

No. 22-40225

**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 OF AMICUS CURIAE TEXAS BUSINESS LEADERSHIP COUNCIL, THE EXECUTIVE
BRANCH OF THE UNT STUDENT GOVERNMENT ASSOCIATION, TEXAS BUSINESS
IMMIGRATION COALITION, TEXAS ASSOCIATION OF MEXICAN AMERICAN CHAMBERS
OF COMMERCE, NORTH TEXAS COMMISSION, INTERCULTURAL DEVELOPMENT
RESEARCH ASSOCIATION, EVERY TEXAN, THE EDUCATION TRUST IN TEXAS, YOUNG
INVINCIBLES, TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION, TEXAS
ASSOCIATION OF DIVERSITY OFFICERS IN HIGHER EDUCATION, AND THE NATIONAL
ASSOCIATION OF GRADUATE AND PROFESSIONAL STUDENTS**

IN SUPPORT OF APPELLANTS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The Intercultural Development Research Association (IDRA) files this brief on its own behalf and on behalf of the below student, business, and higher education organizations. Pursuant to Fifth Circuit Rule 29.2, IDRA hereby supplements the certificate of interested persons provided in the briefs of appellants and appellees by naming the following persons who have an interest in the outcome of this litigation:

The **Texas Business Leadership Council (TBLC)** is a statewide network of senior business executives who advance a long-term vision of a prosperous Texas in a globally competitive business environment.¹ TBLC believes it is beneficial to the health of our economy to increase postsecondary success by providing opportunities for all individuals who live in Texas and have graduated from Texas high schools.

The **Executive Branch of the UNT Student Government Association** is comprised of the President, Vice President, and executive staff of UNT's Student Government Association (SGA), the official voice of UNT's undergraduate student body. The Executive Branch is responsible for promoting the interests of the student body, focusing on identifying areas of impact of the UNT student body, promoting what supports students, and addressing issues threatening the lifestyle and experience of students at UNT. SGA's leaders ensure that the voice of the student body is always heard at the University of North Texas.

¹ <https://www.txblc.org/membership/membership-list/>.

The **Texas Business Immigration Coalition (TBIC)** is a chapter of the American Business Immigration Coalition, a bipartisan coalition of more than 1,200 CEOs in 17 states promoting common sense immigration solutions.² TBIC believes in offering in-state tuition to all Texas high school graduates who want to continue their education and contribute their talents to the Texas economy and strongly opposes all efforts to weaken Texas' in-state tuition law.

The **Texas Association of Mexican American Chambers of Commerce (TAMACC)**³ is a nonprofit 501(c)(6) organization established in 1975 to promote business leadership, create economic opportunities, and provide legislative advocacy for the Hispanic business community in Texas. TAMACC has more than 15,000 members and advocates for over 800,000 Hispanic businesses in Texas.

The **North Texas Commission (NTC)**⁴ is a coalition of over 350 business, education, and civic leaders founded in 1971 to unify the North Texas Region and maximize the visibility of the area as an excellent place to live and do business. NTC convenes and educates public and private sector leaders to ensure that public policies support excellence in public schools, increase the skilled workforce pipeline, and safeguard a thriving business environment.

² <https://abic.us/texas/>.

³ <https://tamacc.org/chambers-organizations/>.

⁴ <https://www.ntc-dfw.org/who-we-are>.

The **Intercultural Development Research Association (“IDRA”)** is a national non-profit organization founded in Texas in 1973 dedicated to ensuring educational opportunity and equity for every student.⁵ Through research, educator training, policy advocacy, and community engagement, IDRA advocates educational policies and practices that prepare all students, and particularly students of color and students from low-income families, to access and succeed in college.

Every Texan is a nonprofit research and advocacy organization that strengthens public policy to expand opportunity for all Texans.⁶ Every Texan was founded in Texas in 1985 and works to promote policies expanding access to affordable higher education for Texas families.

The **Education Trust in Texas** is part of a national nonprofit that works to close opportunity gaps that disproportionately affect students of color and students from low-income families.⁷ Through research and advocacy, Education Trust supports efforts that expand excellence and opportunity in education from preschool through college, particularly for historically underserved students. Ed Trust believes in protecting the rightful opportunity for all Texas students to access and complete postsecondary education for our state to fulfill its greatest potential.

⁵ <https://www.idra.org/>.

⁶ <https://everytexan.org/>.

⁷ <https://edtrust.org/texas/>.

Young Invincibles is a national non-profit, non-partisan organization devoted to amplifying the voices of young adults in the political process and expanding economic opportunity.⁸ For over a decade, Young Invincibles, locally in Texas and in Washington, D.C., has advocated for college students who have been burdened with inequitable access to higher education. Young Invincibles' most central belief is that all young adults should be afforded access to economic security, health and wellbeing, and equitable higher education.

The **Texas Association of Chicanos in Higher Education (TACHE)** is a professional organization dedicated to the improvement and advancement of education and employment opportunities for Latinos/Hispanics/Chicanos in higher education.⁹ TACHE is comprised of students, scholars, practitioners, advocates, and leaders making important contributions in Texas and beyond. Its members at UNT contribute to expanding scholarship, to Texas' economy, and to prepare today and tomorrow's civically engaged and responsible leaders.

The **Texas Association of Diversity Officers in Higher Education (TADOHE)** aims to lead higher education toward inclusive excellence through institutional change and support of its professional members.¹⁰ TADOHE provides resources and support for Texas higher education leaders to pursue institutional

⁸ <https://younginvincibles.org/>.

