

No. 26-50179

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**In the United States Court of Appeals  
for the Fifth Circuit**

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ARWYN HEILRAYNE, CITLALLI SOTO-FERATE, ILIANA MEDRANO,  
AND MIA CISCO,

Plaintiffs–Appellees,

v.

JAMES E. DAVIS AND KEVIN ELTIFE,

Defendants–Appellants.

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On Appeal from the United States District Court  
for the Western District of Texas, Austin Division

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**REPLY BRIEF FOR APPELLANTS**

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## INTRODUCTION

Plaintiffs' response confirms that UT Austin President Jim Davis and Chairman of the UT Board of Regents Kevin Eltife are entitled to sovereign immunity and that Plaintiffs' alleged injuries are not traceable to them. Defendants' opening brief explained why UT's administrative rules do not provide Davis or Eltife with any role in Plaintiffs' disciplinary process. In response, Plaintiffs offer no argument at all about the rules. In fact, they never point to any state law providing Davis and Eltife with relevant student disciplinary authority.

Instead, they incorrectly contend that because their complaint alleges that Davis and Eltife have the relevant authority here, the Court should accept that as true. That is wrong. Whether a state official has the authority to take a given act is a question of state law, not a question of fact, and courts do not accept a complaint's legal conclusions as true. Further, and contrary to Plaintiffs' arguments, nothing about analyzing sovereign immunity under *Ex parte Young* at the pleading stage or the distinction between "facial" and "factual" attacks under Rule 12(b)(1) requires courts to accept as true a complaint's legal conclusion about a state official's authority to act. Indeed, this Court routinely analyzes state law, not complaint allegations, in determining whether a given state official has the authority to take the relevant act under *Young* at the pleading stage.

Plaintiffs' refusal to offer any legal argument about Davis and Eltife's student disciplinary authority shows that both are entitled to sovereign immunity.

## **ARGUMENT**

### **I. Davis and Eltife Are Improper Defendants.**

#### **A. Davis and Eltife are entitled to sovereign immunity.**

Defendants argued that they are entitled to sovereign immunity because the UT Regents' Rules and the UT Austin Institutional Rules do not authorize them to make the types of student disciplinary decisions at issue here, nor to supervise, overrule, or countermand them as a matter of law. Appellant.Br.15-22. The Regents' Rules specifically delegate the authority to make student disciplinary decisions to individual campuses and reserve no supervisory authority over those decisions to the Board, much less the Chairman unilaterally. Appellant.Br.18. Further, UT Austin's Institutional Rules expressly give authority to make the types of student disciplinary decisions at issue here to the Dean of Students. Appellant.Br.19. For Plaintiffs, the decision of the Dean of Students is "final" by rule and not subject to presidential review. Appellant.Br.22.

In response, Plaintiffs offer no argument about the Chairman's or the President's lack of authority to discipline Plaintiffs under the rules. Instead, they contend that the Court should accept their complaint's *legal conclusions* about whether state law gives the Defendants the authority to make student disciplinary decisions. They are mistaken.

#### **1. Courts do not defer to a complaint's legal conclusions about a state official's authority to act.**

Plaintiffs argue that at the pleading stage, "a court need only conduct a 'straight-forward inquiry into whether [the] complaint alleges an ongoing violation of federal

law and seeks relief properly characterized as prospective.’” Appellee.Br.24 (quoting *Verizon. Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002)). That argument conflates two distinct parts of the *Ex parte Young* analysis. *Young* requires both that a plaintiff seek a proper form of relief and sue a proper defendant. The former is a pleading requirement; the latter is a question of law.

To seek a proper form of relief under *Young*, “(1) [a] plaintiff must name individual state officials as defendants in their official capacities; (2) the plaintiff must allege an ongoing violation of federal law; and (3) the relief sought must be properly characterized as prospective.” *Mi Familia Vota v. Ogg*, 105 F.4th 313, 325 (5th Cir. 2024).

To sue a proper defendant, a plaintiff must show that the state official defendant has “some connection with the enforcement of the law being challenged.” *Id.* Under that separate analysis, a plaintiff must show that “(1) the state official has more than the general duty to see that the laws of the state are implemented, *i.e.*, a particular duty to enforce the statute the question; (2) the state official has a demonstrated willingness to exercise that duty; and (3) the state official, through her conduct, compels or constrains persons to obey the challenged law.” *Id.* (citation modified).

