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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Section 1623(a) targets education benefits for certain aliens—not U.S. citizens from other states. It speaks to situations in which aliens are eligible for educational benefits without the same benefits being extended to U.S. citizens from other states. But it nowhere compels that benefits to citizens must be conferred. Because Section 1623(a)'s command is directed solely at alien benefits, it does not conflict with the Texas statute requiring out-of-state tuition for out-of-state students. There is no preemption.

Disregarding the settled maxim that courts must honor a statute's plain text, the district court revised Section 1623(a) to mandate benefits for citizens. This statutory revision is unsupported by any authority and conflicts with well-reasoned decisions construing Section 1623(a). *See, e.g.*, *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007) (concluding that Section 1623(a) restricts alien eligibility but does not require benefits for U.S. citizens). The district court stands alone in misconstruing Section 1623(a).

YCT cannot rehabilitate the erroneous and incomplete analysis undergirding the district court's permanent injunction, which depends on its unauthorized statutory rewrite. Nor were the remaining three requirements for a permanent injunction satisfied.

Finally, YCT lacks standing. The Texas Legislature is the proper forum for YCT's complaints; it seeks public policy change that a court is not empowered to make.

ARGUMENT

I. The district court's misconstruction of Section 1623(a) produced its erroneous preemption holding.

The district court found preemption based on a misreading of the federal statute. Unable to salvage the district court's analysis, YCT favors its own alternative rewrite. Yet neither approach is faithful to the statute's text. When the statute's language is plain, "the sole function of the courts is to enforce the provision according to its terms." *Tex. Educ. Agency v. U.S. Dep't of Educ.*, 908 F.3d 127, 135 (5th Cir. 2018) (quotation, citation, and brackets omitted).

A. The district court departed from Section 1623(a)'s plain text.

Rather than adhering to Section 1623(a)'s plain text, the district court inverted the provision's conditional sequence, which establishes U.S. citizens' eligibility as the condition for nonresident alien students' eligibility. But courts are not permitted to rewrite Congress's chosen text.

1. Section 1623(a) is purely negative: it restricts alien eligibility only.

Section 1623(a) restricts alien eligibility for an educational benefit. The statute does not compel states to provide that benefit to U.S. citizens, as the district

court erroneously concluded. *Citizen* eligibility is not mandated; it is instead a *condition precedent* for *alien* eligibility:

> [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); *see also* UNT.Br. at 22-24. The district court's rewrite, however, converted Section 1623(a)'s "shall not…unless" structure into an "if…then" structure. *See id.* at 26. This is not a matter of "style," as YCT argues. YCT.Br. at 15 n.4. It is a substantive change. The "if/then" conversion transformed citizen eligibility from a condition for alien eligibility into a direct mandate. *See* UNT.Br. at 26.

YCT has offered neither precedent nor secondary authority to justify this extra-textual result. Instead, YCT cites a blog post about how to answer logic questions on the LSAT. *See* YCT.Br. at 15-16 n.4. This is not a serious answer to the district court's fundamental disregard of congressional text.

2. YCT no longer embraces the district court's rewrite of Section 1623(a).

YCT's enthusiasm for what it called the district court's "translation" has faded. *See* UNT.Br. at 18, 26. YCT initially defended the district court's statutory

revision. *Id.* Now, recognizing the revision's infirmity, YCT denies it was the basis for the district court's holding.

Relegating its discussion of the district court's rewrite to a footnote, YCT criticizes the UNT Officials for "focus[ing] a large portion of [their] argument" on the revision. YCT.Br. at 15 n.4. Implying that the district court did not base its ruling on the revision, YCT states that the "if/then" construction appears only "in *some* portions of its opinion," and calls it a mere "stylistic decision" by the district court to "simplify" the statute and make it "more easily readable." *Id*. (emphasis in original).[1]

YCT's retreat from the district court's statutory revision should raise alarms. The district court's "if/then" construction was the linchpin of its decision. Prominently featured on its opinion's first page, the "if/then" revision is ***the*** rationale for the court's conclusion that the Texas statute is preempted:

> The question before the Court is whether the Texas statute is preempted by federal law *mandating* that, *if* a university provides an educational benefit based on residence to an alien who lacks lawful immigration status, *then* that university must provide the same benefit to a United States citizen regardless of the citizen's residency. *The answer is yes, the Texas statute is preempted*.