⁹ <https://www.tache.org/>.

¹⁰ <https://www.tadohe.com/team-4>.

policies, goals, and/or strategies regarding equitable access for all students, faculty, staff and/or administrators. Efforts to diminish equitable access or that target groups as a means of exclusion to equitable access counters TADOHE’s aspirations to advance progress in the areas of diversity, equity, accessibility, and inclusion for all.

The **National Association of Graduate-Professional Students (NAGPS)** is a student-run non-profit organization dedicated to improving the quality of life of graduate and professional students across the United States.¹¹ Founded in 1987, NAGPS represents the interests of graduate and professional students in public and private universities—including students at UNT, Texas A&M University, and Texas Woman’s University.

Respectfully submitted,

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¹¹ <http://nagps.org/southcentral/>.

CERTIFICATE OF CONSENT

Pursuant to Fed. R. App. P. 29(a)(2) and (4), undersigned counsel hereby certifies that all parties have consented to the filing of this amicus brief, and that no party or their counsel contributed money intended to fund the preparation or submission of this amicus brief.

Dated: August 1, 2022

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I. INTEREST OF *AMICI*

Amici are Texas student, business, and higher education organizations that have answered the State of Texas’ call “for government, institutions, community organizations, and business leaders to rally around the common cause of ensuring Texans of all backgrounds have access to higher education and the means to pursue it.”¹² *Amici* assert that the district court’s injunction eliminating out-of-state tuition for out-of-state citizens is harmful to the Texas economy and to the opportunities and experiences of Texas students. *Amici* have an interest in these proceedings and urge reversal of the decision below.

II. SUMMARY OF THE ARGUMENT

Texas has a constitutional obligation to secure its future through the maintenance of public higher education. The Texas Legislature has established a robust system of higher education finance that reflects the State’s commitment to ensuring college access for Texans, particularly low-income Texans.

The injunction upends nearly a century of settled tuition law and practice, undermines the Texas Legislature’s intent and infrastructure to support college access for Texans, interrupts the pipeline of high-qualified workers in the Dallas-Fort Worth (DFW) region where UNT sits, and ultimately hurts the Texas economy.

¹² THECB, *Texas Higher Education Strategic Plan: 2015–2030* 15 (2015), <https://reportcenter.highered.texas.gov/agency-publication/miscellaneous/60x30tx-strategic-plan-for-higher-education/> (“60x30TX Strategic Plan”).

The district court’s order will cost Texas taxpayer billions of dollars, including millions of dollars in lost revenue for UNT. UNT’s loss in revenue reduces its ability to offer high-quality academics, research opportunities, student financial aid, and student services and activities.

The district court’s conclusion that out-of-state U.S. citizens do not have the same opportunity for eligibility of in-state tuition as other students—including undocumented students—is wrong as a matter of law. The district court misapplied federal law and Texas law in concluding that the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”) section 1623 preempts Texas’ tuition law by failing to acknowledge the many ways U.S. citizens can establish eligibility for in-state tuition, including through multiple pathways not available to undocumented students. The injunction allows out-of-state students to skip the line and avoid the standard one-year residency requirement required at nearly every public institution in the nation.

The judgment should be reversed.

III. ARGUMENT

A. Texas has a constitutional commitment to secure the State’s future through the support and maintenance of public higher education.

For nearly 150 years, the State of Texas has committed to providing free public education to Texas students. *See* Tex. Const. art. VII § 1. Recognizing that a “general diffusion of knowledge” at the elementary and secondary level was not

enough to secure the future of Texas, the 1876 constitutional framers also required the Legislature to establish a state university “of the first class . . . for the promotion of literature, and the arts and sciences.” Tex. Const. art. VII § 10. The framers also made significant investments for higher education’s financial support and maintenance, *see* Tex. Const. art. VII §§ 11, 11a, and 11b, and directed the Legislature to build on and expand that investment, *see generally* Tex. Const. art. VII §§ 12–20. The Texas Legislature has implemented this mandate, establishing and refining a state system for funding higher education at all levels. *See generally* Tex. Educ. Code ch. 62 (“Constitutional and Statutory Funds to Support Institutions of Higher Education”), ch. 63 (“Permanent Health Fund for Higher Education”); *see also* Tex. Educ. Code § 130.003 (“State Appropriation for Public Junior Colleges”). Because access to higher education is critical to the welfare and prosperity of the State,¹³ the Legislature controls the purse strings, prohibiting institutions of higher education from collecting tuition, fees, or charges from students “except as permitted by law.” Tex. Educ. Code § 54.003. It also established a central state agency, the Texas Higher Education Coordinating Board (the “Coordinating Board” or “THECB”) to oversee higher education.¹⁴

¹³ *See* Tex. Educ. Code § 61.002(c) (“The legislature finds and declares that the state can achieve its full economic and social potential only if every individual has the opportunity to contribute to the full extent of the individual’s capabilities and only when financial barriers to the individual’s economic, social, and educational goals are removed.”).

¹⁴ *Id.*; *see also id.* § 54.075(a), Tex. Const. art. 7 §17(d).

