.S.C. § 1623(a) (emphasis added).	"***If*** a State makes an unlawfully present alien eligible for a postsecondary education benefit on the basis of state residency, ***it must make*** a United States citizen eligible for the same benefit regardless of whether the citizen is such a resident." ROA.1061 (emphasis added).

Relying on this "simple rule," instead of the statutory text, the district court concluded that Section 1623(a) preempted Section 54.051(d) of the Texas Education Code, such that out-of-state U.S. students could not be charged out-of-state tuition. ROA.1059-73.

The district court also held that YCT satisfied the requirements for a permanent injunction. ROA.1076-77. First, the district court concluded that even one YCT member having to pay out-of-state tuition demonstrated irreparable injury. ROA.1075. Second, the court gave no weight to the loss in UNT's revenue, eliminating the possibility that the balance of the parties' harms could weigh in

UNT's favor. ROA.1076. The district court also dismissed the public interests implicated by impacts to UNT. ROA.1077.

The court issued a permanent injunction prohibiting the UNT Officials "immediately and permanently" from charging Section 54.051(d)'s tuition rate to U.S. citizens from outside Texas. ROA.1079-80. The injunction did not include a grace period in which UNT could transition to new billing and financial aid procedures or plan adjustments to UNT's programming and budget.

F. The district court denied UNT Officials a stay pending appeal and refused to address its misinterpretation of Section 1623(a).

Requesting a stay of the injunction pending appeal, the UNT Officials pointed out that the district court had misconstrued Section 1623(a), producing erroneous conclusions on standing, preemption, and the scope of the injunction. *See* Dist. Ct. Dkt. 69.

After the UNT Officials had requested a stay from this Court,[7] the district court ruled and denied a stay, but failed to address the UNT Officials' statutory construction argument, even though it controlled the substantive analysis. *See Young Conservatives of Tex. Found. v. Univ. of N. Tex.*, No. 4:20-CV-973-SDJ, 2022 WL 2328801, at *2-5 (E.D. Tex. June 28, 2022).

[7] This Court denied the UNT Officials' stay request in an unpublished order on July 14, 2022.

Rather than engaging with the statutory-construction arguments, the district court defended itself with an inaccurate summary of its injunction: "To prevent ongoing violations of federal law, the Court permanently enjoined the UNT Officials *from allowing unlawfully present aliens to pay resident tuition* while denying that benefit to United States citizens based on residency." *Id.* at *1 (emphasis added). But this was the relief YCT explicitly disclaimed, and which the court did *not* grant. Instead, the court prohibited the UNT Officials from charging out-of-state tuition rates to out-of-state U.S. students:

> Defendants Neal Smatresk and Shannon Goodman are therefore immediately and permanently **ENJOINED** from applying the tuition rates prescribed by Section 54.051(d) of the Texas Education Code to United States citizens at the University of North Texas.
>
> Neither Neal Smatresk nor Shannon Goodman, nor any officer, agent, servant, employee, attorney, or other person in active concert with Neal Smatresk or Shannon Goodman, may enforce the tuition rates prescribed by Section 54.051(d) of the Texas Education Code against United States citizens at the University of North Texas.

ROA.1080 (enumeration omitted).

G. Until the injunction issued, UNT charged its students tuition according to the governing state tuition statutes.

Consistent with Section 54.051(d), UNT—like all other Texas institutions—has charged out-of-state students an out-of-state tuition rate, which dates back to at least 1933. *See* 1971 TEX. GEN LAWS at 3352-53 (codifying predecessor of Section 54.051(d)); 1933 TEX. GEN. LAWS at 596-98. Under the injunction, UNT—alone

among Texas public universities—cannot charge out-of-state tuition to its U.S. citizen, out-of-state students.

H. The financial harms to UNT are underway.

After the injunction issued on April 8, 2022, UNT immediately stopped charging out-of-state tuition rates to its out-of-state students who are U.S. citizens. UNT has completed billing cycles for two separate semesters (summer and fall) and has billed out-of-state U.S. citizens at the in-state tuition rate. Appellants' Mot. for Stay, Addendum-3 ¶4, Addendum-8 ¶3. Like most universities, UNT bills ahead of a semester's start; thus, preparation of bills for the spring semester will begin soon.

The injunction is already having substantial, irreversible financial impacts. UNT has projected it will lose approximately $5.7 million annually based on the number of currently enrolled out-of-state U.S. citizens. *Id*., Addendum-5 ¶4. UNT will never recover these funds, since the university cannot retroactively bill students for tuition underpayments should this Court reverse the district court. *See* TEX. EDUC. CODE § 54.009. A $5.7 million reduction in tuition revenue takes UNT from a $2.9 million surplus to a $2.8 million deficit in year one, a hefty loss to UNT's operating budget. Appellants' Mot. for Stay, Addendum-5 ¶6. This loss has prompted consideration of a range of budgetary cuts, including reducing institutional aid awards, freezing salaries, increasing class size, and reducing employee

incentives. *Id.* at ¶7. UNT also must be prepared to address a drop in employee morale, as well as increased employee turnover and resulting training costs. *Id*.

I. In-state and out-of-state tuition rates and fees are the norm at public universities across this country.

Tuition rates and fees charged to out-of-state students are an established component of tuition structures at public universities in the United States. *See, e.g.,* ALA. CODE § 16-64-4(a); MISS. CODE § 37-103-25(2); NEB. REV. STAT. § 85-501. This derives from states' commitment to educate their resident students and create a work force to support state economies. *See generally Harris v. Hahn*, 827 F.3d 359, 367-69, 372 (5th Cir. 2016) (recognizing state's interests in incentivizing completion of high school and investing in students most likely to remain in state after graduation, "thereby preserving the financial resources of Texas taxpayers and maximizing the returns to the local economy," in extending free college tuition to Texas-connected veterans).

In addition to being an established norm, lower, in-state tuition rates have withstood constitutional challenges. *See id.* at 363-64 (reviewing decisions by Supreme Court rejecting challenges to durational residency requirements for tuition status). The Supreme Court has approved "bona fide residence requirements in the field of public education." *Martinez v. Bynum*, 461 U.S. 321, 326-27 (1983). Additionally, the Court has recognized "that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of

its own bona fide residents to attend such institutions on a preferential tuition basis." *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973). "This 'legitimate interest' permits a 'State [to] establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.'" *Bynum*, 461 U.S. at 327 (quoting *Vlandis*, 412 U.S. at 453-54). For this reason, uniformly applied high school attendance and residency requirements have been held to comply with the equal-protection guarantee. *Id.* at 327-28. In addition, such requirements do not burden or penalize a fundamental right protected by the Constitution or implicate a suspect classification requiring strict scrutiny. *Id.* at 328-29 & n.7.

SUMMARY OF THE ARGUMENT

Like most other states, Texas has, for decades, charged out-of-state students a higher tuition than its in-state students. Until now, no court has disturbed this tuition policy on federal preemption grounds.