[1] YCT's attempt to justify the district court's revision as "simplify[ing]" text that was not "readable," YCT.Br. at 15 n.4, clashes with its amicus's recognition that "[i]t is difficult to imagine how Congress could have been clearer than it was [in Section 1623(a)]." Amicus Br. of Advocates for Victims of Illegal Alien Crime, at 5.

ROA.1039 (emphasis added). The district court's revision of Section 1623(a) was outcome-determinative.

YCT suggests that Section 1623(a)'s meaning is beside the point. But the interpretation of a federal statute is key to any preemption claim: "[P]re-emption fundamentally is a question of congressional intent." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000) (quotation and citation omitted). That is why the district court's improper revision of Section 1623(a) fatally undermines its preemption rulings.

3. YCT advances its own revision of Section 1623(a).

YCT now presents its own interpretation of Section 1623(a), distinct from the district court's. But YCT's interpretation suffers from the same defect: it also departs from the text chosen by Congress. According to YCT, Section 1623(a)

> prohibits state universities from doing two things simultaneously: (1) making unlawfully present aliens eligible for in-state tuition on the basis of residence within a state, and (2) denying in-state tuition to United States citizens who are not residents of that state.

YCT.Br. at 15.

But YCT's revision eliminates a critical part of the statutory text. While Section 1623(a) does prohibit alien eligibility and citizen ineligibility simultaneously, YCT's revision assumes that Congress stopped there. It did not. In the event a state effectuated both alien eligibility and citizen ineligibility in violation of Section 1623(a), Congress declared which must go: alien eligibility.

YCT pretends that Congress was silent on this issue, allowing a litigant—and a court—to elect which feature to eliminate. But Section 1623(a)'s "not/unless" language forecloses any self-anointed authority to legislate the outcome. If Congress had wanted to structure Section 1623(a) as YCT argues, it would have used different text. The Court should decline YCT's invitation to dismiss Congress's words. *See, e.g., New Orleans Depot Servs., Inc. v. Dir., Off. of Workers' Comp. Programs*, 718 F.3d 384, 393 (5th Cir. 2013) ("[T]he first rule of statutory construction is that we may not ignore the plain language of a statute.").

YCT defends its statutory revision by observing that Congress could have, but did not, "ban[] unlawfully present aliens from receiving benefits altogether." YCT.Br. at 21. But YCT misses the mark. The fact that Congress did not prohibit states *entirely* from providing benefits to aliens, but conditioned them on corresponding benefits to citizens, does not support YCT's theory that Congress intended to also compel benefits for citizens.

YCT asserts that Section 1623(a) is "wholly agnostic on how universities choose to comply with its terms," allowing states to either "make unlawfully present aliens eligible for in-state tuition on the basis of residence" or "charge United States citizens out-of-state tuition on the basis of residence." YCT.Br. at 21. To be sure, Section 1623(a) gives *states* discretion; the statute does not dictate which of the two options a *state* must elect to avoid preemption. But, if a state does *not* comply,

Section 1623(a) is anything *but* agnostic. It affirmatively dictates what happens next: in a properly brought claim, only *alien* eligibility is prohibited, preempted, and subject to an injunction. *See* 8 U.S.C. § 1623(a) ("an alien…shall *not* be eligible") (emphasis added). Section 1623(a) does not empower a *plaintiff* or a *court* to mandate citizen eligibility instead, or otherwise dictate a different public policy choice. *See 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.").

4. Every court to examine Section 1623(a) concurs in the UNT Officials' straightforward reading.

The UNT Officials cited several decisions supporting its plain-text reading. UNT.Br. at 24-26. Two of these construed Section 1623(a) in suits like YCT's—brought by out-of-state students. Both courts determined that the federal statute does *not* obligate states to confer benefits on 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).

YCT brushes these cases aside, arguing that they concern only whether Section 1623(a) creates "a standalone 'right' or 'entitlement' to in-state tuition," which YCT need not establish because its cause of action is under *Ex parte Young*. YCT.Br. at 25. To be clear, the UNT Officials do not argue that YCT must establish a right of action under Section 1623(a) and do not cite *Day* and *Foss* for that proposition.

Day and *Foss* are important for their *statutory-construction* holdings. En route to their conclusion that Section 1623(a) does not contain a right of action, the *Day* and *Foss* courts *construed* Section 1623(a) and held that its text does *not* compel a benefit for citizens—the very remedy that YCT seeks, and which the district court granted. According to *Day*, "Section 1623 does *not* provide that 'No nonresident citizen shall be denied a benefit' afforded to an illegal alien." 500 F.3d at 1139 (emphasis added); *accord Foss*, 2019 WL 5801690, at *3.