Federal courts have historically recognized and deferred to the states' plenary power to set educational policy, including school finance. *See Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (reaffirming, in the context of public-school finance, *Brown*'s holding that public education is one of the most important services performed by a state); *In re Alien Child. Ed. Litig.*, 501 F. Supp. 544, 562 (S.D. Tex. 1980), *subsequently aff'd sub nom. Plyler v. Doe*, 457 U.S. 202 (1982) (“[I]n Texas, the provision of education is a state function.”); *Harris v. Hahn*, 827 F.3d 359, 362, 368–69 (5th Cir. 2016) (affirming that “[p]romoting education plainly is a legitimate state interest” and that “providing financial assistance for postsecondary education . . . encourages Texas high school students to graduate . . . and return to attend college and graduate school”) (cleaned up). Texas indisputably has “a legitimate interest in protecting and preserving the quality of its colleges and universities,” including “the right of its . . . residents to attend such institutions on a preferential tuition basis.” *See Vlandis v. Kline*, 412 U.S. 441, 453 (U.S. 1973).

B. The district court-imposed tuition structure could cost Texans jobs and billions of dollars in economic benefits.

The district court issued an unprecedented and unfounded injunction barring UNT from collecting non-resident tuition from out-of-state U.S. citizens. The injunction not only compromises the integrity of the State's higher education

funding system, but also will potentially lead to the loss of billions of dollars in revenue to the University and the State's economy.

Because a well-trained and educated workforce is essential to economic growth, Texas has heavily invested taxpayer funds to subsidize public higher education. Economists have found that, "Higher education is particularly crucial to future economic growth as well as personal financial success. In addition, the non-pecuniary benefits of a more active and informed citizenry, an enhanced cultural environment, and a more sustainable social structure are profound." The Perryman Group, *The Economic Benefits of Higher Education Institutions in the Dallas-Fort Worth Area 1* (Jan. 2019).¹⁵ In its 2019 study, Perryman estimated that "ongoing operations of Dallas-Fort Worth area higher education institutions generate a total annual increase in business activity in the Dallas-Fort Worth area of approximately \$13.3 billion in gross product each year and 193,921 jobs." *Id.* at 1. The report also noted that the ancillary economic benefits of higher education operations increased those positive effects, including student and visitor spending in the community, construction spending, and research activity. *Id.*

Critically, the report estimated that graduates of DFW-area institutions, including UNT (which contributes an estimated economic impact of 1.65 billion

¹⁵ Available at <https://www.perrymangroup.com/media/uploads/report/perryman-the-origins-of-ongoing-opportunity-01-04-19.pdf>.

annually),¹⁶ “support about 15% of total economic activity in the region.” *Id.* at 1–2. That economic activity, of course, “generates additional taxes to the State and to local government entities,” and “fiscal benefits of operations, student spending, and visitor spending lead to increased tax receipts of some \$879.0 million to the State and \$701.9 million to local government entities” each year. *Id.* at 2. A reduction in UNT operations—likely to occur as a result of the injunction—will impact not only the quality of academic and student programs at UNT, but also the economic opportunities for the entire region.

The full potential of these economic benefits is only reaped when a school’s graduates *remain* in the community and state after graduation, fulfilling critical workforce needs and contributing to the local economy that helped subsidize the graduate’s opportunity. *Id.* at 21 (“Alumni remaining in the region further enhance the economic effects.”). The Legislature designed its system of higher education finance to incentivize students to remain in Texas and generate those economic benefits by requiring students to meet a minimum one-year residency for eligibility for in-state tuition rates. The district court-imposed tuition structure throws a wrench in that system, undermining the State’s commitments to expand college access for Texans that, in turn, increase economic opportunity and prosperity for Texans.

¹⁶ See <https://www.unt.edu/rankings>.

C. The district court did not accurately assess the operation of the Texas tuition statute or Texas residency determinations.

To make good on its constitutional and legislative commitments to educate its populace and capitalize on the investments of the taxpayers of the State, Texas has established a dual system of resident/non-resident tuition. *Id.* § 54.051(c), (d). Texas’s decision to provide reduced tuition rates for students establishing residency status reflects the State’s commitment to prioritize higher education access for students who (1) are (or who come from families who are) taxpayers contributing to the economy of the State,¹⁷ and/or (2) the State has already invested significant taxpayer funds in educating and developing through public education.¹⁸ This approach has repeatedly been recognized as reasonable and constitutional by the federal courts.¹⁹

1. The injunction allows out-of-state students to skip the line and avoid the standard one-year residency requirement required at nearly every public institution in the nation.

The general rule in Texas and at public institutions of higher education across the nation is that an out-of-state student must live in the state for at least one year

¹⁷ See Tex. Educ. Code § 54.052(a)(1)–(2).

¹⁸ See *id.* § 54.052(a)(3); see also *Harris*, 827 F.3d at 367-69, 372 (5th Cir. 2016) (recognizing state’s interest 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”).

¹⁹ See, e.g., *Starns v. Malkerson*, 326 F. Supp. 234, 241 (D. Minn. 1970), *aff’d*, 401 U.S. 985 (1971) (“This state has a valid interest in providing tuition-free education to those who have demonstrated by a year’s residence a bona fide intention of remaining here and who, by reason of that education, will be prepared to make a greater contribution to the state’s economy and future.”) (quotation omitted).

before becoming eligible to benefit from state taxpayers' investments in public higher education. Reflecting that principle, Texas law provides three pathways for students to establish eligibility for in-state resident status in Texas—all of which contain a minimum one-year residency requirement. Tex. Educ. Code § 54.052:

1. Student resides in Texas the year preceding enrollment and individually establishes domicile in Texas (Tex. Educ. Code § 54.052(a)(1));
2. Student resides in Texas the year preceding enrollment and establishes parents' domicile in Texas (Tex. Educ. Code § 54.052(a)(2)); or
3. Student resides in Texas for the year preceding enrollment **and** graduates from Texas high school **and** resided in Texas for the three years preceding graduation (Tex. Educ. Code § 54.052(a)(3)).²⁰

Virtually every state in the nation relies on a baseline one-year residency commitment to establish access to in-state tuition rates at public colleges and universities.²¹ Contrary to the district court's judgment, IIRIRA section 1623 does not require that any student from any place be eligible to be reclassified as a resident in a receiver state without meeting minimum durational requirements.