But here, the district court has halted a Texas public university from charging out-of-state students out-of-state tuition on the theory that federal law preempts a Texas tuition statute. But the federal statute's only directive regards *alien* eligibility, *not citizen* eligibility. It restricts only non-U.S. citizens' eligibility for education benefits: an "alien…shall not be eligible…for any postsecondary education benefit unless a [U.S.] citizen…is eligible." 8 U.S.C. § 1623(a). The federal provision does *not* give out-of-state citizens a right to the lower tuition Texas charges its own residents.

To justify preemption, the district court changed Section 1623(a) from its not/unless construction to an if/then command: "If a State makes an…alien eligible for a postsecondary education benefit…it must make a [U.S.] citizen eligible" in the same manner. ROA.1061. But the statute confers no positive entitlements on anyone, and certainly not on U.S. citizens.

Appellee YCT concedes that the district court relied on a "translat[ion]" rather than the statute's strict text. Appellee's Resp. to Mot. for Stay at 6 (July 5, 2022). No other court has construed Section 1623(a) in this novel fashion. Quite the

contrary, the district court's construction of Section 1623(a) conflicts with every court to examine the provision. *See, e.g.*, *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007) (concluding that Section 1623(a) grants no education benefit to U.S. citizens).

This fundamental interpretive error precipitated an equally erroneous preemption holding. In reality, the federal statute (prohibiting education benefits for aliens) and the state statute (requiring out-of-state tuition for out-of-state students) peacefully coexist.

Moreover, the district court's permanent injunction has no basis in law. YCT rested its plea for injunctive relief on the district court's acceptance of its preemption argument, and the district court only superficially considered the remaining three requirements for a permanent injunction.

Finally, the district court found standing for YCT after incorrectly concluding that YCT members were harmed and indulging YCT's misreading of Section 1623(a) as the cause of its members' obligation to pay out-of-state tuition. But YCT students' obligation to pay tuition at the out-of-state rate derives from their voluntary decision to attend UNT and the Texas Legislature's decision decades ago to charge out-of-state students at a higher rate. YCT's lack of standing should have ended its lawsuit.

STANDARDS OF REVIEW

This Court reviews a summary-judgment ruling de novo, applying the same standards as the district court. *Robinson v. Orient Marine Co.*, 505 F.3d 364, 365 (5th Cir. 2007).

The Court reviews questions of statutory construction de novo. *In re Enron Corp. Sec.*, 535 F.3d 325, 333 (5th Cir. 2008). Similarly, a federal statute's preemptive effect is a question of law reviewed de novo. *Elam v. Kan. City S. Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011).

The Court reviews questions of standing de novo. *See, e.g., Stringer v. Whitley*, 942 F.3d 715, 720 (5th Cir. 2019).

The Court reviews the granting of a permanent injunction for an abuse of discretion. *Scott v. Schedler*, 826 F.3d 207, 211 (5th Cir. 2016) (per curiam). The district court abuses its discretion if it (1) relies on clearly erroneous factual findings, (2) relies on erroneous legal conclusions, or (3) misapplies factual or legal conclusions when issuing its injunctive relief. *Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 775 F.3d 242, 254 (5th Cir. 2014). The Court reviews underlying factual findings under the clearly erroneous standard and underlying conclusions of law under the de novo standard. *Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021). When an injunction turns on application of statutes, the Court reviews that

interpretation de novo. *United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 472 (5th Cir. 2007).

ARGUMENT

I. The district court's misconstruction of Section 1623(a) caused its erroneous federal preemption ruling.

The district court misread the federal statute YCT invoked. This misinterpretation prompted its fatally flawed preemption analysis.

A. The district court's understanding of Section 1623(a) was a radical departure from its plain language.

1. Section 1623(a) restricts certain alien students' eligibility for an education benefit.

Statutory interpretation begins with the legislative text. Section 1623(a) provides:

> [A]n *alien* who is not lawfully present in the United States *shall not be eligible* on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit *unless a citizen* or national of the United States *is eligible* for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

8 U.S.C. § 1623(a) (emphasis added). The statute is prohibitory: it precludes a State from making an alien eligible for certain benefits "unless" the State provides those same benefits to citizens who are not residents of the state. Nowhere does the text require a state to grant to a U.S. citizen a benefit it grants to an alien. And it certainly does not provide that an out-of-state U.S. citizen is eligible to claim a state's in-state tuition.

Nevertheless, the district court revised Section 1623(a) into "a simple rule" that inverted it from a restriction on benefits for aliens to an entitlement of benefits for U.S. citizens. ROA.1061. This is how the district court announced its rule:

> If a State makes an unlawfully present alien eligible for a postsecondary education benefit on the basis of state residency, it must make a United States citizen eligible for the same benefit regardless of whether the citizen is such a resident.

ROA.1061; *see also* ROA.472 (stating same "simple rule").

The district court thus read Section 1623(a) to grant U.S. citizens a benefit if an alien who is not lawfully present in the United States is eligible for that benefit. But Section 1623(a) does not, either directly or implicitly, bestow benefits. Instead, it limits a state's ability to provide an education benefit to certain aliens based on residency, unless U.S. citizens also receive the same benefit. Indeed, the law's very title expresses this fact. *See* 8 U.S.C. § 1623 ("*Limitation on eligibility for preferential treatment of aliens* not lawfully present on basis of residence for higher education benefits.") (emphasis added); *see also, e.g., Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (pointing to provision's title to resolve any doubt).

The district court converted Section 1623's "unless" clause—a condition precedent to granting a benefit to aliens—into an affirmative obligation to give citizens benefits granted to aliens. But the plain text controls. Section 1623 states that certain aliens "shall not be eligible" for benefits "unless" a U.S. citizen also "is

eligible." 8 U.S.C. § 1623(a). Accordingly, the statute's effect is wholly negative: if a U.S. citizen is ineligible, an alien is also ineligible.

When "the statute's language is plain, the sole function of the courts is to enforce it according to its terms," *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citation and quotation omitted). Contrary to that maxim, the district court revised Section 1623(a) to provide that if an alien is eligible for an education benefit based on residency, a U.S. citizen is conclusively entitled to that same benefit. This is not, as the district court declared, faithful to the statute's "plain wording." ROA.1060. Conspicuously absent from Section 1623(a)'s text is any requirement that if an alien is eligible, a U.S. citizen has a substantive entitlement to the same benefit.

2. Courts have interpreted Section 1623(a) as a limitation on alien eligibility; no court has interpreted it as a grant of entitlements to U.S. citizens.

Multiple courts have held that Section 1623(a) is a limitation on alien eligibility. No court has held that Section 1623(a) creates an education benefit for a U.S. citizen.

Two courts have construed Section 1623(a) in suits like YCT's—brought by out-of-state students. Both courts determined that the federal statute does *not* grant any benefit to U.S. citizens. In *Day v. Bond*, the Tenth Circuit concluded:

> Section 1623 does not provide that "No nonresident citizen shall be denied a benefit" afforded to an illegal alien, but rather imposes a limit on the authority of postsecondary educational institutions.