Importantly, whether a plaintiff seeks a proper form of relief and whether she has sued the proper defendant are “two analyses.” *City of Austin v. Paxton*, 943 F.3d 993, 998 (5th Cir. 2019). “Once it’s clear that the named defendant is proper, our precedent directs us to read the language in *Young* and *Verizon* together. Such an approach *results in two analyses* that help us to determine whether the *Young* exception applies to the relevant state official. We conduct a *Verizon* straightforward

inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *We also decide* whether the official in question has a ‘sufficient connection to the enforcement’ of the challenged act.’” *Id.* (emphases added) (citation modified). Thus, in *City of Austin*, the Court accepted a complaint’s allegation that an ongoing violation of federal law existed, *id.* at 999, but then analyzed the legal question of whether the Attorney General had a “sufficient connection to the enforcement” of the statute at issue and held that he did not, *id.* at 999-1000.

This Court routinely determines whether a state official has the legal authority to enforce a given statute or policy within the meaning of *Young* at the pleading stage. For example, in *Lewis v. Scott*, the plaintiffs sued the Texas Secretary of State and challenged various provisions of the Texas Election Code. 28 F.4th 659, 662 (5th Cir. 2022). The Secretary moved to dismiss, arguing that she lacked the necessary connection to the enforcement of the challenged provisions under *Young*. *Id.* The district court denied that motion. *Id.* This Court reversed. It explained that “[w]here a state actor or agency is statutorily tasked with enforcing the challenged law and a different official is the named defendant, our *Young* analysis ends.” *Id.* at 663. The Court then explained that different officials, not the Secretary, enforced the challenged election code provisions such that the Secretary was not a proper defendant under *Young*. *Id.* at 663-64. In doing so, the Court analyzed the relevant statutes, not complaint allegations, and held that “the statutes themselves refute any notion that the Secretary enforces them.” *Id.* at 664.

Similarly, in *United States v. Abbott*, a group of plaintiffs sued Governor Abbott to challenge an executive order that he issued. 85 F.4th 328, 332 (5th Cir. 2023). The Governor moved to dismiss the case and argued that the suit was barred by sovereign immunity. *Id.* The district court rejected the sovereign immunity argument. *Id.* at 333. This Court examined the executive order at issue and the relevant statutes and held that the Texas Department of Public Safety, not the Governor, enforced the order. Accordingly, “where the challenged law makes clear that [another agency] is the agency responsible for the [law’s] administration and enforcement, only that agency is a proper defendant under *Ex parte Young*.” *Id.* at 334. These cases all show that the Court may not defer to a complaint’s legal conclusions about whether a state official has the authority to take a given act.

Plaintiffs next contend that the Court should accept their complaint’s legal conclusions because Defendants brought a “facial attack” on their complaint under Rule 12(b)(1). Appellee.Br.25. But nothing about the distinction between facial and factual attacks under Rule 12(b)(1) alters the rule that “in evaluating a Rule 12(b)(1) motion, ‘[courts] must take all of the factual allegations in the complaint as true, but [they] are not bound to accept as true a legal conclusion couched as a factual allegation.’” *Daniel v. Univ. of Tex. Sw. Med. Ctr.*, 960 F.3d 253, 256 (5th Cir. 2020) (quoting *Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 287 (5th Cir. 2015)).

“There are two types of attacks against a court’s subject-matter jurisdiction: ‘facial’ and ‘factual.’” *Reardon v. Am. Airlines, Inc.*, 167 F.4th 294, 300 (5th Cir. 2026). “The former challenges subject-matter jurisdiction on the pleadings alone, and the court must presume *the factual allegations* in the complaint as true.” *Id.* (emphasis

added). By contrast, in “a factual attack, defendant submits affidavits, testimony, or other evidentiary materials,” and a plaintiff must then “submit facts through some evidentiary method and has the burden of proving by a preponderance of the evidence that the trial court does have subject matter jurisdiction.” *Id.* at 300.

The distinction between facial and factual attacks under Rule 12(b)(1) thus concerns whether and how a district court may consider evidence; it does not alter the basic rule that courts do not defer to legal conclusions in a complaint. Nor does *Lee v. Verizon Commc’ns, Inc.*, on which Plaintiffs rely, require a court to do so. *See* 837 F.3d 523, 533 (5th Cir. 2016). When *Lee* held that a court should presume the “allegations in the complaint” as true in a facial attack, *id.*, it referenced “factual allegations,” *Reardon*, 167 F.4th at 299. Under Plaintiffs’ logic, any plaintiff can survive a 12(b)(1) motion based on sovereign immunity by alleging in a complaint “the defendant official has statutory authority to do x,” even if the statute at issue states “the official is forbidden from doing x.” That is contrary to settled law.

Here, whether Davis and Eltife have the authority to make, supervise, or countermand the student disciplinary decisions at issue is a question of Texas law, not a factual allegation. Indeed, Plaintiffs correctly state that whether the relevant administrative rules “ultimately vest[] that authority . . . is a merits question about the operation of state law, not a pleading defect.” Appellee.Br.25. That’s the point.

## **2. Plaintiffs misunderstand their burden to overcome sovereign immunity.**

Plaintiffs next contend that “state sovereign immunity is an affirmative defense, and plaintiffs are not required to anticipate or plead around affirmative defenses.”