YCT eschews these statutory-construction holdings, opting to ignore rather than confront them. YCT's amicus, on the other hand, implicitly acknowledges *Day*'s precedential weight, openly urging this Court to reject its holding. *See* Amicus Br. of Advocates for Victims of Alien Crime, at 18 (contending that the "ruling by the different circuit is in error"). *Day* and *Foss*—employing

straightforward, plain-text construction of Section 1623(a)—are directly on point and conflict with the decision below.

YCT cites two other decisions, *see* YCT.Br. at 15-16, but neither supports YCT. Both hold that Section 1623(a) prevented a higher-education institution from charging in-state tuition to certain aliens; neither held that the statute compelled a state to charge in-state tuition to U.S. citizens from other states, as YCT seeks here. *See Equal Access Educ. v. Merten*, 305 F.Supp.2d 585, 606 (E.D. Va. 2004); *Ariz. ex rel. Brnovich v. Maricopa Cnty. Cmty. Coll. Dist. Bd.*, 416 P.3d 803, 807 (Ariz. 2018). Thus, they support the UNT Officials' plain-text reading of Section 1623(a)—not YCT's or the district court's revision.

In sum, the district court created a version of Section 1623(a) out of whole cloth, distorting Congress's text rather than faithfully applying it, and contradicting persuasive precedent from other jurisdictions.

B. Section 1623(a) does not preempt Texas Education Code Section 54.051(d).

Regardless of whether YCT's claim is based on express or conflict preemption, YCT must establish that Section 1623(a) preempts the state statute YCT actually challenged—Texas Education Code Section 54.051(d), which mandates out-of-state tuition for out-of-state students. 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). Thus, YCT

must demonstrate that Congress intended to compel states to extend in-state tuition to out-of-state U.S. students. YCT cannot make this showing; indeed, it does not even try. Its reticence to confront this issue is a seeming concession that the statute's prohibition is expressly directed at alien eligibility—not citizen eligibility. *See supra* Section I.A.

In a preemption case, 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). Having disclaimed any challenge to alien eligibility[2]—the only subject of Section 1623(a)'s preemptive scope—YCT's preemption claim fails. *See* UNT.Br. at 29-30. Thus, Section 1623(a)'s text defeats the district court's conclusions of express and conflict preemption.

Section 1623(a)'s purposes—which also inform conflict preemption, *see* UNT.Br. at 30-31—confirm its text. Congress made its objectives explicit: (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. YCT concedes this point, as it must. *See* YCT.Br. at 21 ("To be sure, Congress may

[2] YCT has repeatedly, expressly disclaimed any challenge to certain aliens paying in-state tuition. ROA.449, 866; Dist. Ct. Dkt. 72 at 4 n.3.

have placed that condition on providing benefits to unlawfully present aliens in order to discourage the practice.").

Under these circumstances, no conflict preemption exists. *Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 599 (4th Cir. 2017) (finding that federal Atomic Energy Act did not preempt state ban on conventional uranium mining because ban did not materially affect Act's purposes), *aff'd*, 139 S.Ct. 1894; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 46 (2d Cir. 2018) (holding that New York's "[zero emissions credit] program is not conflict preempted, because Plaintiffs have failed to identify any clear damage to federal goals").

In sum, there is zero indication, in Section 1623(a)'s text or its purposes, of congressional intent to preempt states from charging out-of-state tuition to out-of-state students. And, of the courts that have construed Section 1623(a), *not one* has held that an out-of-state student who has not paid taxes to support a university may nevertheless use Section 1623(a) to force the university to educate that student at in-state tuition rates. *See* UNT.Br. at 32-33. The district court departed inexcusably from Congress's plain text and existing precedent.

II. YCT does not refute the district court's abuse of discretion in granting the injunction.

Unable to identify case law supporting the district court's approach to the injunction, YCT simply repeats that court's assessment. Before taking the drastic step of overhauling the Texas Legislature's tuition system, the district court should

have carefully assessed the mandated factors for a permanent injunction. Its preemption rulings did not excuse this obligation. The district court erred by inferring an irreparable harm for YCT not supported by this Court's decisions, refusing to consider harms to UNT, and rejecting any public interests other than the structural importance of the Supremacy Clause.