500 F.3d at 1139 (citation omitted). The Arizona Court of Appeals reached the same conclusion, declaring "[t]he Tenth Circuit captured the point," and observing that "Section 1623 never mentions, much less creates and confers, any enforceable private right for individual, non-resident students." *Foss v. Ariz. Bd. of Regents*, No. 1 CA-CV 18-0781, 2019 WL 5801690, at *3 (Ariz. Ct. App. Nov. 7, 2019).

Other courts have similarly interpreted Section 1623(a) as a limitation on alien eligibility, not a grant of a benefit to any U.S. citizens. *See Equal Access Educ. v. Merten*, 305 F.Supp.2d 585, 606 (E.D. Va. 2004) ("The more persuasive inference to draw from § 1623 is that public post-secondary institutions need not admit illegal aliens at all, but if they do, these aliens cannot receive in-state tuition unless out-of-state United States citizens receive this benefit."); *Ariz. ex rel. Brnovich v. Maricopa Cnty. Cmty. Coll. Dist. Bd.*, 416 P.3d 803, 807 (Ariz. 2018) ("That section allows a state to provide in-state tuition to students who are not 'lawfully present' only under certain conditions, and Arizona has not met those conditions."); *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010) ("Congress has prohibited the states from making unlawful aliens eligible for postsecondary education benefits under certain circumstances.").

No court has interpreted Section 1623(a) as the district court did—as entitling U.S. citizens to postsecondary education benefits.

3. YCT admits that the district court "translated" the statutory text rather than obeying it.

By defending the district court's interpretation as a "translat[ion] into 'a simple rule,'" YCT conceded that the district court rewrote Section 1623(a). Appellee's Resp. to Mot. for Stay at 6 (quoting ROA.1061). But explicit statutory text needs no translation. Comparison of the "simple rule" and Section 1623(a)'s text confirms the judicial revision. The district court transformed Section 1623(a) from a statute limiting benefits into a statute that creates them:

Section 1623(a)	District Court's "translation"
"[A]n alien who is not lawfully present in the United States ***shall not be eligible***	"***If*** a State makes an unlawfully present alien eligible
on the basis of residence…for any postsecondary education benefit	for a postsecondary education benefit on the basis of state residency,
unless a citizen or national of the United States is eligible for such a benefit…without regard to whether the citizen or national is such a resident."	***it must make*** a United States citizen eligible for the same benefit regardless of whether the citizen is such a resident."
8 U.S.C. § 1623(a) (emphasis added).	ROA.1061 (emphasis added).

Courts may not rewrite legislative language. *See, e.g., Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S.Ct. 617, 629 (2018) ("[T]hose are not the words that Congress wrote, and this Court is not free to rewrite the statute[.]"); *Badaracco v. C.I.R.*, 464

U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement."). Courts are bound by "the understanding that Congress says in a statute what it means and means in a statute what it says[.]" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotation and citation omitted). The district court defied elementary rules of statutory construction in coming up with its own version of Section 1623(a), and in doing so, implemented a backwards version of the statute that flouted Congress's plain intention.

B. Section 1623(a) does not preempt Texas Education Code Section 54.051(d), which requires out-of-state students pay out-of-state tuition rates.

Relying on its own version of Section 1623(a), the district court found both express and conflict preemption. ROA.1061-74. Whether analyzed under express preemption or conflict preemption principles, "pre-emption fundamentally is a question of congressional intent" and relies on statutory construction. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000) (brackets, quotation, and citation omitted).

1. Preemption hinges on the federal statute's plain text.

A federal law may preempt a state law in three ways: (1) express preemption; (2) conflict (or implied) preemption; and (3) field preemption. *Est. of Miranda v. Navistar, Inc.*, 23 F.4th 500, 504 (5th Cir. 2022). Pre-emption is "compelled whether

Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

This Court has explained the two types of preemption at issue here:

> [E]xpress preemption occurs when Congress adopts express language defining the existence and scope of pre-emption.
>
> …
>
> [C]onflict preemption occurs where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Est. of Miranda, 23 F.4th at 504 (quotations and citations omitted).

In determining a federal statute's preemptive reach, congressional purpose is "the ultimate touchstone." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quotation and citation omitted). "'Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue,' and 'in the first instance [we] focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.'" *United Motorcoach Ass'n, Inc. v. City of Austin*, 851 F.3d 489, 492 (5th Cir. 2017) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)).

Moreover, courts "start with the assumption" that state law is "not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Id*. (quoting *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*,

536 U.S. 424, 432 (2002)). And significantly, "when there is 'more than one plausible reading'" of a statute, courts "ordinarily accept the reading that disfavors pre-emption." *Id*. (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008)).

2. The district court's misreading of Section 1623(a) invalidates its conclusion that Section 54.051(d) is preempted.

The district court found both express and conflict preemption. ROA.1061-74.[8] But neither is supportable. In preemption, as in "any statutory interpretation dispute, [it is not] enough for any party or court to rest on a supposition (or wish) that 'it must be in there somewhere.'" *Va. Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1901 (2019). Finding preemption in Section 1623(a), where there is nothing, was the district court's error.

a. The district court lacked the necessary evidence of Congress's express intent to preempt Texas's out-of-state tuition.

Express preemption applies when Congress "adopts express language defining the existence of scope of pre-emption." *Est. of Miranda*, 23 F.4th at 504 (quotation and citation omitted). As the district court conceded, Section 1623(a) lacks the explicit preemption statement that most statutes creating express preemption contain. ROA.1064 (citing contrasting examples of congressional statements in statutes regarding ERISA and airline regulation).

[8] YCT did not argue field preemption. ROA.1060.

The district court brushed off this obstacle by noting that no "magic words" are necessary for express preemption. ROA.1064-65. But even when Section 1623(a)'s language is examined, there is no evidence that Congress intended to expressly preempt Section 54.051(d). The federal statute lacks the entitlement the district court discerned. Section 1623(a) does *not* require States to provide a postsecondary education benefit to all U.S. citizens regardless of residency. Nor does it prohibit states from distinguishing among U.S. citizens according to residency. *See, e.g., Day*, 500 F.3d at 1139. The preemptive intent the district saw is just not there. *See Va. Uranium*, 139 S.Ct. at 1900 ("Virginia Uranium insists that the federal Atomic Energy Act preempts a state law banning uranium mining, but we do not see it.").

The district court missed this fundamental textual reality because it was wed to its so-called "simple rule"—its incorrect, flipped interpretation of Section 1623(a). ROA.1061; *see supra* Section I.A. Without the necessary clear intent, express preemption fails.

b. The federal and state statutes invoked here peacefully co-exist.

