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

BRIEF FOR *AMICUS CURIAE*
IMMIGRATION REFORM LAW INSTITUTE
IN SUPPORT OF PLAINTIFF-APPELLEE

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1 and Fed. R. App. P. 26.1, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entity has an interest in the outcome of this case: Immigration Reform Law Institute.

DATED: August 31, 2022

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. For more than twenty years the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 579 U.S. 547 (2016); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

[1] Defendants-Appellants have consented in writing to the filing of IRLI's *amicus curiae* brief, and Plaintiff-Appellee stated in writing that it does not oppose the filing of IRLI's *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Federal law makes illegal aliens ineligible, based on state residency, for instate tuition at state universities that charge U.S. citizens, regardless of state residency, out-of-state tuition. Under a Texas statutory scheme, however, the University of North Texas ("UNT") has charged illegal aliens who reside in Texas instate tuition based on their residency, while charging U.S. citizens who are not residents of Texas, including members of Plaintiff-Appellee Young Conservatives of Texas Foundation ("Young Conservatives"), out-of-state tuition. Because the statute under which UNT charged those members out-of-state tuition is preempted by federal law, and thus violates the Supremacy Clause of the U.S. Constitution, it is a nullity.

Furthermore, Defendants-Appellants violated federal law—specifically, the Supremacy Clause—when they applied this unconstitutional statute to members of Young Conservatives. In addition, the federal law in question is properly read as granting a federal right to U.S. citizens, including those members, to pay instate tuition to state universities that charge instate tuition to illegal aliens based on their state residency, and Defendants-Appellants violated this right. For both of these reasons, Young Conservatives has standing under Article III of the Constitution to bring this action, and a cause of action under the doctrine of *Ex parte Young*, 209

U.S. 123 (1908), to seek injunctive and declaratory relief against Defendants-Appellants as state officials.

ARGUMENT

> 8 U.S.C. § 1623(a) provides:
>
> (a) IN GENERAL
>
> Notwithstanding any other provision of law, an 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.

As the District Court explained, however, Texas law provides that non-Texas residents attending state universities in Texas pay out-of-state tuition, and also allows UNT to charge illegal alien residents of Texas much-lower instate tuition based on their residency. *See* ROA.1040 (citing Tex. Educ. Code §§ 54.051(c), 54.051(d), 54.052).

Young Conservatives contends that the provision requiring its members to pay out-of-state tuition violates the Supremacy Clause. Also, Defendants-Appellants' application of it to members of Young Conservatives violates their federal right to be charged instate tuition by state universities that charge resident illegal aliens instate tuition. For both of these reasons, Young Conservatives has both a cause of action under *Ex parte Young* and standing under Article III.

Further, Young Conservatives is correct on the merits of its preemption claim. The Texas statutory scheme is plainly in conflict with, and thus preempted by, § 1623(a). Specifically, the provision making non-Texas residents ineligible for instate tuition both contradicts § 1623(a)'s grant of eligibility to U.S. citizens for instate tuition, regardless of residence, when resident illegal aliens are so eligible, and violates U.S. citizens' federal right to be charged such tuition.

I. Young Conservatives has both a Cause of Action and Standing.

The District Court found that the doctrine of *Ex parte Young* permitted Young Conservatives to state an equitable claim for declaratory and injunctive relief against Defendants-Appellants. As the District Court stated:

> An "official-capacity equitable claim is cognizable under *Ex parte Young"* if (1) the defendant is a state official, (2) the complaint seeks prospective, injunctive relief based on an ongoing violation of federal law, and (3) the defendant state official bears a sufficiently close connection to the unlawful conduct such that a district court can meaningfully redress the asserted injury with an injunction against that official.

ROA.464-465 (citing *Freedom From Religion Foundation, Inc. v. Mack*, 4 F.4th 306, 311-12 (5th Cir. 2021)). Although Young Conservatives did not explicitly cite *Ex parte Young* in its complaint, the District Court ruled that the factual allegations it pled were sufficient to invoke that doctrine and for its suit in equity to proceed. *See* ROA.466-67.

