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APPENDIX A

Supreme Court of Texas

No. 20-0811

University of Texas at Austin President Jay Hartzell, et al.,
Petitioners,

v.

S.O.,
Respondent

On Petition for Review from the
Court of Appeals for the Third District of Texas

~ *consolidated for oral argument with* ~

No. 20-0812

Texas State University President Denise M. Trauth, et al.,
Petitioners,

v.

K.E.,
Respondent

On Petition for Review from the
Court of Appeals for the Third District of Texas

Argued September 20, 2022

JUSTICE LEHRMANN delivered the opinion of the Court, in which Chief Justice Hecht, Justice Busby, Justice Bland, Justice Huddle, and Justice Young joined.

JUSTICE BOYD filed an opinion concurring in the judgment.

JUSTICE BLACKLOCK filed a dissenting opinion, in which Justice Devine joined.

The principal issue in these two ultra vires suits, which we consolidated for oral argument, is whether state university officials have the statutory authority to revoke a former student's degree upon concluding that the former student engaged in academic misconduct in pursuit of that degree. The same court of appeals held in both suits that no such authority exists and affirmed the trial courts' denials of the university officials' jurisdictional pleas as to the pertinent claims. We disagree and reverse those portions of the court's judgments. Because no other claims remain pending in 20-0811, we dismiss that case for lack of jurisdiction. However, we agree with the court of appeals that the due-process claims in 20-0812 may continue. Accordingly, we affirm that judgment in part and remand the case to the trial court for further proceedings.

I. Background

A. 20-0812

K.E. is a former graduate student at Texas State University. She enrolled in the doctoral program of the University's biology department in 2006. Her dissertation involved analyzing data collected in the field using a leaf gas analyzer called a LiCor instrument. K.E. presented and successfully defended her dissertation, and in May 2011 the University conferred on K.E. a Doctor of Philosophy (Ph.D.) with a major in aquatic resources.

After K.E. graduated, while she and her doctoral advisor were collaborating on a journal article, the advisor found inconsistencies in K.E.'s dissertation research data that led the advisor to believe K.E. had manipulated the data. Unsatisfied with K.E.'s explanations for both the discrepancies and some missing original LiCor data files, the advisor notified Dr. Michael Blanda, Assistant Vice President for Research and Federal Relations, of her suspicion that K.E. had falsified the data and the basis for that suspicion. K.E. submitted a response to Dr. Blanda through her attorney. Based on those submissions, the University commenced an investigation into the advisor's allegations of academic misconduct. That investigation proceeded as follows:

- Dr. Blanda appointed a three-member Committee of Inquiry.

- The committee held a meeting with K.E., whose attorney and forensic expert were present. K.E. submitted additional documentation to the committee after the meeting.

- The committee submitted a detailed report recommending a full investigation, and K.E. submitted a written response to the report.

- Based on those submissions, the University formally charged K.E. with "misconduct in research and scholarship" while a student at the University.

- K.E. was sent written notice of the formal charges, the procedures to be followed by the three-member Investigating Committee, and K.E.'s right to appeal.

- The Investigating Committee conducted a two-day hearing with a court reporter present. K.E. was represented by counsel, called witnesses, cross-examined witnesses, and submitted written documents for the committee's consideration.

- The Investigating Committee found by a preponderance of the evidence that K.E. committed misconduct in research and scholarship by falsifying and fabricating data in her dissertation, and it recommended that the University revoke her Ph.D.

- K.E. appealed the findings to University President Denise M. Trauth, who affirmed the decision and recommended to the Texas State University System Board of Regents that it revoke K.E.'s degree at its quarterly meeting.

- K.E. submitted a written dispute of the recommendation to the Board, and at her attorney's request the Board heard the appeal in executive session.

- The Board affirmed Trauth's recommendation to revoke K.E.'s degree.