Likewise, there is no conflict preemption. As an implied preemption doctrine, it begins with the presumption that "Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Preemption occurs only when compliance with both federal and state law is impossible, or when the state law is an

obstacle to accomplishing and executing Congress's full purposes and objectives. *United States v. Zadeh*, 820 F.3d 746, 751 (5th Cir. 2016). This preemption doctrine is "different in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent." *Geier*, 529 U.S. at 884.

Texas Education Code Section 54.051(d), the object of YCT's challenge, does not conflict with Section 1623(a). The federal statute's prohibition is directed at alien eligibility, not citizen eligibility. And YCT has repeatedly insisted it does *not* challenge alien eligibility for in-state tuition. Having disclaimed any challenge to alien eligibility—the only subject of Section 1623's preemptive scope—YCT cannot substantiate its preemption claim.

By complying with Section 54.051(d) and continuing to charge out-of-state tuition to out-of-state U.S. students, the UNT Officials do not run afoul of Section 1623(a), which leaves untouched states' authority over out-of-state tuition. *See Va. Uranium*, 139 S.Ct. at 1900 (finding no preemption when Congress, in Atomic Energy Act, "conspicuously chose to leave untouched the States' historic authority over the regulation of mining activities on private lands within their borders"). Compliance with both the federal statute and *the state statute YCT has elected to challenge* is entirely possible.

Nor does charging out-of-state tuition to out-of-state U.S. students obstruct Congress's objectives. This analysis requires "examining the federal statute as a

whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). The federal statute, entitled "Restricting Welfare and Public Benefits for Aliens," 8 U.S.C. Chap. 14, is directed solely to limiting certain aliens' eligibility for public benefits. Moreover, Congress was explicit regarding its aims, which include (1) promoting aliens' self-sufficiency, (2) reducing burdens on public assistance, and (3) removing incentives for immigration to the United States. *See* 8 U.S.C. § 1601. Allowing a Texas university to continue to charge out-of-state tuition to out-of-state U.S. students, as required by Section 54.051(d), neither infringes upon those objectives nor implicates them in any way. The district court erroneously found conflict preemption.

Of the courts that have construed Section 1623(a), none has held that a student from, for example, New York or Nebraska, who has not paid taxes to support Texas universities, may nevertheless use Section 1623(a) to force a Texas university to educate that student at in-state tuition rates. Other courts analyzing Section 1623(a)'s preemptive effect consider the proper intersection of federal and state laws, that is, whether Section 1623(a) limits alien students' eligibility for in-state tuition, not whether it entitles U.S. students from other states to that benefit.

Under that analysis, some courts have recognized preemption. *See, e.g., Ariz. ex rel. Brnovich*, 416 P.3d at 804. Some courts have not. *See, e.g., Martinez*, 241 P.3d at 860. But no court has expanded Section 1623(a)'s scope beyond limiting

aliens' eligibility for certain benefits. And no court has held that Section 1623(a) grants out-of-state U.S. students an affirmative right to demand in-state tuition.

Moreover, even if there were "more than one plausible reading" of Section 1623(a), courts err on the side of "the reading that disfavors pre-emption." *Altria Grp.*, 555 U.S. at 77 (quotation and citation omitted). Here, where the district court fundamentally rewrote the statute, in a way at odds with every other court's reading, this rule applies with even greater force. The district court erroneously found implied preemption.

Even assuming that Section 1623(a) *would* preempt Texas's statutory scheme making certain aliens eligible for in-state tuition, an issue not presented here, that preemption could not justify the relief awarded—preventing UNT from collecting out-of-state tuition from out-of-state U.S. students. Thus, whatever the preemptive effect of Section 1623(a), it does not encompass the opportunistic remedy sought by YCT and granted by the district court.

3. Alternatively, the Texas statute bases eligibility for in-state tuition on Texas high-school graduation in addition to residency, precluding an irreconcilable conflict.

Even if Section 1623(a) were interpreted (incorrectly) to grant out-of-state U.S. students an entitlement to in-state tuition, the statute's preemptive force could only be triggered if Texas extended in-state tuition to aliens "on the basis of residence." 8 U.S.C. § 1623(a).

As with all statutory construction, preemption analysis must take account of the larger statutory scheme to inform the meaning of the state statute under examination. *See, e.g., United States v. Lauderdale Cnty.*, 914 F.3d 960, 965 (5th Cir. 2019). Directly relevant to Section 54.051(d)'s operation is the separate provision defining "resident," which determines a student's status and statutory tuition rate. Among the three methods of obtaining in-state tuition offered by Texas law, Section 54.052(a)(3) offers residency status to alien students based on attendance and graduation from a Texas high school. Any student, Texan or otherwise, can qualify by (1) graduating from a Texas high school, (2) maintaining a residence in the state for three years preceding graduation, and (3) living in Texas the year preceding enrollment in an institution of higher education. TEX. EDUC. CODE § 54.052(a)(3). The opportunity is thus dependent on earning a Texas high school diploma and having attended a Texas high school for at least three years—not mere residency. Because qualification for in-state tuition in this way is not "on the basis of residence," but also dependent on completion of high school in Texas—reflecting a meaningful connection to the State and presence as part of its tax base—the necessary conflict between the federal and state statutes is missing.[9]

[9] *See also* House Research Organization, Bill Analysis, H.B. 1403 77th Leg., R.S., at 3-4 (April 18, 2001) ("HB 1403 would help decrease the number of students dropping out of Texas' public schools by providing an incentive for students to advance and pursue their higher education goals.… The state should recover this valuable economic and intellectual resource that currently

An unlawfully present alien could not qualify through mere residence, for instance by just living in Texas or moving to Texas right before high school graduation or college. In-state tuition is not based on residency, but also on an additional substantive requirement, thus precluding conflict with federal law. *See Martinez*, 241 P.3d at 369 (concluding that Section 1623(a) did not preempt state law exempting some alien students from paying out-of-state tuition because "the exemption is not based on residence").

Section 54.052(a)(3) does not provide alien students an opportunity denied to out-of-state U.S. citizens. *See* TEX. EDUC. CODE § 54.052(a)(3). Out-of-state students can avail themselves of the same statutory opportunity to qualify for residency, further precluding the conflict necessary for preemption. *See* TEX. EDUC. CODE §§ 54.052(a)(3), .053(3).

II. YCT did not satisfy the four prerequisites for a permanent injunction.

An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982); *see also id.* at 313 ("[A] federal judge…is not mechanically

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is being discarded and help these students gain the tools they need to be successful, independent, and productive members of society.").

obligated to grant an injunction for every violation of law").[10] Four requirements must be satisfied for a permanent injunction. YCT had to establish that:

> (1) it succeeded on the merits;
>
> (2) a failure to grant the injunction would cause it irreparable injury;
>
> (3) its injury outweighs any damage that the injunction would cause UNT; and
>
> (4) the injunction would not disserve the public interest.