2. The district court disregarded an entire subchapter of the Texas tuition statute dedicated to waivers and exemptions for non-resident students to qualify for in-state tuition.

The district court found that “[a]nyone who fails to meet [Texas Education Code section 54.052’s] residency requirements is not entitled to receive instate

²⁰ If the student is an undocumented immigrant, they must also sign an affidavit indicating intent to apply for permanent resident status as soon as possible. Tex. Educ. Code § 54.053(3).

²¹ See Op. Tex. Att’y Gen. No. JM-302 (1985) (“A one-year period of residency is the usual requirement employed by virtually all state universities.”).

tuition.”²² This is plainly inaccurate. Tuition status is determined by meeting various statutory, regulatory, and institutional requirements and/or by qualifying for one or more tuition exemptions and waivers established by the State, the Coordinating Board, or the institution itself. Those additional fact-specific pathways allow out-of-state students to access Texas’ in-state tuition rates—or even be exempt from paying tuition at all. *See generally* Tex. Educ. Code ch. 54, subch. D. Eligible students include:

- Several categories of Arkansas, Louisiana, New Mexico, or Oklahoma residents (Tex. Educ. Code § 54.231(a), (g));²³
- Any nonresident student receiving a scholarship greater than \$1,000 (Tex. Educ. Code § 54.213, 19 Tex. Admin. Code § 21.2263);
- A student participating in the Texas National Student Exchange Program (19 Tex. Admin. Code § 21.993);
- Veterans, military personnel and dependents (Tex. Educ. Code §§ 54.2031, 54.241, 54.341, 54.345; 19 Tex. Admin. Code § 21.2272);
- Nurses seeking Texas licensure (Tex. Educ. Code § 54.251);
- Faculty, their spouses, and children (Tex. Educ. Code § 54.211);
- Teaching and research assistants (Tex. Educ. Code § 54.212);
- Students receiving scholarships and pursuing biomedical research (Tex. Educ. Code § 54.214);²⁴
- Certain employees (and their dependents) of the University of Texas System and the Texas A&M System (Tex. Educ. Code § 54.221, 54.369);
- Students who have a familial connection to Texas businesses participating in a state economic development and diversification (Tex. Educ. Code § 54.222);
- An Olympic athlete (Tex. Educ. Code § 54.223);

²² *Young Conservatives of Texas Found. v. Univ. of N. Texas*, No. 4:20-CV-973-SDJ, 2022 WL 1063876, at *1 (E.D. Tex. Apr. 8, 2022).

²³ *See also* Tex. Educ. Code § 54.0601 and 19 Tex. Admin Code § 21.2264 (allowing other residents of New Mexico, Oklahoma, Arkansas, and Louisiana to qualify for tuition rates lower than non-resident rates).

²⁴ Notably, this scholarship is *only* available to U.S. citizens. *See* Tex. Educ. Code §54.214(3).

- Non-resident students participating in the Academic Common Market program (Tex. Educ. Code § 54.233); and
- A foreign service officer employed by the U.S. Department of State and enrolled in Texas college (Tex. Educ. Code § 54.206).

These waivers and exemptions cost the State and its public institutions millions of dollars. For example, the foregone revenue of six of the State’s flagship or regional institutions in 2020 is as follows:²⁵

Non-Resident Tuition Waivers and Exemptions by Institution, 2020 (\$)					
Univ. of North Texas	Texas A&M Univ.	Univ. of Texas at Austin	Univ. of Texas at El Paso	Univ. of Houston	Univ. of Texas at Rio Grande Valley
\$25,217,404	\$52,327,607	\$50,094,612	\$24,177,881	\$28,581,518	\$9,078,027

Ultimately, each residency tuition determination is unique to each individual student. The district court erred in failing to consider this broader statutory context. *See United States v. Lauderdale Cnty.*, 914 F.3d 960, 965 (5th Cir. 2019). And even if an out-of-state student fails to qualify for a waiver or exemption, Texas law allows all students to seek reclassification from an initial out-of-state tuition assignment after a one-year waiting period. *See* Tex. Educ. Code § 54.055.

²⁵ This information was retrieved from the Legislative Appropriations Requests submitted to THECB, available at <http://www.txhighereddata.org/index.cfm?objectid=F6DE9EA0-D878-11E8-BB650050560100A9>. A summary of this information is available in **Appendix A**.

3. Undocumented students do not receive preferential treatment on the basis of residency under Texas law.

IIRIRA section 1623 provides that states are allowed to provide postsecondary education benefits²⁶ to undocumented immigrants so long as they do not receive “preferential treatment” on the basis of residency. 8 U.S.C. § 1623. The district court incorrectly concluded that the Texas tuition laws at issue offer “preferential treatment” to undocumented students “on the basis of residency.”