Following the Board's action, Trauth notified K.E. that a notation of that action had been placed on her transcript, and Trauth requested that K.E. cease representing herself as holding a Ph.D. from the University and return her doctoral diploma to the registrar. K.E. then sued Trauth, Blanda, the registrar, and the members of the Board of Regents in their official capacities.[1] In her live pleading, she asserted ultra vires claims against the University officials based on their alleged lack of authority to revoke her degree. She further claimed that the process the University officials employed to revoke the degree did not afford her due course of law under the Texas Constitution.[2] She sought declaratory and

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[1] K.E. sued several other defendants that she later nonsuited.

[2] Specifically, K.E. alleged that: the degree-revocation process was "conducted in an *ad hoc* manner" that did not give her adequate notice as to how the proceedings against her would be handled; two of the three members of the Investigating Committee were not impartial, or at least their presence created the appearance of impropriety; the University "failed to preserve forensically sound evidence and have in place a coherent system to centralize the data that was at issue in this case"; the burden of proof—preponderance of the evidence—was too low; the hearing

injunctive relief, including an order requiring the University officials to reinstate her degree.[3]

The University officials filed a plea to the jurisdiction on sovereign-immunity grounds, arguing that they had legal authority to revoke K.E.'s degree for cause and that K.E. failed to plead a viable constitutional claim in light of the process she was afforded. In response, K.E. asserted that Texas law does not authorize revocation of her degree "outside of a court of competent jurisdiction" and that the University officials must seek contractual remedies in court "because a Ph.D. is a protected property and liberty interest." She alternatively argued that, even if the University officials had authority to revoke her degree, she was subjected to "fundamentally flawed proceedings" that denied her due course of law. The trial court denied the plea, and the University officials appealed. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (authorizing an interlocutory appeal from an order that grants or denies a governmental unit's

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included no criteria for the admissibility of evidence; and the appellate review process was insufficient.

[3] In addition to declarations that the University officials lacked authority to revoke her degree and violated her due-process rights, K.E. sought declarations that: the 2006 University Catalog in effect when K.E. was a graduate student constitutes a binding contract with the University; the provisions of that catalog governing disciplinary procedures are unconstitutional; and the University may not enforce any rules amended, modified, or adopted after she graduated. The court of appeals did not discuss these specific requests, nor do the parties independently address them in this Court. Accordingly, neither will we.

plea to the jurisdiction).

A divided court of appeals affirmed, holding that K.E.'s pleadings alleged an ultra vires claim against the University officials that was not barred by sovereign immunity. 613 S.W.3d 222, 232 (Tex. App.—Austin 2020). Examining the statutes governing the Texas State University System, the court of appeals held that they neither expressly nor impliedly authorize revocation of a student's degree after it has been conferred. *Id.* at 228–31.[4] The court also rejected the University officials' argument that K.E. sought only retrospective relief, which would foreclose an otherwise proper ultra vires claim. *Id.* at 231–32. Justice Kelly dissented, opining that the Board "has the authority to revoke a former student's degree for academic dishonesty so long as, as relevant here, it affords due process under the United States Constitution and due course of law under the Texas Constitution." *Id.* at 233 (Kelly, J., dissenting).

B. 20-0811

S.O. enrolled in The University of Texas in 2003 as a graduate student working toward a Ph.D. in chemistry. Her dissertation research involved efforts to develop multistep synthetic routes to natural products, including lundurine products. S.O. presented and successfully defended her dissertation, and in May 2008 the University conferred on S.O. a Ph.D.

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[4] The court of appeals did not address the University officials' argument that K.E. failed to plead a valid constitutional claim.

In 2012, S.O.'s graduate advisor, Professor Stephen Martin, brought a complaint against her for academic misconduct relating to some of the data reported in her dissertation.[5] The University formed a committee to investigate the allegations, and the committee concluded 2–1 that S.O. engaged in scientific misconduct. The committee's findings were referred to S.O.'s dissertation committee to, "at a minimum, ensure that the dissertation reflects the actual results of her research." With one member declining to participate, the dissertation committee determined that S.O.'s degree was improperly awarded and should be revoked. According to S.O., she "was not accorded notice of the cause or causes presented to the dissertation committee," "was not provided with the materials that the dissertation committee considered in reaching its decision," and "was not provided the opportunity to be heard by the dissertation committee to address and defend the integrity of her dissertation."