See, e.g., Valentine, 993 F.3d at 280.[11]

YCT did not satisfy the prerequisites. Myopically focusing on its incorrect construction of Section 1623(a), the district court excused YCT from its burden through a series of "per se" propositions for the remaining three prerequisites. YCT's effort to demonstrate the remaining three elements was limited to two pages, ROA.887-88, and the absence of fact findings confirms that the district court did not assess evidence of injuries with and without the permanent injunction, nor all the impacted public interests.

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[10] *See also, e.g., Posada v. Lamb Cnty.*, 716 F.2d 1066, 1070 (5th Cir. 1983) (permanent injunctions are "never lightly given" and are "hedged about with circumspection").

[11] The multi-factor test is also sometimes stated to include both an irreparable injury and an inadequate remedy. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Because this Court has recognized that irreparable injury and inadequate remedy are often two sides of the same coin, *see, e.g., Lewis v. S. S. Baune*, 534 F.2d 1115, 1124 (5th Cir. 1976), and the district court relied on the more succinct set of factors, the UNT Officials also employ the shorter set of factors.

A. YCT cannot be excused from establishing the injunction prerequisites on the basis of express preemption.

As an initial matter, the district court wrongly observed that YCT's success on the merits of its express-preemption claim excused it from establishing the three remaining injunction factors. ROA.1044 ("[I]n an express preemption case, a finding of success on the merits 'carries with it a determination that the other three requirements have been satisfied.'") (quoting *VRC LLC v. City of Dall.*, 460 F.3d 607, 611 (5th Cir. 2006)); *see also* ROA.1074.

First, YCT did not demonstrate express preemption. *See supra* Section I.B.2.a.

Second, only a handful of cases have cited this principle, and those cases rely on *VRC LLC*, like the district court.[12] *VRC LLC*, in turn, relied on the logic in *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 783 (5th Cir.1990), *abrogated on other grounds by Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493 (5th Cir. 1999).[13] In *TWA*, the Court concluded, after reviewing the long history of federal airline regulation, that "*[u]nder the facts of this case*," the likelihood-of-success

[12] *VRC*'s recitation of this principle was effectively dicta because no preemption occurred, eliminating any reliance on the principle. *VRC LLC*, 460 F.3d at 615.

[13] *VRC* also cited *Greyhound Lines, Inc. v. City of New Orleans*, 29 F.Supp.2d 339, 341 (E.D. La.1998), but *Greyhound* relied exclusively on *TWA*.

finding "carries with it a determination that the other three requirements have been satisfied." 897 F.2d at 783 (emphasis added).

The Court thus did not state a broad rule for all express preemption, as the district court erroneously suggested. Instead, it relied on particular congressional findings to conclude that the remaining three requirements for an injunction were established. For irreparable injury to the airlines, the Court cited deprivation of Congress's declared "federally created right to have only one regulator in matters pertaining to rates, routes and services" and not being "subjected to the demands and criteria of numerous legislatures." *Id*. at 784. The public interest was evidenced by a congressional finding that exclusive federal regulation of airline rates, routes, and services was in the public interest. *Id*.

TWA's reasoning is inapplicable here because Congress made no relevant findings or declarations about out-of-state students' obligation to pay out-of-state tuition rates that could support the injunction factors. Moreover, Section 1623(a) assumes that States also have authority over educational matters separate and apart from the federal government, *see United States v. Lopez*, 514 U.S. 549, 564 (1995), foreclosing the possibility of relying solely on congressional findings.

To the extent that the district court relied on the *TWA* proposition to justify its superficial treatment of the injunction prerequisites, it erred as a matter of law.

B. YCT did not carry its burden to satisfy all the injunction prerequisites.

Despite the novelty of its holding, the district court did not insist that YCT satisfy its burden for an injunction beyond its merits argument, but moved quickly to a dramatic result: a permanent injunction. Indeed, YCT did not address these elements until its reply in support of summary judgment. ROA.887-88. Rather than insisting on evidence, the district court superficially considered the balance of the parties' harms and the public interests, invoking per se presumptions to justify the injunction. ROA.1075-78.

1. YCT failed on the merits of its preemption claim.

To satisfy the first requirement for permanent injunctive relief, YCT must have succeeded on the merits. Here, the district court erred as a matter of law in recognizing both express and conflict preemption. *See supra* Section I.B. Without preemption, the injunction cannot stand.

If the Court determines that the preemption holding was incorrect, no further analysis is required, and the Court must vacate the injunction.

2. The district court erred in concluding that YCT would suffer irreparable injury in the absence of an injunction.

The district court concluded that YCT showed that at least one of its members would suffer irreparable harm without a permanent injunction. ROA.874, 1046-48, 1075-76.

The court relied on the proposition that violation of a constitutional right necessarily constitutes irreparable harm. ROA.1075-76. But YCT never invoked its members' constitutional rights, instead advancing a constitutional structural problem. *See, e.g.,* ROA.855. Because preemption is not a *personal* constitutional right, "the loss of constitutional freedoms" and "constitutional right[s]" cannot support irreparable harm. ROA.1075. The district court's cited authorities link irreparable harm to impairment of *personal* constitutional liberties, which are absent here. *See BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 & n.21 (5th Cir. 2021) (citing individuals' "liberty interests" and "free religious exercise"); *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) (relying on claims under Establishment Clause and Free Exercise Clause); 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 2948.1 nn.24-26 (3d ed. updated 2021) (collecting cases recognizing irreparable harm based on First Amendment rights).

The "irreparable harm" presumption originated in *Elrod v. Burns*, where a three-justice plurality wrote that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 347, 373 (1976) (plurality op.). This Court has invoked this presumption to recognize irreparable harm for First Amendment claims, but not for a structural constitutional violation. *See, e.g., Sambrano v. United Airlines, Inc.*, No. 21-11159,

2022 WL 486610, at *7-8 (5th Cir. Feb. 17, 2022) (per curiam); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 348 (5th Cir. 2022) (per curiam); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012).[14]

The district court also reasoned that paying a higher tuition rate would be an irreparable harm because the lawsuit proceeded under an *Ex parte Young* theory, which does not permit monetary recovery. ROA.1075-76. Although the two YCT students' obligation to pay out-of-state tuition rates—an obligation they assumed when they accepted UNT's offer of admission—represents some quantum of alleged financial injury, it fails to register as an irreparable harm that could justify the injunction. The injunction's far-reaching impacts on the university and its ability to operate at established levels greatly outweighed the two YCT students' financial complaint. *See infra* Section II.B.3.

Because neither of the district court's conclusions sustain an irreparable-harm determination, this prerequisite was unsatisfied.

[14] Other circuits likewise do not presume irreparable harm absent impairment of constitutional rights. *See, e.g., Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (right to vote); *Ezell v. City of Chi.*, 651 F.3d 684, 699 (7th Cir. 2011) (Second Amendment); *Nat'l People's Action v. Vill. of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990) (First Amendment); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (Eighth Amendment); *but see Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989) (explaining that not all constitutional harms are synonymous with irreparable harm, and assertion of First Amendment right does not automatically require irreparable-harm finding); *Pub. Serv. Co. of N.H. v. Town of W. Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) (rejecting argument that violation of constitutional rights per se establishes irreparable injury).