Prior to 2001, students qualified for residency status only through the establishment and maintenance of “domicile” in Texas. In the Texas higher education context, domicile is defined as “a person’s principal, permanent residence to which the person intends to return after any temporary absence.” Tex. Educ. Code § 54.0501(3); 19 TAC § 21.22(7). This is distinct from “residence,” which is defined as “a person’s home or other dwelling place.” Tex. Educ. Code § 54.0501(6); 19 TAC § 21.22(25). Students seeking to avail themselves of Texas’ in-state tuition rates can “establish domicile” by “[p]hysically residing in Texas, with the intent to maintain domicile in Texas, for at least the 12 consecutive months immediately preceding the census date of the term of enrollment, allowing for documented

²⁶ *Amici* dispute that the district court properly concluded that in-state tuition rates are “benefits” within the meaning of 8 U.S.C. § 1623.

temporary absences.” 19 TAC § 21.22(1) (implementing Tex. Educ. Code § 54.052(a)(1)).²⁷

Undocumented immigrants cannot establish domicile under Texas law. THECB, statutorily charged with promulgating rules for institutional compliance with tuition laws,²⁸ has issued regulations defining the types of “non-U.S. citizens” eligible to “establish and maintain domicile.” *See* 19 TAC § 21.24(d). Consistent with 8 U.S.C. section 1623, the regulation only allows lawfully-present immigrants to establish domicile and thus be qualified as “residents” under the two one-year domicile avenues in Texas Education Code section 54.052(a)(1) and (2)). *Id.* Under these rules, undocumented students cannot access the standard, one-year pathway for establishing in-state tuition eligibility. But virtually any U.S. citizen can. By default, all U.S. citizens can qualify for in-state tuition by meeting a minimal one-year residency requirement. This framework balances the State’s interests in recruiting and retaining diverse and highly-qualified students to study (and ultimately work) in Texas, while also alleviating some of the burden of subsidizing higher education borne by resident taxpayers.

²⁷ Establishing domicile can be evidenced in a variety of ways including by working, owning or leasing property, or registering to vote in Texas. *See* 19 Tex. Admin. Code 21.24(b), (f) (providing non-exhaustive list of factors and documentation that can support a student’s claim to residency and domicile).

²⁸ Tex. Educ. Code § 54.075(a).

4. Out-of-state U.S. citizens have the same opportunity to access in-state tuition through high school graduation as undocumented Texans.

In 2001, the Texas Legislature revised the residency laws to allow a student to be classified as a Texas resident if the student graduated from a Texas high school and resided continuously in Texas for three years leading up to high school graduation or receipt of a GED. Tex. Educ. Code § 54.052(a)(3).²⁹ The law was amended in 2005 to broaden access to the in-state tuition rate,³⁰ with the explicit goal of including many students who were legally domiciled outside of the state.³¹ See H. Research Org., *Bill Analysis*, S.B. 1528, 79 Leg., Reg. Sess., at 3 (Tex. 2005) (“The bill [] would give U.S. citizens and permanent residents the same opportunity to base residency on three years residence and high school graduation . . .”).³² As the THECB has explained: “Senate Bill 1528 amended the provisions of House Bill 1403 so that they applied to all individuals who had lived in Texas a significant part

²⁹ See H.B. 1403, 77th R.S. (2001), <https://lrl.texas.gov/legis/billSearch/BillDetails.cfm?legSession=77-0&billTypeDetail=HB&billnumberDetail=1403&submitbutton=Search+by+bill>. Notably, the bipartisan legislation had Republican and Democratic co-authors, was signed into law by Republican Governor Rick Perry, and was unopposed throughout hearings in both chambers.

³⁰ See S.B. 1528, 79th R.S. (2005), <https://lrl.texas.gov/legis/billSearch/BillDetails.cfm?legSession=79-0&billTypeDetail=SB&billnumberDetail=1528&submitbutton=Search+by+bill>. Shortly after S.B. 1528 was passed in 2005, YCT sponsored an event called “Catch an Illegal Immigrant Day” at UNT. YCT members wore orange t-shirts with slogans that read “Illegal Immigrant” and “Catch me if U can.” They ran around the university’s campus asking spectators to capture them for the reward of a 100 Grand candy bar.

³¹ See THECB, *Overview: Residency and In-State Tuition* (2008), <http://www.thecb.state.tx.us/DocID/pdf/1528.pdf>, (“THECB Residency Overview”).

³² Available at <https://hro.house.texas.gov/pdf/ba79r/sb1528.pdf#navpanes=0>.

of their lives. Citizens, Permanent Residents and certain non-immigrant students could establish a claim to residency following its provisions.” THECB Residency Overview at 1.

On its face, then, the plain text of the high school graduation pathway applies to both citizens and undocumented immigrants who meet the statute’s requirements. For example, students born and raised in Texas but whose parents moved out of state before they had enrolled in college were previously classified as nonresidents. Likewise, students raised by grandparents or other family members who had never gone to court to acquire legal custody were considered residents of the state in which their biological parents lived.³³ The revised section 54.052(a)(3) “enabled these students, and all other students who graduate from high school in Texas under the prescribed conditions, to be classified as residents and allow them to enroll while paying the resident tuition rate.”³⁴

The district court seemed to conclude that the Texas tuition provision is preempted because Texas does not make *all* U.S. citizens eligible for in-state tuition when even a single undocumented Texan is eligible for the same. This is a grossly overbroad reading of Section 1623(a), which establishes compliance requirements

³³ In addition, students who attend and graduate from boarding school in Texas (who previously could not always qualify because their parents were often domiciled outside of Texas) also would qualify. *See, e.g.*, <https://texasboardingschools.org/schools/>; <https://boardingschools.us/state/texas/>.

³⁴ *THECB Residency Overview* at 2.

for institutions of higher education, and not an entitlement for U.S. citizens. *See* 8 U.S.C. § 1623.