*Jackson v. Wright*, 82 F.4th 362, 368 (5th Cir. 2023); Appellee.Br.25. There are three problems with that argument.

*First*, the sufficiency of factual allegations in Plaintiffs’ complaint does not determine Davis and Eltife’s legal authority here. Defendants have not argued that the factual allegations in Plaintiffs’ complaint do not overcome sovereign immunity. They have argued that the relevant UT rules do not give them the authority to make decisions in Plaintiffs’ disciplinary process *as a matter of law*. Appellant.Br.22-23.

*Second*, *Jackson* did not overrule this Court’s prior holding that “sovereign immunity is jurisdictional,” *Cozzo v. Tangipahoa Par. Council--President Gov’t*, 279 F.3d 273, 280 (5th Cir. 2002), nor could it have done so under the rule of orderliness. Long before *Jackson*, *Cozzo* squarely held that state sovereign immunity is a “question[] of subject matter jurisdiction.” *Id.* And “the party invoking federal jurisdiction bears the burden of establishing its existence.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 104 (1998). And after *Jackson*, the Court reaffirmed that “[s]overeign immunity is jurisdictional’ and ‘[a] lack of subject matter jurisdiction may be raised at any time.’” *Tawakkol v. Vasquez*, 87 F.4th 715, 718 n.2 (5th Cir. 2023) (quoting *Cozzo*, 279 F.3d at 280).

*Third*, Defendants have separately argued that their lack of authority over the student disciplinary decisions at issue here precludes a showing of traceability for Article III standing purposes, *see* Appellant.Br.30-31, which is unquestionably Plaintiffs’ burden to establish, *Steel Co.*, 523 U.S. at 103-04. So even if sovereign immunity were an affirmative defense, Plaintiffs must still establish standing.

### 3. *Jackson v. Wright* is inapposite.

The district court and Plaintiffs relied primarily on *Jackson* to conclude that Davis and Eltife are proper *Ex parte Young* defendants. Appellant.Br.23-29. But *Jackson* is inapposite for two key reasons, and Plaintiffs’ arguments do not alter the analysis.

First, under *Jackson*’s “[G]uidepost 1,” the Court focused on the powers of the University of North Texas’s Board of Regents as a body in holding that the UNT Regents had the “ultimate governance authority” over UNT and thus had a “scintilla of enforcement” within the meaning of *Young*. Appellant.Br.23-24. Here, however, Chairman Eltife is the only regent before the Court, and he does not have “ultimate governance authority” over the UT System unilaterally because Texas law vests that authority in the Board as a body, not in the Chairman unilaterally. Appellant.Br.24-25.

In response, Plaintiffs contend that in *Jackson*, only eight of the nine UNT Regents were sued, and the Court still found them to be appropriate *Young* defendants. Appellee.Br.27. That argument ignores an important rule about reading cases. “Where an opinion fails to address a question squarely, we will not treat it as binding precedent.” *Thomas v. Tex. Dep’t of Crim. Just.*, 297 F.3d 361, 370 n.11 (5th Cir. 2002). “Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” *Id.* Thus, “the rule of orderliness applies where (1) a party raises an issue and (2) a panel gives that issue *reasoned consideration*.” *Ochoa-Salgado v. Garland*, 5 F.4th 615, 619 (5th Cir. 2021).

*Jackson* never considered the distinction between the authority of a Board of Regents as a body and any single regent. It did not analyze any statutes establishing the authority of UNT’s Board of Regents or any authority empowering a single regent to act unilaterally. *See Jackson*, 82 F.4th at 365, 367-68. Nor did *Jackson*’s analysis place any legal significance on the number of regents before the Court in its *Young* analysis; it merely noted that eight of the nine regents were defendants in stating the facts of the case. *See id.*

Here, however, the “ultimate governance authority,” *id.* at 367, of UT is “vested in a board of nine regents,” not the Chairman, Tex. Educ. Code § 65.11, and “[t]he board,” not any one regent, is “authorized and directed to govern” the UT System by statute, Tex. Educ. Code § 65.31(a). Further, UT’s Regents’ Rules do not give the Board or any single regent the authority to make or review any student disciplinary decisions. Appellant.Br.25. And the rules can only be amended by majority vote. The Univ. of Tex. Sys., Regents’ Rules and Regulations, Rule 10100(2), § 5 (Nov. 21, 2024), <https://www.utsystem.edu/board-of-regents/rules/10100-rule-rules-and-regulations>. None of these arguments were considered or rejected by *Jackson*, so *Jackson* does not control.<sup>1</sup>

*Second*, under *Jackson*’s “guidepost 2,” Defendants explained that even if the Chairman had some degree of “ultimate governance authority” over UT, *Jackson* never addressed how its analysis might be different if a Board delegated an aspect of

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<sup>1</sup> Plaintiffs briefly mention that the Board may remove UT officers, faculty, and employees. Appellee.Br.28. Again, that is a power of “[t]he board,” not of the Chair individually. Tex. Educ. Code § 65.32.

its authority to other officials without including any mechanism for supervisory review. Appellant.Br.25, 27. Here, the Board did just that—it gave individual campuses the power to discipline students and included no mechanism for the Board to review those decisions. Appellant.Br.25.