The court was correct to do so. As the court in *Green Valley Special Util. Dist. v. Walker*, 324 F.R.D. 176, 181 (W.D. Tex. 2018), has explained:

> the Fifth Circuit has repeatedly allowed suits seeking equitable relief on the basis of federal preemption to proceed under *Ex parte Young*. *See, e.g., Air Evac [EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 515 (5th Cir. 2017)] (finding *Ex parte Young* exception applied in action seeking injunctive relief against state officers on the basis of federal preemption); *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 403 F.3d 324, 331-33 & n.46 (5th Cir. 2005) (recognizing implied right of action to assert preemption claims seeking injunctive and declaratory relief); *Cox v. City of Dallas, Tex.*, 256 F.3d 281, 307-08 (5th Cir. 2001) (concluding *Pennhurst* [*State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)] did not bar suit against state officials where plaintiff alleged violations of federal law rather than state law); *cf Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 159-60, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (concluding *Ex parte Young* is "inapplicable in a suit against state officials on the basis of state law").

Here, as in the cases the Western District cited, the *Ex parte Young* factors all are met, including the factor of an ongoing violation of federal law. Defendants-Appellants violated federal law in two ways: first, by applying to members of Young Conservatives a state law that is preempted and therefore unconstitutional under the Supremacy Clause, and second, by violating those members' federal right, conferred by § 1623, to be charged in-state tuition by state universities that charge in-state tuition to illegal aliens based on their instate residency.

In *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), the Supreme Court explained how Congress may confer federal rights on individuals through preemptive statutes that appear to be addressed to states. In an opinion by

Justice Alito, the Court held that the Constitution grants Congress the ability to regulate individuals either directly or by conferring on them a federal right to be free from state regulation. Justice Alito illustrated the point by examining *Morales v. Trans World Airlines, Inc.*, 504 U. S. 374 (1992), dealing with the Airline Deregulation Act:

> This language might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is phrased. As we recently explained, "we do not require Congress to employ a particular linguistic formulation when preempting state law." *Coventry Health Care of Mo., Inc. v. Nevils*, [137 S. Ct. 1190, 1199] (2017) (slip op. at 10-11). And if we look beyond the phrasing employed in the Airline Deregulation Act's preemption provision, it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities (*i.e.*, covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints.

Murphy, 138 S. Ct. at 1480.

So, too, with § 1623. It confers on U.S. citizens a right not to be regulated by a state law that charges them higher tuition than that charged to illegal aliens based on their residency in that state. And because § 1623 *can* be read to confer this right, it *should* be so read. *See Murphy*, 138 S. Ct. at 1481 (holding that the federal law at issue in that case, which forbade states to authorize sports gambling, was not preemptive because it *could not be* understood as a regulation of private actors, that is, as either conferring a federal right on private actors, such as "a federal right to

engage in sports gambling," or as imposing any federal restrictions on private actors).

This federal right conferred on members of Young Conservatives, the violation of which caused them "concrete and particularized" financial injury, *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992), and also Defendants-Appellants' ongoing violation of federal law, gave those members standing to seek, under *Ex parte Young*, an injunction against such further violations. *See, e.g., NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 394 & n.5 (5th Cir. 2015) (noting that the "requirement" under *Ex parte Young* of an ongoing violation of federal law "is similar but not identical to the Article III minimum for standing to request an injunction, which requires ongoing harm or a threat of imminent harm") (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)). And, contrary to Defendants-Appellants' claim (Brief of Defendants-Appellants at 55-57), the District Court's injunction against Defendants-Appellants' charging nonresident citizens out-of-state tuition redressed the injury to members of Young Conservatives by ending their financial injury, stopping Defendants-Appellants' further violation of federal law, and enforcing those members' federal right not to pay out-of-state tuition to state universities that charge in-state tuition to illegal aliens.