In February 2014, S.O. was informed of the decision to revoke her degree and immediately filed suit, alleging that the University's actions violated her constitutional rights and seeking a temporary restraining order to prevent any disciplinary action

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[5] According to S.O.'s petition, in 2011, Martin submitted a journal article for publication that used S.O.'s research as well as a post-doctoral researcher's related work; Martin was listed as lead author, and S.O. and the post-doc were listed as co-authors. Another graduate student later conducted experiments indicating that some of the reported data in the article were inaccurate, ultimately leading Martin to retract the article and make the complaint against S.O.

against her. Before the TRO hearing, the parties entered into a Rule 11 agreement specifying that the University would restore S.O.'s degree while the parties discussed "additional process." Shortly thereafter, the University notified S.O. that it was initiating the student-discipline process to address the investigative committee's findings and the dissertation committee's subsequent recommendation. Included with the notice was a copy of the University's rules pertaining to student conduct and discipline. The University then filed a plea to the jurisdiction on mootness grounds, the trial court granted the plea, and the court of appeals affirmed. *[S.O.] v. Univ. of Tex. at Austin*, No. 03-14-00299-CV, 2015 WL 5666200, at *5 (Tex. App.—Austin Sept. 23, 2015, no pet.).

The University subsequently notified S.O. that a disciplinary hearing was scheduled for January 29, 2016. The notice stated that S.O. was charged with violating sections of the Board of Regents' and the University's Rules and Regulations governing academic dishonesty based on allegations that she "falsified data and modified Nuclear Magnetic Resonance (NMR) spectra" by "underreporting and misreporting NMR signals for three compounds . . . in [her] doctoral dissertation." The information contained in the notice included:

- an advisory that S.O. was entitled to a private hearing, to appear in person and have an advisor present, to challenge the persons designated to hear the charges, to know the identity of adverse witnesses and to cross-examine those witnesses, to present witnesses

and evidence on her own behalf, and to appeal under Section 11-804 of the University's Institutional Rules;

- the identity of the members of the Student Conduct Board Panel designated to hear the charges and S.O.'s right to challenge any of the members for lack of fairness or objectivity;

- the identity of the witnesses the University may call to testify;

- a list of the documentary evidence the University may furnish in the proceeding; and

- the deadline for S.O. to furnish the Dean of Students with a list of witnesses who would testify on her behalf and copies of evidence she would offer at the hearing.

After the hearing was rescheduled for March 4, 2016, S.O. filed this suit against several University officials for declaratory and injunctive relief.[6] In pertinent part, S.O. sought declarations that the officials "are not authorized to revoke a degree" and that the University's rules governing disciplinary proceedings do not satisfy due process. She also sought an injunction preventing the University from proceeding with the disciplinary hearing. The

[6] The named defendants in S.O.'s live pleading, all sued in their official capacities, are the President of the University, the University Registrar, the Dean of Students, and the members of the UT System's Board of Regents.

University officials responded with a plea to the jurisdiction. After a combined hearing, the trial court entered an agreed order providing that the disciplinary hearing would be held before a single hearing officer and that "Defendants will abate any formal action resulting from a decision in the disciplinary process for thirty (30) days to provide Plaintiff an opportunity to request additional injunctive relief, should she choose to do so, at the conclusion of the internal appeal of the disciplinary process." The court expressly reserved ruling on the plea to the jurisdiction.

The disciplinary hearing was rescheduled several times but ultimately never commenced. As a result, in October 2016 the trial court granted the University officials' plea to the jurisdiction on the ground that S.O.'s claims were not ripe for review. The court of appeals reversed in part, holding that a justiciable controversy exists with respect to S.O.'s claim for a declaratory judgment that the University officials are acting ultra vires because they lack authority to revoke her degree. *S.O. v. Fenves*, No. 03-16-00726-CV, 2017 WL 2628072, at *4 (Tex. App.—Austin June 15, 2017, no pet.).