In response, Plaintiffs suggest that *Jackson* considered the UNT Board’s authority to delegate various responsibilities to individual campuses “as proof” that the Board had “more than a general duty to see the laws implemented.” Appellee.Br.28. That argument simultaneously conflates *Jackson*’s two “guideposts” and ignores the (in)significance of the word “delegate” in the opinion. *Jackson* briefly cited a UNT Regents’ Rule mentioning delegation authority for the proposition that UNT’s Board had “ultimate governance authority” over UNT and therefore the required “scintilla of enforcement” under *Young* for purposes of “Guidepost 1.” *Jackson*, 82 F.4th at 367. But the Court cited that rule only for the proposition that the UNT Regents had “ultimate governance authority at UNT”; nothing about the UNT Board’s *delegation* authority was material to that holding. *Id.*

Further, that analysis was about Guidepost 1. Guidepost 2, by contrast, asks whether the relevant state official has more than “the general duty to see that the laws of the state are implemented.” *Id.* In analyzing Guidepost 2, the Court held that UNT’s Board had more than such a general duty because it had a “supervisory role over the individuals who were allegedly violating constitutional rights” and the “authority to countermand the decisions of the subordinate UNT officials.” *Id.* at 368. But the UNT Board’s authority to delegate played no role in that analysis.

*Jackson*'s analysis did not consider Defendant's argument here. Specifically, where a university board has delegated the relevant authority to an individual campus by rule, has included no supervisory mechanism in the rule to review those decisions, and can only change that rule by majority vote, *see* Appellant.Br.25-26, then the Board does not have a "scintilla of enforcement . . . with respect to the challenged law," under Guidepost 1 or a "supervisory role over the individuals who were allegedly violating constitutional rights" and the "authority to countermand the decisions of the subordinate . . . officials" under Guidepost 2, *Jackson*, 82 F.4th at 367-68. *Jackson* did not give "reasoned consideration" to the specific issue of a Board's decision to delegate authority without a supervisory role, so it does not bind the Court here. *Ochoa-Salgado*, 5 F.4th at 619.

Plaintiffs respond that the UT Board's delegation of "its student disciplinary authority only proves that the Board members possess that authority" as well as the authority to "countermand the decisions" of subordinate officials. Appellee.Br.28. That is incorrect. That the Board delegated authority over student discipline but included no supervisory mechanism, *see* Appellant.Br.25, shows that it *had* the authority to discipline students but chose to give that authority away to others. If the Board wants to *reclaim* authority over student disciplinary matters, then it would have to change the rules by majority vote. Appellant.Br.26. Further, Texas courts interpret administrative rules like statutes. Appellant.Br.17. That the Regents' Rules include a mechanism for the Board to supervise certain faculty disciplinary decisions but not student disciplinary decisions, Appellant.Br.25, shows that the Board presently lacks supervisory authority over student discipline unless it chooses to change the Rules.

**4. Plaintiffs’ arguments about President Davis’s authority are incorrect.**

Defendants explained that UT Austin’s Institutional Rules do not give President Davis the authority to make, supervise, or overrule, the types of student disciplinary decisions that Plaintiffs received. The Dean of Students, not the President, disciplined Plaintiffs, and the Dean’s decision became “final” by rule when Plaintiffs chose not to appeal. Appellant.Br.19. Further, the institutional rules give the President specific enumerated responsibilities in the student disciplinary process, but they give the President the power to overrule a student disciplinary decision only in the educational release context, which is not applicable here. Appellant.Br.22. That the rules make the Dean of Students’ decision “final” and give the President no authority to countermand that decision in this context, Appellant.Br.26, shows that the President does not have “direct governing authority over the . . . officials that are allegedly continuing to violate [Plaintiffs’] First Amendment rights,” does not have “direct supervisory authority over the . . . officials who took the actions at issue,” and does not have the “authority to countermand the decisions of the subordinate . . . officials” in this context, *Jackson*, 82 F.4th at 368; Appellant.Br.27.

In response, Plaintiffs offer little argument. They repeat the district court’s error that the President has authority over the Dean of Students and the disciplinary process at UT, but the rules show that is incorrect with respect to the administrative dispositions that Plaintiffs received. Appellant.Br.17-22. Plaintiffs then assert that Defendants conceded that the President has the authority to “overrule a student disciplinary decision.” Appellee.Br.29. But they omit the key qualifier: The President

has “the power to overrule a student disciplinary decision *only through the educational release process not at issue here.*” Appellant.Br.22 (emphasis added).