A. Even if YCT had established express preemption, it was not excused from satisfying the injunction prerequisites.

YCT asserts that courts need not consider the prerequisites for injunctive relief when a court finds express preemption, and offers little response to the UNT Officials' challenge to that proposition. YCT.Br. at 34-36. The mere handful of cases citing this proposition all derive from *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir. 1990), *abrogated on other grounds by Heimann v. National Elevator Industrial Pension Fund*, 187 F.3d 493 (5th Cir. 1999), which did *not* skip the remaining injunction factors, but decided that *"[u]nder the facts of this case*," those factors were met, *id.* at 783 (emphasis added). *See* UNT.Br. at 37-38 & nn.12-13.

Neither *TWA,* nor its only offspring—*VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006)—are "regularly cited" to excuse plaintiffs from demonstrating injunction prerequisites, as YCT states. YCT.Br. at 35 n.8. Indeed, YCT cites only three district-court decisions. One of these was issued by the court below. *See ESI/Emp. Sols., L.P. v. City of Dall.*, 531 F.Supp.3d 1181 (E.D. Tex.

2021) (Jordan, J.). And all three merely restate the proposition without discussion.[3] YCT's scant citations prove the UNT Officials' point that this proposition is an outlier. UNT.Br. at 37.

YCT cannot find support elsewhere. *See* YCT.Br. at 35-36. None of its authorities involves express preemption. And none asserts the urged proposition. None treat the injunction factors as *per se* satisfied because of preemption. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488-89 (2d Cir. 2013) (considering injunction factors in deciding whether a preliminary injunction should have issued); *Awad v. Ziriax*, 670 F.3d 1111, 1131-32 (10th Cir. 2012) (same); *Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1262, 1269 (11th Cir. 2012) (same).[4]

YCT's remaining two authorities involve neither express preemption nor an injunction. To the extent they could be relevant, YCT's characterizations overreach. YCT claims that in *National Federation of Independent Business v. Department of Labor*, 142 S.Ct. 661 (2022) (per curiam), the Court "refus[ed] to balance [the] equities once [the] regulation was found to be unlawful" when assessing a stay

[3] Another involved preemption by the same Airline Deregulation Act at issue in *TWA*, making *TWA*'s same rationales applicable. *See Air Evac EMS, Inc. v. Sullivan*, 331 F.Supp.3d 650, 667 (W.D. Tex. 2018), *aff'd*, 8 F.4th 346 (5th Cir. 2021) (addressing issues unrelated to injunction).

[4] *See also Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) (per curiam) (holding in brief decision with little reasoning, not involving preemption, that preliminary injunction was appropriate because undisputed evidence showed plaintiff was denied a personal constitutional right).

request. YCT.Br. at 35. But there, the Court noted the equities at issue, and explained that the agency lacked authority to issue the challenged vaccine mandate because elected officials are the rightful decisionmakers, not a court or agency. *Nat'l Fed'n*, 142 S.Ct. at 666. YCT also quotes this Court in the same vaccine-mandate litigation to imply that the Court did not consider potential harm to the government when it evaluated a stay request (again, not an injunction). YCT.Br. at 35 (citing *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021)). But in *BST*, the Court did not bypass consideration of the competing harms but evaluated them, concluding that any harm to the government "pales in comparison and importance" to harms to individuals and employer companies. 17 F.4th at 618.

In any event, because Section 1623(a) did not expressly preempt state law, *see supra* Section I, YCT did not qualify for the proposition to the extent it might exist.

B. The district court inferred irreparable harm from preemption, refused to consider any harms to UNT, and considered only the public interest represented by preemption.

1. The district court wrongly relied on preemption to demonstrate irreparable harm to YCT.

The per se irreparable-harm rule has been confined to violations of *personal* constitutional rights. *See* UNT.Br. at 40-41 & n.14. YCT protests that the Court has never expressly declared this limitation. YCT.Br. at 37 n.9. But this Court, and other circuits, restrict this rule to personal constitutional rights.