3. The district court wrongly concluded that YCT's injury outweighed irremediable damage to UNT from the injunction.

The district court concluded that YCT's injury outweighed any damage from the injunction to UNT, but only by dismissing out-of-hand the financial harms to UNT and assuming that UNT could not claim a legitimate interest in enforcing Texas's out-of-state tuition statute. ROA.1076.

Rather than requiring YCT to show that its alleged injuries outweighed those to UNT, the district court dismissed the possibility of irreparable harm to UNT, citing this Court's observation in *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962), that compliance with federal law is not a hardship. ROA.1076. But this single observation concerned *private* warehouse employers' compliance with the FLSA. The district court did not attempt to square its dismissal of any harm to UNT with this Court's understanding that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020) (per curiam) (quotation and brackets omitted); *see also, e.g.*, *E.T. v. Paxton*, 19 F.4th 760, 770 (5th Cir. 2021) ("Texas's public officials are charged with carrying out Texas's public policy, and enjoining those officials and that policy injures the state."); *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) ("When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public

interest in the enforcement of its laws.").[15] Assuming UNT could not suffer irreparable harm without considering this Court's state-irreparable-harm principle was error as a matter of law.

Compounding this mistake, the district court justified its refusal to consider the injunction's financial injuries to UNT by invoking this Court's observation in *BST Holdings* that "[a]ny interest…in enforcing an unconstitutional law is 'illegitimate.'" ROA.1076 (quoting *BST Holdings*, 17 F.4th at 618); *see also YCT*, 2022 WL 2328801, at *6. But, in *BST Holdings*, the Court ***did not assume*** there could be no harm to the enforcing government agency, but instead considered possible harms to *all* involved parties. 17 F.4th at 618. The Court concluded that halting enforcement of OSHA's new federal "emergency temporary standard" would not harm the agency itself (and any claimed harm was only "abstract") and identified possible injuries to the other parties at issue ("countless" employees, employers, and the States). *Id*. Moreover, the Court suspended a new,

[15] *Accord Robinson v. Ardoin*, 37 F.4th 208, 227 (5th Cir. 2022) (per curiam); *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 569 (5th Cir. 2020) (per curiam); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 243 (5th Cir. 2020); *Mi Familia Vota v. Abbott*, 834 F.App'x 860, 864 (5th Cir. 2020) (per curiam); *City of El Cenizo v. Tex.*, No. 17-50762, 2017 WL 4250186, at *2 (5th Cir. Sept. 25, 2017) (per curiam); *Veasey v. Perry*, 769 F.3d 890, 895-96 (5th Cir. 2014); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *Voting for Am., Inc. v. Andrade*, 488 F.App'x 890, 904 (5th Cir. 2012) (per curiam); *see also Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)) (recognizing same); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (recognizing same).

unprecedented, and temporary federal regulation that had never been implemented, precluding impacts to any reliance interests. *Id*. at 609; *see also* 29 U.S.C. § 655(c)(3).

Here, by contrast, the district court enjoined a decades-old state statute that is the norm across this country's public universities,[16] on which UNT relied as a significant element of its annual operations budget. Before enjoining a settled, near-universal tuition scheme, the district court should have at the very least considered the parties' competing harms. *See, e.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24-31 (2008) (considering competing hardships (and public interest) in detail and noting that district court "did not give serious consideration" to those factors).

The injunction will have substantial, irreversible financial impacts on UNT. UNT has projected it will lose approximately $5.7 million annually in tuition revenue. *See supra* Statement of the Case, Section II.H.[17] That sum could benefit countless students through scholarships and campus resources, fund research projects, and support faculty hiring and compensation. UNT can never recover the lost tuition revenue because it cannot retroactively bill students later for any tuition underpayments should this Court reverse the district court. *See* TEX. EDUC. CODE §

[16] *See, e.g.,* N.Y. EDUC. LAW § 6206(7)(a); N.C. GEN. STAT. § 116-144; WYO. STAT. § 21-17-105.

[17] In the district court, YCT presented no information about, for example, the amount of tuition revenue loss to UNT, potential impacts on UNT's annual budget, negative consequences for student financial aid, class size, or number of faculty. *See* ROA.887-88.

54.009. Because there is no "available remedy by which the movant can later recover monetary damages," such monetary injuries are irreparable. *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 473 (5th Cir. 1985).

By refusing to consider that UNT could suffer irreparable harm and excusing YCT from showing that its alleged injuries outweighed those to UNT, the district court ignored the injunction's impacts on, for example, UNT's operations, staffing, student financial aid, research capacity, class sizes, infrastructure, and delivery of education services. Financial harm like UNT's is unquestionably irreparable harm and should have been considered. *See, e.g., Texas v. U.S. EPA*, 829 F.3d 405, 433-34 (5th Cir. 2016) (finding irreparable injury and granting stay where "[t]he tremendous costs of the emissions controls impose a substantial financial injury on the petitioner power companies" and "[n]o mechanism here exists…to recover the compliance costs" if the emissions rule was invalidated).[18]

[18] *See also, e.g., United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 40 (5th Cir. 1983) (per curiam) (finding loss of all Medicare and Medicaid funds was irreparable injury for medical center and recognizing substantial effect on health-care-services recipients); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment) ("complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs"); *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (finding irreparable injury, although "[e]conomic harm is not normally considered irreparable," because states would incur compliance costs under new administrative rules); *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425-26 (8th Cir. 1996) (staying FCC's local competition-pricing rules because "threat of unrecoverable economic loss…qualif[ies] as irreparable harm"); *see also BST Holdings*, 17 F.4th at 618 (treating serious costs and financial penalties as irreparable harm for a stay).

In the first year under the injunction, a $5.7 million reduction in tuition revenue takes UNT from a $2.9 million surplus to a ***$2.8 million deficit***, a devastating loss. *See supra* Statement of the Case, Section II.H. The injunction's adverse impact on annual revenue will compel UNT to make downward budgetary adjustments. Possible strategies include freezing staff salaries, lowering institutional aid awards, increasing class sizes, and reducing employee incentives. *Id.* UNT also must be prepared to address a loss of employee morale, as well as increased employee turnover and resulting training costs, coupled with a handicap in attracting new employees. *Id.*

Dismissing financial impacts to UNT, the district court remarked, "[b]udgetary constraints do not absolve constitutional violations." ROA.1076. But it cited no authority absolving it of the obligation to weigh the competing harms. And UNT's irreparable harm is a mandated element in the injunction calculus. *See, e.g., Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 459 (5th Cir. 2016) ("[T]he balance of harm requirement…looks to the relative harm to both parties if the injunction is granted or denied.").