Finally, Plaintiffs repeat their previous errors, asserting that the Court must defer to their complaint’s legal conclusions that Davis and Eltife have the relevant student disciplinary authority here. Appellee.Br.30. That is incorrect for the reasons explained above.

### **B. Plaintiffs lack standing to sue Davis and Eltife.**

Defendants argued that Plaintiffs lack standing to sue Davis and Eltife because they cannot meet the traceability and redressability requirements of Article III. Appellant.Br.30-34. That is so for largely the same reasons that Defendants are entitled to sovereign immunity: UT’s rules do not give the Chairman or the President the authority to discipline Plaintiffs; the Dean of Students disciplined Plaintiffs; that decision became “final” by rule; and UT’s rules do not give the Chairman or President the authority to reverse that decision. Appellant.Br.31. It follows that Plaintiffs’ injuries are not traceable to the Defendants.

In response, Plaintiffs repeat their central error, arguing that because “the complaint alleges that Davis and Eltife possess authority to expunge Plaintiffs’ disciplinary records” and Plaintiffs “expressly requested an order reversing the disciplinary action,” they have established traceability and redressability. Appellee.Br.18, *see* Appellee.Br.16, 23. But as discussed above, “[i]n evaluating a Rule 12(b)(1) motion, we must take all of the factual allegations in the complaint as true, but we are not bound to accept as true a legal conclusion couched as a factual allegation.” *Daniel*, 960 F.3d at 256. That is true whether a party brings a facial or factual challenge under Rule

12(b)(1). *Supra* 5-6; *contra* Appellee.Br.10-11. Whether a state official has the authority to take a given act is a question of state law, not a question of fact. Plaintiffs’ own brief characterizes the relevant questions—whether UT’s rules give Davis and Eltife an “operative role” in Plaintiffs’ discipline, whether the rules “vest[] that authority” in Defendants, and whether Defendants can “expunge Plaintiffs’ records”—as “question[s] about the operation of state law.” Appellee.Br.25.

Plaintiffs’ refusal to offer any state law granting Davis or Eltife authority over student discipline is fatal for standing purposes. It is Plaintiffs’ burden to establish standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), not Defendants’ burden to disprove it, *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 412 n.4 (2013). Plaintiffs offer no argument about UT’s administrative rules in attempting to establish traceability and redressability. *See* Appellee.Br.16-18, 23. They do not point to a single statute or rule giving Davis or Eltife authority over their disciplinary processes or empowering either of them to “reverse” their disciplinary decisions, ROA.512, or “expunge” their records, Appellee.Br.16, 23. Accordingly, they have not met their burden.

The cases on which Plaintiffs rely to establish traceability and redressability are inapposite. *Book People* held that the plaintiffs had established traceability because the defendant official “oversees the challenged process and because his actions are among those that would contribute to Plaintiffs’ harm.” *Book People, Inc. v. Wong*, 91 F.4th 318, 333 (5th Cir. 2024) (citation modified). But UT’s rules do not provide an oversight role for the President or Chairman in Plaintiffs’ disciplinary process or

empower them to take any action contributing to Plaintiffs' harm here. Appellant.Br.17-22.

*Jackson* found traceability to UNT's Board members for the same reasons it held that they were proper *Ex parte Young* defendants. *Jackson*, 82 F.4th at 369. But UT's rules do not give Davis or Eltife "direct governing authority" over the disciplinary process here or the "authority to countermand" Dean of Students' decisions. Appellee.Br.17 (quoting *Jackson*, 82 F.4th at 368); see Appellant.Br.24-27.

Finally, Plaintiffs cite *Reule v. Jackson* for the proposition that to satisfy redressability, "the specific form of relief sought must at least lessen the injury of which plaintiff complains, but it need not completely resolve it." 114 F.4th 360, 368-69 (5th Cir. 2024); see Appellee.Br.17-18. But the issue here is not whether Plaintiffs' requested relief would redress their alleged injuries partially or completely. It is that Plaintiffs have cited no Texas law showing that Davis and Eltife have the authority to grant any part of their requested relief—namely, reversing their disciplinary decisions or expunging their student records. ROA.512; Appellee Br.18, 23. Without citing any Texas law giving Davis and Eltife the authority to reverse a student disciplinary decision or expunge student records, Plaintiffs cannot show that it is "likely" and not "speculative" that an injunction ordering Davis and Eltife to do those things will redress their alleged injuries. *Lujan*, 504 U.S. at 561.