5. The sole pathway for undocumented immigrants to qualify for in-state tuition through high school graduation requires far more than one-year residency in Texas.

Texas law allows any U.S. citizen to qualify for in-state tuition establishing domicile in Texas for one year prior to enrolling. Tex. Educ. Code § 54.052(a)(1). Undocumented immigrants are not granted that privilege. *See* 19 Tex. Admin. Code § 21.24(d). Instead, the Texas legislature added three additional requirements for undocumented immigrants seeking to access in-state tuition: one year of residency prior to enrollment, *plus* graduation from a Texas public or private high school (or equivalent), *plus* three additional years of residency while enrolled in high school; *plus* the signing of an affidavit committing to seek lawful immigration status as soon as they are eligible. Tex. Educ. Code §§ 54.052(a)(3)(B); 54.053(3). Put simply, the only pathway for undocumented students requires far more than residency alone. This is not preferential treatment on the basis of residency for undocumented students prohibited by 8 U.S.C. section 1623. In fact, as discussed above, Texas' tuition law actually advantages out-of-state U.S. citizens who have lived in Texas for one year above taxpaying and longstanding Texans who are undocumented immigrants.

The mere presence of the word “reside” in section 54.052(a)(3)(B) does not bring the Texas tuition statute into conflict with federal law. In failing to review YCT’s challenge to section 54.051(d) in the broader context of the Texas tuition statutes, the district court erroneously concluded that the law as applied in this case is preempted by IIRIRA section 1623. It is not. The State has made available several pathways for out-of-state students to access in-state tuition, including through the high school graduation pathway that permits a limited number of undocumented students (who must meet an additional requirement), to qualify. If out-of-state citizens cannot establish eligibility within any of these many pathways³⁵ but nonetheless desire to benefit from Texas’ in-state tuition rate, they must make a down payment to Texas and its taxpayers by residing in the State the year prior to enrollment.

D. The injunction disserves the public interest because it will cost the State’s higher education institutions millions, hurt Texas students, and set Texas back on its strategic plan to expand college access.

The court-imposed tuition structure will weaken the Texas economy, hamstringing the ability of Texas higher education institutions to generate the out-of-state tuition revenue necessary for high-quality and affordable higher education for

³⁵ *Amici* believe that fact issues exist with respect to YCT’s representative member’s eligibility under Texas tuition law which precluded the grant of summary judgment, and that the fact-specific nature of tuition eligibility necessitated the member’s participation in this litigation.

Texans, and undermine the competitive advantage of Texas students globally and compared with out-of-state students.

1. Texas schools stand to lose millions under the district court’s flawed analysis.

The impact of the court’s order is particularly acute because institutions have substantially relied on the revenue generated by higher out-of-state tuition rates in the face of steadily declining state appropriations to fund higher education.³⁶ For example, under the district court’s injunction, UNT stands to lose approximately \$9 million over the course of the next year (based on 2020 enrollment numbers).³⁷ And the potential impact is exacerbated for Texas’ top-tier schools with higher tuition costs and greater populations of out-of-state students. Unable to collect out-of-state tuition, UT Austin faces a potential shortfall of approximately \$30 million. Appendix A. Texas A&M stands to lose approximately \$21 million. *Id.* The table

³⁶ See State Higher Education Finance (SHEF) Report, “State Profile: Texas” (2021) <https://shef.sheeo.org/state-profile/texas/>, at 3 (“General operating appropriations in Texas have decreased 14.1% per FTE from \$8,962 in 2001 to \$7,701 in 2021.”), 5 (“Unlike education appropriations, net tuition has increased steadily over time and there has been a substantial shift of responsibility for financing public higher education toward net tuition revenue. Texas has seen an average annual 3.1% increase since 1980.”).

³⁷ See Appendix A. Tuition data was collected from the 2022–23 legislative appropriations requests made by each of the institutions, specifically in their “Schedule 1A: Other Educational and General Income” table. See *supra* n. 27. The proportion of non-resident tuition paid by out-of-state students was calculated by utilizing the fall 2020 enrollment numbers reported by the THECB, specifically in the “Enrollment by Geographic Source” table which disaggregates enrollment by in-state, out-of-state, and foreign/international students, available at <http://www.txhigheredaccountability.org/AcctPublic/InteractiveReport/ManageReports>.

below describes the potential impact on six geographically diverse, top-tier Texas institutions:

Potential Lost Tuition from Out-of-State Students, 2020						
	Univ. of North Texas	Texas A&M Univ.	Univ. of Texas at Austin	Univ. of Texas at El Paso	Univ. of Houston	Univ. of Texas at Rio Grande Valley
Number of Out-of-State Students	1,442	3,478	4,744	1,079	1,241	251
Potential Lost Tuition from Out-of-State Students	\$8,938,639	\$20,952,054	\$30,202,923	\$2,944,392	\$5,900,260	\$883,745

Out-of-state tuition revenue is particularly important for “R1” research institutions³⁸ (including UNT) to maintain the ability to offer the highest quality of programming and credentials for Texas students. All public institutions, including the State’s flagships and regional universities, would be negatively impacted financially by an application of the court’s order. Based on application and enrollment trends, the difference between in-state and out-of-state tuition has not dissuaded out-of-state students from attending a Texas institution of higher education. And it is largely because of the higher tuition paid by out-of-state students that Texas universities can provide a world-class education to all their students.

³⁸ The Carnegie R1 status is the highest designation for research universities in the country and is viewed as an important step to recruit high-quality faculty and obtain more prestigious research grants. *See* https://carnegieclassifications.acenet.edu/lookup/srp.php?clq=%7B%22basic2005_ids%22%3A%2215%22%7D&start_page=standard.php&backurl=standard.php&limit=0,50.