Defendants-Appellants also contend that the District Court's decision conflicts with *Day v. Bond,* 500 F.3d 1127 (10th Cir. 2007), *cert. denied*, 554 U.S.

918 (2008). Brief of Defendants-Appellants at iv. The Tenth Circuit in that case ruled that 8 U.S.C. § 1623 did not create an independent or private right of action and that the plaintiffs lacked standing to bring suit under 42 U.S.C. § 1983. *Day*, 500 F.3d at 1138-39. But Young Conservatives' claims were brought in equity under the doctrine of *Ex parte Young*, not 42 U.S.C. § 1983, and Young Conservatives "never claimed that Section 1623 creates a standalone cause of action." Brief of Plaintiff-Appellee at 26. As shown above, whether or not Young Conservatives would have had standing to bring an action under § 1983, or would have had a cause of action under § 1623, it has a cause of action under *Ex parte Young* that is well-established, and standing under Article III to seek an injunction ending its members' financial harm and enforcing their federal rights.

II. Federal Law Preempts the Texas Statute Applied Here.

The Supremacy Clause of the Constitution provides that federal law is "the Supreme law of the land, … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Thus, "[a] fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). There are three types of preemption: express, conflict, and field. *E.g., Est. of Miranda v. Navistar, Inc.,* 23 F.4th 500, 504 (5th Cir. 2022).

The District Court properly found that 8 U.S.C. § 1623 preempted Section 54.051(d) of the Texas Education Code. Memorandum Opinion and Order at 1. Indeed, that provision logically conflicts with § 1623 by making non-Texas residents who are U.S. citizens *ineligible* for the same instate tuition that Texas allows to illegal aliens based on their Texas residence, where § 1623 makes such citizens *eligible* for any instate tuition illegal aliens are allowed based on their residence. The provision is thus conflict preempted in a fundamental way. *See* U.S. Const., art. VI, cl. 2 (providing that federal law is supreme, state law "*to the Contrary* notwithstanding") (emphasis added). In a basic way, conflict preemption exists where there is a logical contradiction between state and federal law. *See, e.g., Kansas v. Garcia*, 140 S. Ct. 791, 808 (2020) (Thomas, J., with whom Justice Gorsuch joins, concurring) (stating that preemption occurs when "the ordinary meaning of federal and state law directly conflict") (internal quotation marks and citation omitted); *Merck Sharp & Dohme Corp. v. Albrecht,* 139 S. Ct. 1668, 1681 (2019) (Thomas, J., concurring) ("[F]ederal law pre-empts state law only if the two are in logical contradiction."); *Wyeth v. Levine*, 555 U.S. 555, 590 (2009) (Thomas, J., concurring in judgment). *See also Am. Tel. & Tel. Co. v. Centraloffice Tel.*, 524 U.S. 214, 227 (1998) (finding preemption where state law claims "directly conflict" with federal law), *superseded by statute on other grounds*.

In addition, the Texas provision at issue is preempted because it denies the federal right § 1623 confers on U.S. citizens to be charged the same instate tuition as states charge illegal aliens based on their instate residence. A state law that abridges a federal right conferred by a federal statute is certainly "to the Contrary" of that federal statute. U.S. Const., Art. VI, cl. 2. *Cf. Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613-14 (1986) (noting that the Supreme Court has long considered the National Labor Relations Act to preempt state interference with rights arguably conferred by that Act).

CONCLUSION

For the forgoing reasons, this Court should affirm the District Court's judgment.

DATED: August 31, 2022

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Fed. R. App. P. 27(d)(2)(A) because it contains 2,357 words, as measured by Microsoft Word software. The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) & 32(a)(6) because it has been prepared in a proportionally spaced, Roman-style typeface of 14 points or more.

DATED: August 31, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 31, 2022, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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