The district court also justified ignoring UNT's irreparable financial harm with a quotation from the Supreme Court's decision staying the OSHA vaccine mandate. ROA.1076 ("[I]t is not the judiciary's 'role to weigh such tradeoffs.'") (quoting *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S.Ct. 661, 666 (2022) (per

curiam)). But the Supreme Court's comment there reflected its *objection that elected officials had no role in the vaccine mandate* and was ***not*** a general disparagement of financial impacts as irrelevant. *See Nat'l Fed'n*, 142 S.Ct. at 666.

The district court was wrong in refusing to consider the injunction's irreparable harm to UNT, and in failing to weigh the competing harms to the parties. To the extent YCT showed any irreparable injury, it was vastly outweighed by UNT's irreparable harm.

4. The district court erred in deciding that the injunction would not disserve the public interest.

The district court was required to determine that the injunction would not disserve the public interest.

Acknowledging only a single public interest, the court concluded that a permanent injunction would not disserve the public interest because "it will prevent constitutional deprivations." ROA.1077 (quoting *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014)). But federal preemption, as discussed, is a *structural* constitutional challenge that does not work any "constitutional deprivation." *See supra* Section II.B.2. Reliance on *Jackson Women's Health* is thus misplaced. *See Jackson Women's Health*, 760 F.3d at 458-59 & n.9 (undue burden on *personal* constitutional right). For the same reason, the district court's reliance on *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) and *New York Progress & Protection PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013),

is unavailing because both decisions recognized the public interest in protecting constitutional liberties under the First Amendment. *See* ROA.1077.

As for authority finding a public interest in the constitutional structure of government, the district court cited only *BST Holdings*, 17 F.4th at 618-19, but there, the Court recognized *multiple* public interests. The Court noted the public interest in "maintaining our constitutional structure," but it was not dispositive; the Court also relied on individuals' liberty interests in making "intensely personal decisions." *Id*. at 618.[19] Here too multiple public interests are implicated. But the district court ignored entirely the incontrovertible public interests represented by this large public university, despite the Supreme Court's instruction that analysis of the public-interest factor must account for "the public consequences [of] employing the extraordinary remedy of injunction," to which courts "should pay particular regard." *Winter*, 555 U.S. at 24 (quoting *Weinberger*, 456 U.S. at 312).

Public higher education is a long-recognized public good. As a major public research university providing an education to over 42,000 students through 244 degree programs and employment of over 10,000 staff and faculty, *see supra* Statement of the Case, Section II.D., a sudden and significant decrease in tuition revenue impacts the education of Texas's work force, the stability of a major

[19] In denying the UNT Officials a stay, the district court relied on *BST Holdings* in the same way and did not acknowledge any additional public interests. *YCT*, 2022 WL 2328801, at *7.

employer, and economic advancement of Texas's population of tomorrow. Failing to even consider these public interests is indefensible.

The district court should have assessed the significant negative public impacts of sudden administrative disruption and substantial reductions to UNT's operational budget. Significant harm to UNT's programs and staffing is inevitable. The considerable drop in revenue will prevent UNT from funding its academics, infrastructure, and operations at prior levels. The public interest favored UNT's ability to maintain its academic services, faculty and staff levels, and financial commitments.

Moreover, the state policy of charging out-of-state students a higher tuition rate—embodied in the state tuition provisions—"is in itself a declaration of public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937); *see also Andrews Transp., Inc. v. CNA Reinsurance Co.*, 37 F.App'x 87, *3 (5th Cir. 2002) (per curiam) ("Texas expresses its public policy in its statutes.") (quotation and citation omitted). Texas's longstanding policy, like most states, is to charge differing tuition rates according to residency. Here, the harm to UNT and the public interest are one and the same.

Charging out-of-state students higher rates is a decades-long component of the higher-education tuition system, in Texas and throughout the nation. Yet, now, that tuition system has been upended at UNT, which is now the only Texas institution

prohibited from charging U.S. citizen students out-of-state tuition, without any reciprocal advantage to Texas students attending state universities outside Texas. The financial upheaval is at direct odds with the Texas Legislature's long-established tuition structure.

When the public interests are assessed, as they should have been, the crucial and concrete public interests associated with UNT's ability to maintain its operations and staffing and deliver the same quality of educational services predominate and weigh heavily against a permanent injunction. Driven by its unsupportable conclusion that federal law preempted Texas out-of-state tuition, the district court erred as a matter of law in refusing to consider the public interests disserved by the injunction.

The unprecedented nature of the district court's preemption decision demanded careful adherence to the prerequisites for an injunction. That did not happen here. Under a proper review of the required factors, the balance of the harms and the public interests weighed strongly against the drastic measure of a permanent injunction.

III. YCT lacked standing to pursue its theory of preemption.

YCT faced an additional barrier in its pursuit of in-state tuition: it lacked standing.

Article III standing requires a litigant to demonstrate (1) an injury in fact, (2) a causal connection between the injury and the conduct complained of that fairly can be traced to the defendant's challenged action, and (3) a likelihood that the court can redress the injury through a favorable decision. *Stringer*, 942 F.3d at 720. When an organization claims standing on behalf of its members, it need not necessarily show it has itself suffered an injury from the challenged conduct. *Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 504 (5th Cir. 2021), *cert. denied*, 142 S.Ct. 2852 (2022).

But that does not mean that organizations are exempt from jurisdictional requisites. A court considers three factors in deciding if the group has associational standing: (1) the association's members would have standing to sue in their own right; (2) the interests sought to be protected are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires individual members to participate in the lawsuit. *Id.* Only the first requirement—whether YCT's members satisfied the three components for standing—is challenged here.

The district court incorrectly concluded that YCT members suffered an alleged economic injury when charged out-of-state tuition rates, and improperly linked that alleged injury to the UNT Officials' supposed failure to enforce Section 1623(a)'s impact on the Texas statute establishing out-of-state tuition for out-of-state students. ROA.461-62; *see also YCT*, 2022 WL 2328801, at *5. In truth,

YCT's obligation to pay the out-of-state tuition rate exists independently of any application of Section 1623(a).

First, YCT cited as an injury only a financial obligation voluntarily assumed when its members accepted UNT's offer of admission as out-of-state applicants. *See, e.g.*, ROA.37-38, 952-53, 956-57. The district court disclaimed the need for an underlying "interest" in or "right" to in-state tuition to show an injury and accepted the YCT members' payment of out-of-state tuition and ineligibility for in-state tuition as an injury. *YCT*, 2022 WL 2328801, at *2-3. Yet YCT based its case—and its injury-in-fact—in its interest in paying less for tuition, as allegedly required under Section 1623(a). ROA.243, 855-56.[20]

In addition, an injury of the plaintiff's own making, or in other words, a "self-inflicted" harm, is not a cognizable injury. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) (harm to plaintiff state's fisc because of its own statute was "self-inflicted" and could not support standing); *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018) (voluntary change in campaign-solicitation plans, that was not under threat of prosecution, did not confer standing). Here, the

[20] Without an injury, YCT members present only a generalized grievance, which cannot confer standing, no matter how earnest. *See, e.g., Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree."); *Allen v. Wright*, 468 U.S. 737, 754 (1984) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.").