2. The injunction will diminish the educational opportunity of all Texans.

The injunction barring UNT from charging out-of-state tuition compromises both the University's revenue stability and the academic, student life, and employment opportunities UNT offers and can sustain based on revenue projections. If the injunction is applied to other Texas schools, as Plaintiff has suggested,³⁹ it would further disrupt the entire higher education marketplace available to all Texas students. Colleges and universities depend on revenue projections, based on enrollment and corresponding in- and out-of-state tuition revenue, to be competitive in the higher education marketplace for students. The onset of COVID-19 in 2020 has demonstrated how devastating these disruptions are for higher education institutions and the educational opportunities they offer.⁴⁰

UNT has already indicated it must consider making significant budgetary and programmatic cuts, including to student financial aid, scholarships, campus resources, and research opportunities. Appellants' Br. at 62. Cuts to financial aid and scholarships will be particularly damaging to the ability of Black and Latino students to access and complete higher education. Christina Long, et al., Young Invincibles, *Student Debt in Texas*, at 11–12 (2021).⁴¹ Budget cuts will also likely

³⁹ See <https://www.texaspolicy.com/press/tppf-court-says-students-deserve-fair-tuition>.

⁴⁰ See, e.g., <https://www.texastribune.org/2020/04/16/texas-universities-coronavirus/>.

⁴¹ Available at https://younginvincibles.org/wp-content/uploads/2021/01/Student_Debt_in_Texas.pdf.

have a significant negative impact on programs and services for low-income students and students of color, such as academic advising, mental health services, and other student supports. Laura T. Hamilton and Kelly Nielsen, *Broke: The Racial Consequences of Underfunding Public Universities* 119–141, University of Chicago Press (2021). These consequences would be particularly devastating to UNT and other schools that are Minority-serving institutions (MSIs) or Hispanic-serving institutions (HSIs).⁴²

Perhaps even more troubling, a predictable response to the prohibition on collecting statutory tuition would be increasing discretionary tuition for all students, which any institution is authorized to do if its “governing board considers [it] necessary for the effective operation of the institution.” *See* Tex. Educ. Code § 54.0513. Any such tuition hikes will undermine the State’s goal and plans for increasing enrollment and completion of higher education by diverse Texans.

Finally, another consequence of the injunction may be an increased incentive for schools to recruit and admit a higher percentage of international students, who—

⁴² UNT recently achieved MSI and HSI designation from the U.S. Department of Education. *See* [https://research.unt.edu/research-funding-opportunities/hispanic-serving-institution-funding-opportunities#:~:text=In%202020%2C%20The%20University%20of,Hispanic%20Serving%20Institution%20\(HSI\)](https://research.unt.edu/research-funding-opportunities/hispanic-serving-institution-funding-opportunities#:~:text=In%202020%2C%20The%20University%20of,Hispanic%20Serving%20Institution%20(HSI)). UNT is one of the few Tier 1 research universities designated as an HSI—meaning that its students can access high-quality academic and research opportunities. *See* <https://news.unt.edu/news-releases/designated-hispanic-serving-institution-unt-can-amplify-resources-growing-and-better>. Of note, as part of its commitment to serving these populations, “UNT currently offers Hispanic students a wide range of support, *including recruiting these students from local high schools.*” *Id.* (emphasis added).

under the injunction—are the only students still subject to the out-of-state tuition rate. At UNT, for example, the University enrolled 1,442 out-of-state U.S. citizens as compared to 2,365 international students during the 2020-21 academic year. To make up the revenue shortfall caused by the injunction, the University could simply enroll more international students—likely reducing opportunities for both Texans and U.S. citizens to attend Texas schools. Other schools, if subjected to the injunction, would face similar scenarios:⁴³

Non-Resident Tuition by Public Institution for Non-Resident U.S. Citizens and International Students, 2020						
Category	Univ. of North Texas	Texas A&M Univ.	Univ. of Texas at Austin	Univ. of Texas at El Paso	Univ. of Houston	UT Rio Grande Valley
Total Non-Resident Students	3,807	7,769	9,258	2,781	4,511	861
Number of Non-Resident U.S. Citizen Students	1,442	3,478	4,744	1,079	1,241	251
Number of Non-Resident International Students	2,365	4,291	4,514	1,702	3,270	610
Tuition from Non-Resident U.S. Citizens	\$8,938,639	\$20,952,054	\$30,202,923	\$2,944,392	\$5,900,260	\$883,745
Tuition from International Students	\$14,660,111	\$25,849,703	\$28,738,616	\$4,644,445	\$15,547,020	\$2,147,746

⁴³ See Appendix A, *supra* n. 39.

3. The injunction will set Texas back on its strategic plan to increase higher education access and completion for Texas students.

Texas has long recognized that access to higher education improves the lives of Texans. Tex. Educ. Code § 61.002. To create and maintain a high-quality, affordable, and equitable system of higher education, the Legislature established the Coordinating Board, charged with carrying out the Legislature’s policy objectives. *Id.* THECB has recognized a need to ensure equity in its planning, because although Latino and Black students comprise more than 60 percent of the K-12 pipeline for higher education in Texas, those students “have traditionally been underrepresented in the State’s higher education institutions but are critical to the [State’s] success.”⁴⁴

These are not mere idealist principles. Beginning in 2000, the State has developed and implemented three comprehensive strategic plans aimed at “closing the gaps in higher education participation and success, in educational excellence, and in funded research.”⁴⁵ Ensuring access for Texas high school graduates has long been a critical component of the State’s plans and success. In addition to adding the graduation pathway to access in-state tuition in 2001, in 2003, the State appropriated millions of dollars to help low-income Texans attend college and ensured that funds

⁴⁴ 60x30TX Strategic Plan at viii., 15.