YCT cites two decisions for the notion that preemption necessarily results in irreparable harm, YCT.Br. at 37, but neither holds so. Moreover, the *TWA* decision, *id.* (citing 897 F.2d at 784), is not a guidepost because the Supreme Court made its own pronouncement on irreparable harm in that litigation. The prospect of an imminent state lawsuit—not preemption—caused the irreparable harm necessary for the injunction, "for it is the prospect of that suit which supplies the necessary irreparable injury." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992).[5]

And in *Texas v. U.S. Environmental Protection Agency*, the Court cataloged the harms of unemployment, permanent power plant closures, compliance costs, grid instability, and potential brownouts to recognize irreparable injury, while only noting the *possibility* that "institutional injury to Texas from the inversion of the federalism principles enshrined in the Clean Air Act *may* constitute irreparable injury." 829 F.3d 405, 434 (5th Cir. 2016) (emphasis added). Neither opinion inferred irreparable harm from a structural constitutional violation like preemption.

[5] In *Morales*, the Court reviewed *Trans World Airlines, Inc. v. Morales*, 949 F.2d 141 (5th Cir. 1991), a decision subsequent to the *TWA* decision cited by YCT. In that subsequent decision, this Court relied on the law of the case established by the earlier decision cited by YCT, *TWA*, 949 F.2d at 144-15, necessarily extending the Supreme Court's holding in *Morales* to the earlier *TWA* decision cited by YCT. *See Morales*, 504 U.S. at 391 (reversing in part and affirming in part).

2. YCT does not dispute that the district court did not consider any harms to UNT, which meant it never balanced the competing hardships to the parties.

YCT does not deny that the district court refused to consider any harm to UNT in its hardships evaluation. *See* ROA.1076; *see also* UNT.Br. at 42-47. That side of the equation cannot be ignored.

The substantial harms to UNT vastly outweigh any financial injury to two out-of-state students obligated to pay the out-of-state tuition rate they voluntarily assumed.[6] Only by disregarding the harms to UNT could the district court declare that the balance of hardships tilted in YCT's favor.

YCT defends the omission of UNT from the hardships assessment by claiming that States cannot suffer irreparable harm by complying with federal law. In support, YCT offers two contextless comments from this Court. YCT.Br. at 40.

In *TWA*, this Court observed that "the states are not injured by [an] injunction" in the context of Congress's *express* preemption and the States' efforts to counter federal airline deregulation by imposing state consumer protection laws on airlines.

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[6] YCT also cites decisions addressing irreparable injury based on exclusion from school in cases under Section 504 of the Rehabilitation Act of 1973 and the Equal Protection Clause and the First Amendment, YCT.Br. at 39-40, but the district court relied only on financial injury, together with irreparable harm from a structural constitutional violation, to find the irreparable-harm factor satisfied. *See* ROA.1046-47, 1075.

YCT asserted in the district court that one of its two complaining members was dropped from her classes due to an inability to pay tuition, and represented that it would file a declaration by the student about the circumstances, ROA.874 & n.6, but no such documentation appears to be in the record.

897 F.2d at 784. Here, there is no express preemption. *See supra* Section I. In addition, by addressing education policy—an area traditionally reserved to the States—the federal statute's subject matter is not confined to a subject controlled by Congress like airline regulation. Here, the district court refused to consider the impacts of ending a decades-old tuition system that predated the federal statute and on which UNT reasonably relied in committing to educational services for students, employing staff, and planning operations.[7]

In *Mitchell v. Pidcock*, the Court concluded that an injunction should issue against private employers who had flagrantly refused to comply with the FLSA's minimum-wage requirements, rebuffed the Department of Labor's repeated attempts at voluntary compliance, and ignored several court decisions and federal guidance ("massive authority") foreclosing their only defense against FLSA coverage. 299 F.2d 281, 283-85 (5th Cir. 1962). In this context, after noting that the public interest was also "jeopardized," the Court remarked that an injunction should issue, which would not "subject[] the defendants" to "penalty" or "hardship" because it would finally compel "the defendants to do what the Act requires anyway—to comply with the law." *Id.* at 287.

[7] In addition, the Supreme Court's *Morales* opinion is the final word on the propriety of the *TWA* injunction, and the Supreme Court did not suggest that States cannot be injured by an injunction.

The Court's remarks in these two opinions do not add up to a rule that relieves courts from considering harms to States in the injunction calculus. YCT's reliance on these distinguishable cases only highlights the district court's erroneous refusal to consider the impact of its injunction.[8]

Moreover, dismissing harms to the State has an exaggerated impact here because the State is not a solitary, private party but represents the public interest—a fact that makes the district court's refusal more egregious. YCT attempts to diminish the Court's routine recognition that enjoining a state from enforcing its laws is per se irreparable harm because those decisions involved stay motions or preliminary injunctions. YCT.Br. at 40-41; *see also* UNT.Br. 42-43 & n.15. But the State's unique position representing the public is unassailable, and there is undisputed evidence of harm to UNT here.