YCT out-of-state students chose to come to Texas for college under an agreement to pay out-of-state tuition.

Second, YCT cannot show the necessary traceability to, or causation by, the UNT Officials' conduct. YCT's causation rationale for standing depends on its fatally flawed interpretation of Section 1623(a). *See supra* Section I.A. That interpretation is a legal matter reviewed de novo by this Court, and this Court has no obligation to assume that YCT's unsupportable statute-based theory of traceability is true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."); *Pulse Network, L.L.C. v. Visa, Inc.*, 30 F.4th 480, 491-93 (5th Cir. 2022) (examining antitrust standing allegations to determine if anticompetitive conduct caused alleged antitrust injury). Under a correct reading of the federal provision, YCT's theory of standing collapses.

YCT members' obligation to pay out-of-state tuition does not derive from any failure by the UNT Officials to respect the terms of Section 1623(a). Responsibility to pay out-of-state tuition results from a legislative decision long ago to assess higher rates on out-of-state students—not a failure to implement Section 1623(a). *See supra* Section I.A. (explaining that Section 1623(a) addresses only alien students' eligibility for an education benefit). Indeed, that legislative decision predates Section 1623(a) by over 60 years. *See* 1933 TEX. GEN. LAWS at 596-98. Thus, the

financial obligation traces to a cause independent from the conduct YCT contests, precluding standing. *See, e.g., Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 468-69 (5th Cir. 2020) (en banc) (plaintiff lacked standing to claim preemption of a state statute that state agency did not rely on to decide against plaintiff).[21]

The district court's reliance on *Contender Farms* cannot salvage the absence of a nexus because its principle—that a plaintiff who is the "object" of an agency regulation usually can show injury and redressability—lacks applicability here. ROA.1050 (citing *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015)); *YCT*, 2022 WL 2328801, at *5 (same). The "object" of Section 1623(a) is undocumented alien students; the provision restricts their eligibility for an education benefit. *See* 8 U.S.C. § 1623(a). Because YCT members are not Section 1623(a)'s "target," YCT's task to establish standing is "substantially more difficult." *Contender Farms*, 779 F.3d at 264-65.

[21] *See also, e.g., N.Y. Civ. Serv. Comm'n v. Snead*, 425 U.S. 457, 458 (1976) (per curiam) (plaintiff lacked standing to challenge statutory leave procedure when that procedure was not used in placing her on leave); *BBX Cap. v. Fed. Dep. Ins. Corp.*, 956 F.3d 1304, 1312-14 (11th Cir. 2020) (per curiam) (plaintiffs lacked standing to challenge Federal Reserve Board determination regarding limitation on proposed payments to bank executives displaced by sale of bank when limitation on payments was caused by Federal Deposit Insurance Corporation's prior decision); *White v. United States*, 601 F.3d 545, 552-53 (6th Cir. 2010) (plaintiffs engaged in breeding and selling game fowl lacked standing to challenge federal Animal Welfare Act's restrictions on cockfighting because their alleged economic injuries could not be traced to federal law when state prohibitions would remain in place notwithstanding any invalidation of the federal law); *Brotherhood of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006) (rejecting standing because the injury "was not in any meaningful way 'caused' by the Board").

Third, the district court relied on the injunction's "prevent[ion]" of YCT members being charged out-of-state tuition to substantiate redressability. *YCT*, 2022 WL 2328801, at *5. But the injunction does *not* compel the relief that would remedy YCT's claimed injury: eligibility for in-state tuition. *See, e.g.*, ROA.36-37, 856, 1047. To establish redressability, a plaintiff must show a "substantial likelihood" that the requested relief will remedy the alleged injury-in-fact. *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 45 (1976). The redressability inquiry focuses on whether the alleged injury is likely to be redressed through the requested relief. Here, YCT asserts a financial injury based on being denied the lower, in-state tuition rate and being required to pay the higher tuition rate. *See, e.g.,* ROA.35-38, 952-53, 956.

Rather than affirmatively awarding relief, like entitlement to in-state tuition, the injunction here is a negative injunction, that is, it prohibits certain specified conduct. The district court ordered the UNT Officials not to charge U.S. citizens from outside Texas out-of-state tuition. ROA.1080. But invalidation of Section 54.051(d) does not entitle out-of-state students to in-state tuition under state law, nor does the injunction compel the UNT Officials to charge the out-of-state students the in-state tuition rate.[22] And it could not. YCT has never suggested that

[22] In the interest of obedience to a federal-court order, the UNT Officials have billed out-of-state U.S. citizens at the in-state tuition rate since the injunction was issued. But the injunction's specific terms do not compel that conduct. UNT Officials faced a Hobson's choice. They had to

the UNT Officials have discretion to alter the tuition rate imposed by state law on out-of-state students. And the district court recognized that the UNT Officials' authority was limited to enforcing tuition rates prescribed by statute. *See* ROA.1052-53.

Moreover, the limits of the *Ex parte Young* doctrine constrict the district court's authority to compel a change in Texas's tuition statutes. Here, YCT could obtain the in-state tuition rate from the district court only through an injunction compelling a change in the state tuition statutes. Tuition rates are the Texas Legislature's prerogative. Only the Texas Legislature can change the state tuition statutes, but the Texas Legislature is not a party to this lawsuit, and even if it was, the district court could not "dictate to legislative bodies…what laws…they must promulgate." *Mi Familia Vota*, 977 F.3d at 469; *see also Richardson*, 978 F.3d at 241 (explaining that an injunction that controls a state official's "*discretionary* functions" is "impermissible"). The fact that in-state tuition is a discretionary determination in the Texas Legislature's hands confirms that the district court could not give YCT relief for its claimed financial injury, that is, paying the higher out-of-state tuition rate. *See, e.g., El Paso Cnty. v. Trump*, 982 F.3d 332, 341 (5th Cir.

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assess a tuition charge and immediately comply with the district court's injunction. Under state law, a public university cannot assess a charge unless authorized by law, giving UNT no choice but to assess to out-of-state U.S. citizens the only tuition rate that was not enjoined: the in-state tuition rate. *See* TEX. EDUC. CODE § 54.003. A practical result cannot substitute for the necessary showing for redressability.

2020) (redressability not demonstrated when county did not show that its lost tax revenue would be recouped by enjoining the federal government from diverting funds to border-wall construction because a new use for the federal funds would be a discretionary agency decision).

By its terms, the injunction is not the antidote for YCT's discontent. And because the district court could not remedy YCT's purported financial injury (ineligibility for Texas's in-state tuition rate), YCT cannot demonstrate redressability. This failure also precludes standing.

CONCLUSION

For these reasons, the Court should reverse the district court's final judgment, vacate the injunction, and dismiss the case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,447 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word in 14-point font, Times New Roman type style, except for footnotes, which are in 12-point font as permitted by Fifth Circuit Rule 32.1.

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