## II. Plaintiffs Seek Improper Relief.

### A. Plaintiffs do not seek proper relief under *Ex parte Young*.

Defendants argued that all Plaintiffs except Heilrayne seek improper relief under *Ex parte Young*. Appellant.Br.34-38. *Young* requires a plaintiff’s complaint to allege an ongoing violation of federal law and to seek prospective relief. *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 471 (5th Cir. 2020). Those are two separate requirements. *Id.* As to the first, a “complaint must allege that the defendant *is violating* federal law, not simply that the defendant *has done so*.” *Id.* Further, an ongoing violation of federal law is not the same as ongoing *harm* stemming from a past violation of federal law. *See id.* at 471-72. Here, Plaintiffs seek an injunction reversing their disciplinary decisions and expunging their academic records. Appellee.Br.2. But the academic sanctions against all Plaintiffs except Heilrayne have ended, and their complaint does not allege that the mere existence of records documenting past academic sanctions, as opposed to the sanctions themselves, constitutes First Amendment retaliation. Plaintiffs therefore have not pleaded an ongoing violation of federal law. Appellant.Br.34.

In response, Plaintiffs argue that the district court held that they alleged an ongoing violation of federal law. Appellee.Br.34-35. They misread the district court. Plaintiffs point to the section of the district court’s opinion that analyzed whether Plaintiffs seek appropriate relief under *Young*. ROA.841-42. But that two-page analysis conflated ongoing *harm* with an ongoing *violation* of federal law. It explained that “Plaintiffs in this case allege ‘continued reputational harm’ due to their disciplinary records, noting that their success in job or graduate school applications often

depends on disclosure and review of academic records.” ROA.841-42. On that reasoning, the district court held that Plaintiffs’ “requests to amend their disciplinary records constitutes prospective relief appropriate under *Ex parte Young*.” ROA.842. Finally, “Plaintiffs’ request for expungement of their records still constitutes prospective relief since the reputational harm related to their academic and disciplinary records is ongoing.” ROA.842 n.3.

That analysis says nothing about whether the mere existence of a student record is an ongoing violation of federal law; it says that Plaintiffs may experience or have experienced ongoing *harm* from the existence of those records and that the remedy of expungement is prospective. In other words, the district court conflated ongoing harm from a past violation of federal law with a present ongoing violation of federal law. It simultaneously conflated *Young*’s requirement to seek prospective relief with the separate requirement to allege an ongoing violation of federal law. Those are legal errors. *See* Appellant.Br.37; *Green Valley*, 969 F.3d at 471-72.

Next, Plaintiffs suggest that the district court’s discussion of the *merits* of their First Amendment retaliation claim actually addressed the ongoing-violation requirement. Appellee.Br.35. Plaintiffs take the district court’s opinion out of context. In discussing Plaintiffs’ First Amendment retaliation claim, the district court explained that Plaintiffs alleged that they were “arrested and disciplined based on engagement in protected First Amendment activities,” ROA.829, and that their “arrests and the later disciplinary actions brought against them” were retaliation for their participation in the protest, ROA.856. Then, it explained that “Plaintiffs alleged injuries were from retaliatory arrests themselves and UT’s subsequent disciplinary actions against

them.” ROA.857. “Arrest is an action which would chill a person of ordinary firmness from engaging in protected activity.” ROA.857. “Similarly, adverse disciplinary actions on student records, including the deferred suspension and academic probation consequences Plaintiffs faced, would also chill students from engaging in protected activities.” ROA.857. The district court continued that Plaintiffs had alleged facts suggesting that “these adverse actions” were “motivated against their exercise of protected speech,” including that only pro-Palestinian protestors were “subject to arrest and discipline” while counter-protestors were not. ROA.857.

From this analysis, Plaintiffs cherry-pick the phrase “adverse disciplinary actions on student records, including the deferred suspension and academic probation consequences Plaintiffs faced,” Appellee.Br.35 (citing ROA.857), to suggest the district court held that the existence of a student record is itself an ongoing act of First Amendment retaliation. But read in context, that is not what the district court held. It never described the First Amendment retaliation claim that way; it explained that the student discipline itself would chill students from protesting, and that the student disciplinary action itself was allegedly motivated by Plaintiffs’ speech. None of that analysis discusses sovereign immunity, *Young*, or the requirement to allege an ongoing violation of federal law.

Next, Plaintiffs suggest that, regardless of the district court’s analysis, their complaint does allege an ongoing violation of federal law. Appellee.Br.35. But they fail to point to anything in their complaint alleging that the mere existence of a student record constitutes First Amendment retaliation.

First, Plaintiffs note that Heilrayne is still subject to her deferred suspension. Appellee.Br.35 (citing ROA.498). But Defendants argued that all Plaintiffs *except* Heilrayne had not alleged an ongoing violation of federal law. Appellant.Br.34.