[8] YCT also suggests that the projected annual $5.7 million loss is not significant by repackaging the number as a percentage of UNT's 2022 overall revenue. YCT.Br. at 41. That is not how harm is quantified. The sum of $5.7 million could benefit countless students, support research efforts, and maintain faculty. Nor does YCT's percentage address the expense side of UNT's ledger: as UNT's revenue drops, its costs do not. The key fact is that the tuition revenue loss plummets UNT from a $2.9 million surplus to a $2.8 million deficit in the first year. UNT.Br. at 46.

In addition, using total FY 2022 revenue masks the level of harm the injunction inflicts on UNT's finances. YCT's unexplained percentage is based on FY 2022 revenue, which was a unique year, not to be repeated, because revenues included $42.2 million in federal CARES Act funds. Addendum to Appellants' Reply in Supp. of Mot. for Stay, Tab A (Decl. of Clayton Gibson), ¶5 (July 12, 2022). This one-time infusion also carried restrictive guidelines that limited uses for the funds. *Id.*

Finally, YCT analogizes again to the OSHA vaccine mandate, suggesting that the Supreme Court's stay of OSHA's temporary emergency standard, which would have arguably saved "over 6,500 lives" and avoided "hundreds of thousands of hospitalizations," shows why the district court did not err by ignoring the harm to UNT. YCT.Br. at 41. YCT quotes the Court's observation that "[i]t is not our role to weigh such tradeoffs." *Id.* at 41-42 (quoting *Nat'l Fed'n*, 142 S.Ct. at 666). But the Supreme Court's comment reflected its concern that elected officials had no role in the vaccine mandate. There was no suggestion that financial harms are irrelevant. *See Nat'l Fed'n*, 142 S.Ct. at 667 (Gorsuch, J., concurring) ("The central question we face today is: Who decides?").

Citing *BST*, YCT contends that a state lacks a legitimate interest in enforcing an unconstitutional law. YCT.Br. at 41. But, as the UNT Officials already pointed out, the *BST* Court *did not assume* in that First Amendment challenge that there could be no harm to the enforcing government agency, but instead considered possible harms to *all* involved parties, 17 F.4th at 618, which is what the district court should have done here. *See* UNT.Br. at 43-44.

3. YCT cannot justify an injunction calculus that excludes impacted public interests.

YCT defends the district court's treatment of the Supremacy Clause as the sole public interest merely by repeating that there is a public interest in upholding

the Constitution. YCT.Br. at 42.[9] But YCT offers no authority to eliminate consideration of other public interests. Indeed, the *BST* Court considered multiple public interests, rather than treating the interest in structural limitations on government as dispositive. 17 F.4th at 618-19; *see* UNT.Br. at 48.

The district court abused its discretion by refusing to consider any of the other public interests, including impacts to UNT's academic programs, stability as an employer, and ongoing financial commitments. *See* UNT.Br. at 11, 15-16, 48-50. Nor was the district court justified in refusing to consider the public interests inherent in the Texas Legislature's enactments. *See* UNT.Br. at 49-50. Courts can "not pick and choose among policy options on which the Legislature has spoken," *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 690 (Tex. 2007); policy considerations are animated in the legislative process.

YCT claims the injunction will serve the public interest by "deter[ring] other universities from adopting policies that conflict with federal immigration law." YCT.Br. at 43.[10] But the Texas Legislature—not individual universities—sets the

[9] YCT asserts that the injunction has reduced tuition for many students, YCT.Br. at 43, but the unexpected decrease in tuition does not serve a public interest, only individual students' personal financial interests. Moreover, eliminating out-of-state tuition for out-of-state students at UNT disserves the public interest in the equitable functioning of public universities nationally, under which Texas universities charge an out-of-state rate keyed to other states' tuition charges to Texas students at their universities. *See* UNT.Br. at 7-8.

[10] YCT asserts that it "spent years litigating" its challenge. A timeline refutes that claim. Seventeen months elapsed from the case's filing in state court to final judgment. ROA.25, 1079. Moreover, this litigation is the first challenge of its kind to Texas's tuition system even though

tuition rules. *See* TEX. EDUC. CODE § 54.003 ("No institution of higher education may collect from students attending the institution any tuition, fee, or charge of any kind *except as permitted by law*.") (emphasis added). YCT should address its concerns to the Legislature.