⁴⁵ See THECB, *Closing the Gaps: The Texas Higher Education Plan 3* (2000), <https://reportcenter.highered.texas.gov/agency-publication/miscellaneous/closing-the-gaps-by-2015/> (“Closing the Gaps”); 60x30TX Strategic Plan, *supra* n. 12; THECB, *2022-2030 Strategic Plan: Building a Talent Strong Texas*, <https://reportcenter.highered.texas.gov/agency-publication/miscellaneous/building-talent-strong-texas/> (“Talent Strong Texas”).

would be set aside to provide financial assistance for Texas residents in the face of rising costs of higher education.⁴⁶ The Legislature enhanced its policy in 2013⁴⁷ by “encourag[ing] higher education institutions to collaborate with high schools identified as having chronically low college-going rates to increase student success, with emphasis on African American males and Hispanics, two groups that have traditionally had lower college enrollment and persistence rates.” Tex. Educ. Code § 51.810.⁴⁸ THECB is not alone in striving for this goal. In 2021, the Legislature established the “Tri-agency Workforce Initiative,” which codified the commitments of the Governor, Coordinating Board, Texas Education Agency, and Texas Workforce Commission to increase economic growth by shepherding Texas elementary and secondary students into Texas higher education and, ultimately, the Texas workforce. Tex. Gov’t Code § 2308A.002(1). For all of these reasons, the State has asked “government, institutions, community organizations, and business leaders to rally around the common cause of ensuring Texans of all backgrounds have access to higher education and the means to pursue it.”⁴⁹

⁴⁶ See THECB, *Overview: Tuition Deregulation* (2010), <http://www.thecb.state.tx.us/DocID/PDF/1527.pdf>; see also Tex. Educ. Code §§ 56.011, 56.012 (requiring institutions to set aside tuition charged to resident students to provide financial assistance for students).

⁴⁷ See H.B. 2550, 83rd R.S. (2013).

⁴⁸ THECB, *Closing the Gaps Final Progress Report 27* (2016), <https://reportcenter.highered.texas.gov/reports/data/closing-the-gaps-final-progress-report-june-2016/>.

⁴⁹ *60x30TX* Strategic Plan at 15.

IV. CONCLUSION

The district court's order upends nearly a century of settled tuition law and practice, undermines the Texas legislature's intent and infrastructure to support higher education opportunity and access for its residents, and ultimately hurts all Texas students and the Texas economy. The judgment should be reversed.

Respectfully submitted,

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V. APPENDIX A

Gross and Net Non-Resident Tuition by Public Institution, 2020

Tuition	University of North Texas	Texas A&M University	University of Texas at Austin	University of Texas at El Paso	University of Houston	University of Texas Rio Grande Valley
Gross Non-Resident Tuition	\$48,816,154	\$99,129,364	\$109,036,151	\$31,766,718	\$50,028,798	\$12,109,518
Less: Non-Resident Waivers and Exemptions	\$25,217,404	\$52,327,607	\$50,094,612	\$24,177,881	\$28,581,518	\$9,078,027
Net Non-Resident Tuition	\$23,598,750	\$46,801,757	\$58,941,539	\$7,588,837	\$21,447,280	\$3,031,491
Total Non-Resident Students	3,807	7,769	9,258	2,781	4,511	861
Number of Non-Resident: Out-of-State	1,442	3,478	4,744	1,079	1,241	251
Number of Non-Resident: International	2,365	4,291	4,514	1,702	3,270	610
Tuition from Out-of-State Students	\$8,938,639	\$20,952,054	\$30,202,923	\$2,944,392	\$5,900,260	\$883,745
Tuition from International Students	\$14,660,111	\$25,849,703	\$28,738,616	\$4,644,445	\$15,547,020	\$2,147,746

Enrollment by Geographic Source, 2020

Foreign/ International Students	2,365	4,291	4,514	1,702	3,270	610
Out-of-State Students	1,442	3,478	4,744	1,079	1,241	251
In-State Students	36,846	57,503	41,024	22,806	42,549	31,359
Total Enrollment	40,653	65,272	50,282	25,587	47,060	32,220
Percent Foreign/ International Students	6%	7%	9%	7%	7%	2%
Percent Out-of-State Students	4%	5%	9%	4%	3%	1%
Percent In-State Students	91%	88%	82%	89%	90%	97%

Source: Texas Higher Education Coordinating Board "Enrollment by Geographic Source" 2020 table
<http://www.txhigheredaccountability.org/AcctPublic/InteractiveReport/ManageReports> (pulled on July 23, 2022); Texas Legislative Appropriations Requests (submitted to the THECB from Texas public institutions of higher education):
<http://www.txhigheredaccountability.org/AcctPublic/InteractiveReport/ManageReports>

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that a true and correct copy of the foregoing document was served on opposing counsel by mail and e-mail.

Dated: August 1, 2022

/s/ Paige Duggins-Clay _____
Paige Duggins-Clay

Counsel for *Amici Curiae*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT,
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,499 words, excluding the sections of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14 (footnotes size 12).

Dated: August 1, 2022

/s/ Paige Duggins-Clay _____

Paige Duggins-Clay

Counsel for Amici