Second, Plaintiffs point to allegations that their sanctions remain on their academic records and that Davis and Eltife have the authority to expunge their records to prevent ongoing harm to Plaintiffs' future academic and professional plans. Appellee.Br.35 (citing ROA.498-99). But that says nothing about whether the existence of a record itself constitutes First Amendment retaliation. It conflates ongoing harm from a past violation with a present ongoing violation of federal law.

Third, Plaintiffs allege that Defendants retaliated against them by disciplining them because they protested. Appellee.Br.35 (citing ROA.498). Again, except for Heilrayne, that is an alleged past violation of federal law because the sanctions have ended. Moreover, it says nothing about whether the existence of an academic record is a present violation.

Fourth, Plaintiffs "allege that the retaliatory sanctions were imposed in the past, continue to be enforced by their maintenance in their academic records, and inflict present and future reputational harm." Appellee.Br.36. But they offer no record citation to a place in their complaint alleging that the existence of those records presently violates federal law.

Plaintiffs also incorrectly analyze the relevant law. They selectively quote *Green Valley* to imply that all they need to show is ongoing *harm* traced to a past act. Appellee.Br.36. *Green Valley* actually held: "It is true, of course, that a complaint must allege that the defendant *is violating* federal law, not simply that the defendant *has*

*done so*. But as long as the claim seeks prospective relief for ongoing harm, the fact that a current violation can be traced to a past action does not bar relief under *Young*.” 969 F.3d at 471-72 (citation modified). So, while a “current violation” can be traced to a “past action,” there must still be a current violation of federal law.

Defendants also discussed *T.W. v. New York State Board of Law Examiners*, 110 F.4th 71 (2d Cir. 2024), which explained the distinction between alleging an ongoing violation of federal law and seeking prospective relief in the context of records of past acts. Appellant.Br.35-36. In response, Plaintiffs point to the court’s statement that “expungement relief may well be prospective in nature.” *T.W.*, 110 F.4th at 95; Appellee.Br.37. But Defendants’ opening brief did not take a position on whether expungement constituted prospective relief.

Plaintiffs next note *T.W.*’s holding that the complaint there “did not allege that the Board’s maintenance of records . . . violates federal law,” *T.W.*, 110 F.4th at 94, and that if the complaint “had alleged that the Board’s maintenance of records violated [the Americans with Disabilities Act], her claim may well have survived,” *id.* But even if expungement qualified as prospective relief, Plaintiffs have failed to identify any allegations of an ongoing violation of federal law here.

Plaintiffs argue that Cisco’s “speech remains chilled as a result of the prior sanction and the threat of future enforcement” Appellee.Br.37. But Plaintiffs have not sought any prospective relief for that alleged injury. *See* ROA.512. The only prospective relief they have sought is an order requiring UT officials to reverse their

disciplinary sanctions and expungement. ROA.512; Appellee.Br.2.<sup>2</sup> And “chill[]” “as a result of the prior sanction” that has now ended is, again, alleged harm from a past act, not an ongoing violation of federal law. Appellee.Br.37. “*Ex parte Young* permits suits against state officials that seek only prospective relief *in order to* end a continuing violation of federal law.” *T.W.*, 110 F.4th at 93 (citation modified). That means the requested relief must match the continuing violation.

Next, Plaintiffs repeat that the sanctions remain on their academic records, and they will be required to disclose them to future graduate schools or employers. Appellee.Br.37. That is still alleged ongoing harm from a past violation of federal law, not a present ongoing violation of federal law.

Finally, they allege that the existence of their records is itself a violation of the First Amendment. Appellee.Br.37 (citing ROA.499). But the cited page of their complaint says no such thing. Rather, it says that Davis and the Board of Regents “have the authority to expunge Plaintiffs’ disciplinary records to prevent ongoing harm to Plaintiffs’ academic and professional plans.” ROA.499.

## **B. Plaintiffs lack standing to seek prospective relief against Davis and Eltife.**

All Plaintiffs except Heilrayne lack standing to seek prospective relief because their academic sanctions have ended, and any injury stemming from the mere existence of their disciplinary records is speculative. Appellant.Br.39-43. Plaintiffs do not argue that the existence of their records injures them, but rather that a future

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<sup>2</sup> That no requested prospective relief matches these alleged injuries raises a separate standing problem, discussed below.

employer or graduate school might *discover* those records, causing reputational harm. Appellant.Br.39. But whether a future employer or graduate school might discover their disciplinary records is highly speculative. Most obviously, Plaintiffs have pleaded no facts indicating specific plans to apply to graduate school, let alone that a hypothetical graduate school would ask for disciplinary records as opposed to transcripts, which they admit will not include their disciplinary sanctions. Appellant.Br.41; ROA.480. And Plaintiffs have pleaded no specific facts about their prospective future employers, including whether they will ask for UT disciplinary records. Appellant.Br.42-43. In any event, UT Austin's rules, designed to comply with FERPA, do not permit the University to release Plaintiffs' disciplinary records to third-party employers without their consent. Appellant.Br.43.