III. YCT lacks standing.

A. YCT misunderstands the UNT Officials' traceability argument.

YCT's traceability theory depends on YCT's unsupportable interpretation of Section 1623(a), which the Court should not accept. UNT.Br. at 53-54 & n.21. Traceability requires YCT to show that the UNT Officials were required to implement YCT's particular reading of Section 1623(a), and it was their purported failure to adhere to YCT's interpretation that caused them to bill YCT out-of-state members at the out-of-state tuition rate.

Once the Court examines that statutory reading, a de novo legal matter, it is clear that Section 1623(a) does not preempt Section 54.051(d). *See supra* Section I. Without preemption, the obligation to pay out-of-state tuition rates is not caused by (that is, is not traceable to) any purported failure by UNT Officials to obey Section

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Section 1623(a) has been effective since 1996. The case moved swiftly, and nothing in this case relieves a party from proving all prerequisites for an injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course…. [T]he balance of equities and consideration of the public interest—are pertinent in assessing the propriety of *any* injunctive relief[.]") (emphasis added).

1623(a). That obligation, instead, results from the Texas credit-hour tuition statute governing out-of-state students.

YCT contends that when a plaintiff "is an object of a regulation there is ordinarily little question that the action or inaction has caused him injury[.]" YCT.Br. at 30 n.7 (quoting *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th Cir. 2015)). YCT then asserts that since Section 54.051(d) concerns out-of-state students, the standing question has been answered. But YCT ignores that its claim *depends on Section 1623(a)*. Because YCT's claimed injury *depends on Section 1623(a)'s preemption*, the proper question is: what is the "object" of Section 1623(a)? Section 1623(a)'s "object" is to directly impact certain alien students, not U.S. citizens. *See* 8 U.S.C. § 1623(a); UNT.Br. at 54.

YCT has yet to confront this defect in traceability. Instead, it misstates the UNT Officials' challenge to traceability as based on the timing of the enactment of Section 1623(a), YCT.Br. at 11, 31-32, a position the UNT Officials have never asserted.[11]

[11] In responding to its distortion of the UNT Officials' argument, YCT contends that "[t]here is no dispute that YCT members' injuries are directly caused by Section 54.051(d)," YCT.Br. at 31, but YCT continues to ignore the traceability standard. Traceability depends on a "causal connection between the injury and *the conduct complained of*[.]" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (plurality op.) (emphasis added); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) ("there must be causation—a fairly traceable connection between the plaintiff's injury *and the complained-of conduct of the defendant*") (emphasis added); *see also Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, -- F.4th --, No. 17-20545, 2022 WL 3723116, at *10 & nn.1-2 (5th Cir. Aug. 30, 2022) (Oldham, J., dissenting) (explaining that "the plaintiff must show that the *defendant's action X did in fact cause the plaintiff's injury Y*") (emphasis

B. YCT cannot establish the necessary redressability for standing.

YCT's alleged injury cannot be redressed through its preemption claim. *See* UNT.Br. at 55-57.

1. Section 54.0513 of the Texas Education Code does not supply redressability.

YCT believes it has overcome its redressability problem by arguing that the UNT Officials have discretion under Texas Education Code Section 54.0513(a) to change Section 54.051(d)'s tuition rate. YCT.Br. at 12, 32.[12] Section 54.0513(a), however, provides no such discretion.

A student's total tuition and fees include several categories of charges, only one of which is Section 54.051 tuition. *Statutory* tuition is the subject of this litigation and is the only component of a student's tuition package that residency status controls.[13] Section 54.0513(a) authorizes institutions to assess a different

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added). YCT must demonstrate that the UNT Officials' conduct caused its injury, not merely that a state statute imposed a higher tuition rate than its members desire to pay.

[12] YCT also incorrectly asserts that the injunction declared Section 54.051(d) "void." YCT.Br. at 12. The injunction prohibited its application only to out-of-state U.S. citizens. *See* ROA.1080. Section 51.054(d) continues to govern tuition for non-U.S. citizens who are not Texas residents (foreign students). *See* TEX. EDUC. CODE § 54.051(m).