Plaintiffs' arguments in response are either incorrect or irrelevant. *First*, they argue that Heilrayne has an Article III injury because she is still subject to a deferred suspension. Appellee.Br.12. But Defendants never disputed that Heilrayne has alleged a present injury. Appellant.Br.39.

*Second*, Plaintiffs allege that their disciplinary records burden them "right now" because "when Plaintiffs 'apply to graduate school or jobs that request information about their academic records, they will be obligated to disclose and explain their disciplinary records.'" Appellee.Br.19 (citing ROA.498-99). That is a non sequitur. Plaintiffs do not argue that the mere *existence* of their disciplinary records, sitting on a server unseen by humans, causes them harm. *See* Appellee.Br.19-20. And even if they did, the argument is forfeited because they did not raise it below. *See* ROA.499, 743; *Ctr. for Biological Diversity v. U.S. E.P.A.*, 937 F.3d 533, 542 (5th Cir. 2019)

(“Arguments in favor of standing . . . can be forfeited or waived.”). Rather, Plaintiffs argue that they will suffer reputational harm because a graduate school or a future employer might *discover* their records in the future. Appellee.Br.19-21. Indeed, Plaintiffs have repeatedly characterized their injury as one of reputational harm. Appellee.Br.20 (“Plaintiffs allege exactly that interest: continued reputational harm from disciplinary records that must be disclosed to prospective employers and graduate programs.”); Appellee.Br.21 (“reputational-harm theory”); ROA.743.

But Plaintiffs’ reputational-harm theory *presupposes* that an employer or graduate school will discover their records. That is speculative because Plaintiffs have pleaded no facts describing any specific plans to apply for graduate school. Appellant.Br.41. Rather, they have pleaded “some day intentions” “without any description of concrete plans, or indeed even any specification of *when* the some day will be.” *Lujan*, 504 U.S. at 564. As for employers, they have pleaded no facts about any plans to apply to a specific employer, much less facts indicating that any given employer will ask for their student disciplinary records. Appellant.Br.42-43. Plaintiffs vaguely refer to a “disclosure obligation” but cite no law or facts suggesting that any specific graduate school or employer will ask about their disciplinary records. Appellee.Br.21. And UT Austin’s rules do not permit the University to disclose Plaintiffs’ records to third-party employers without their written consent. Appellant.Br.43; *see* 20 U.S.C. § 1232g(b)(1). In short, Plaintiffs’ “reputational harm” injury depends on the premise that a person will discover their disciplinary records in the future. But they have pleaded no facts demonstrating that will happen and do not argue that they have.

The cases on which Plaintiffs rely do not help them. Appellee.Br.20. *Overdam v. Texas A&M University*, 43 F.4th 522 (5th Cir. 2022), suggests that a case is not moot if a former student alleges continued reputational harm that may impede future employment or graduate studies, *id.* at 529. But it did not address the separate issues of whether a plaintiff has pled specific plans to attend graduate school or seek employment with an entity that asks for student disciplinary records. *See id.* Nor did it give “reasoned consideration” to the distinction between the mere existence of a student record and reputational harm resulting from its possible discovery, the injury pleaded here. *Ochoa-Salgado*, 5 F.4th at 619. Further, *Esfeller v. O’Keefe*, 391 F. App’x 337 (5th Cir. 2010), is an unpublished decision that also did not consider the distinction between the existence of a student record and reputational harm stemming from it if discovered, *see id.* at 340. Rather, it assumed that reputational harm from a negative student record would follow. *Id.*

*Third*, Plaintiffs allege that Cisco has separate injuries because she remains subject to UT’s disciplinary rules, intends to engage in activism in the future but is fearful of further retaliation, and faces a credible threat that the University will again enforce its rules against her. Appellee.Br.22. But none of those injuries “would be redressed by the requested judicial relief.” *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). The only prospective relief that Cisco seeks is expungement of her record because her probation has ended. Appellee.Br.2. But expunging a record does not free Cisco from UT’s rules, prevent the University from engaging in alleged “further retaliation” or prevent UT from enforcing its rules against her. Cisco does not seek injunctive relief against any of UT’s rules, unlike the Plaintiffs in *Speech*

*First, Inc. v. Fenves*, 979 F.3d 319, 322, 326, 338 (5th Cir. 2020). *Contra* Appellee.Br.22.

### **CONCLUSION**

The Court should reverse the district court's order to the extent that it denied sovereign immunity to Davis and Eltife and remand with instructions to dismiss Plaintiffs' remaining claims for lack of jurisdiction. Appellants request all other relief to which they may be justly entitled.

Respectfully submitted.

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### **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,482 words, excluding the parts of the brief exempted by Rule 32(f) and Fifth Circuit Rule 32.2, according to the word count of Microsoft Word. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Equity font.

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