[13] Section 54.051 credit-hour tuition is determined by multiplying the number of enrolled credit hours by one of the two applicable credit-hour rates, with the rate being determined by resident or nonresident status. *See* TEX. EDUC. CODE § 54.051(c) (resident rate), (d) (nonresident rate); *see also* 19 TEX. ADMIN. CODE § 13.142(15)(A), (B) (distinguishing "statutory tuition" (tuition determined by the Texas Legislature through statute) from "designated tuition" (tuition designated by institution's governing board)).

category of tuition charges. "*In addition* to amounts" that may be charged under other Chapter 54 provisions, like Section 54.051(d), an institution's board "may charge any student an amount designated as tuition that the governing board considers necessary for the effective operation of the institution." TEX. EDUC. CODE § 54.0513(a) (emphasis added). "Designated" tuition, therefore, is an optional, additional campus-based charge to supplement the statutory tuition the Legislature has set. *See, e.g., Dall. Cnty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 875 n.5 (Tex. 2005) (noting that Section 54.0513 permits institutions to charge a discretionary, institution-specific tuition "in addition to the tuition rates specifically authorized by chapter 54"). Designated tuition is charged equally to all students, regardless of residency.

Section 54.0513 cannot cure YCT's redressability defect.

2. YCT does not contend that the district court can remedy its alleged injury.

The relief YCT seeks is not of a kind a court can dispense. *See* UNT.Br. at 55-57 (explaining that YCT's alleged injury was lack of access to in-state tuition and that the Texas Legislature enacts statutes that control tuition). YCT's requested relief (prohibiting out-of-state U.S. citizens from being charged out-of-state tuition) does not redress YCT's claimed injury (ineligibility for in-state tuition). The proper forum for YCT's arguments is the Texas Legislature.

YCT contends that the injunction against charging U.S. citizens out-of-state tuition counts as "some relief," which is sufficient for redressability. YCT.Br. at 33. But standing is determined at the outset of a lawsuit and is not based on later developments. *Lujan*, 504 U.S. at 570 n.5 ("standing is to be determined as of the commencement of suit"); *see also, e.g., Singh v. RadioShack Corp.*, 882 F.3d 137, 151 (5th Cir. 2018) (per curiam). To demonstrate redressability, there must be a "substantial likelihood" that the requested relief will remedy the alleged injury-in-fact. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *El Paso Cnty. v. Trump*, 982 F.3d 332, 341 (5th Cir. 2020).

Even indulging YCT's "some relief" theory, the district court's order would not effect a remedy. And YCT's cited authorities on this point do not excuse or alter the requirement that sought-after relief must be substantially likely to remedy a litigant's alleged injury by recognizing redressability based on just a "bit" or "some" relief for an alleged injury. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 258, 261-62 (1977), the Court recognized standing for builders to challenge a suburb's exclusionary zoning. The Court's observation, that there was a "substantial probability" that the housing would happen if the builders prevailed in their zoning challenge, concerned whether the housing would be built and not whether the legal relief sought—a declaration that the rezoning denial was unconstitutional and injunctive relief against the local

government—would afford relief for the unconstitutional action. *Id.* at 264 (quotation and citation omitted). By contrast, here, YCT complained about students being denied the in-state tuition rate but does not contend that the district court could *award* it that rate.[14] Redressability is absent.

CONCLUSION

For these reasons and those presented in the UNT Officials' opening brief, the Court should reverse the district court's final judgment, vacate the injunction, and dismiss the case.

[14] YCT also invokes *Brackeen v. Haaland* for a lenient standard for redressability, YCT.Br. at 33 (citing *Brackeen v. Haaland*, 994 F.3d 249, 372-73 (5th Cir. 2021) (en banc) (per curiam) (opinion of Duncan, J.)), but YCT cites a portion of the lengthy, fractured opinions that was not the opinion of the en banc court. *See Brackeen*, 994 F.3d at 269 (designating which portions of Judge Duncan's opinion are the opinion of the en banc court). Moreover, the Supreme Court has granted four petitions of certiorari in the *Brackeen* litigation. *See Brackeen v. Haaland*, 142 S.Ct. 1205 (2022); *Haaland v. Brackeen*, No. 21-376 (consolidated with *Cherokee Nation v. Brackeen*, No. 21-377, *Texas v. Haaland*, No. 21-378, and *Brackeen v. Haaland*, No. 21-380), in the U.S. Supreme Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because this brief contains 6,389 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-point font size and Times New Roman font style, except for footnotes, which are in 12-point font size as permitted by Fifth Circuit Rule 32.1.

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