On remand, S.O. filed an amended petition seeking several declarations, including declarations that the University officials lack express or implied authority to revoke a former student's degree.[7] She

[7] S.O. also requested declarations that S.O. has a constitutionally protected property and liberty interest in her Ph.D.; the 2003 University Catalog in effect when S.O. was a graduate student constitutes a binding contract with the

also filed a motion for summary judgment, arguing that she was entitled to the requested declaratory relief as a matter of law. The University officials responded with a second plea to the jurisdiction, arguing that they "have implied authority to revoke a diploma that a student obtains in violation of their Institutional Rules, as long as [they] afford adequate due process." The officials contended that S.O.'s other claims for declaratory relief were also barred by sovereign immunity.

The trial court denied the plea to the jurisdiction "as to [S.O.'s] ultra vires claim regarding whether [the officials] are acting without authority to revoke a degree" but granted the plea as to all other claims for relief. The trial court also granted S.O.'s motion for summary judgment as to the requests for a declaratory judgment that the officials lack express and implied authority to revoke her degree. Finally, the trial court denied S.O.'s motion for attorney's fees.

As in 20-0812, the same divided court of appeals affirmed, holding that S.O. asserted a cognizable ultra vires claim against the University officials—specifically, that they acted without legal authority by instituting an internal proceeding to decide whether to revoke her degree—that is not barred by sovereign immunity. 613 S.W.3d 244, 256

University; enforcement against S.O. of any rules amended, modified, or adopted after she graduated would be unconstitutional; and the 2003 University Catalog as written for disciplinary proceedings is unconstitutional because it does not satisfy due process or provide S.O. equal protection under the law.

(Tex. App.—Austin 2020). Examining the statutes governing The University of Texas System, the court of appeals held that they neither expressly nor impliedly authorize revocation of a student's degree after it has been conferred. *Id.* at 253–56. The court also rejected the University officials' contention that the ultra vires claims are not ripe unless and until S.O.'s degree is revoked. *Id.* at 256–58.[8] Justice Kelly again dissented, opining that the System's Board of Regents "has the authority to revoke a former student's degree for academic dishonesty so long as, as relevant here, it affords due process under the United States Constitution and due course of law under the Texas Constitution." *Id.* at 260–61 (Kelly, J., dissenting). The dissent also agreed with the University officials that S.O.'s claims regarding the officials' authority to revoke her degree are unripe. *Id.* at 261.

We granted the University officials' petitions for review in both 20-0811 and 20-0812 and consolidated

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[8] S.O. argued on cross-appeal that the trial court abused its discretion in failing to award her attorney's fees and erred in denying her motion for summary judgment on the two requests for declaratory relief involving whether the 2003 University Catalog was a binding contract with the University and whether the University could enforce against S.O. any disciplinary rules enacted or amended after her graduation. The court of appeals overruled both issues, 613 S.W.3d at 259–60, and S.O. does not seek review of those rulings in this Court. As to the trial court's grant of the University officials' plea to the jurisdiction on S.O.'s constitutional claims, S.O. did not challenge those portions of the trial court's judgment in the court of appeals, which recognized that the constitutional claims were not before it. Id. at 252 n.5.

the cases for oral argument.

II. Ultra Vires Framework

Although sovereign immunity generally bars lawsuits against state officials acting in their official capacities, the doctrine does not apply to suits seeking to require such officials to comply with the law. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). To maintain an ultra vires suit, the claimant must "allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Id.* On meeting that burden, the claimant is entitled to "prospective injunctive relief, as measured from the date of injunction." *Id.* at 376. Retrospective relief, however, remains barred by immunity absent a legislative waiver. *Id.* at 376–77. Whether a claimant has alleged a valid ultra vires claim is a question of law that we review de novo. *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 929 (Tex. 2010).

III. Statutory Authority

The University officials, as officials of the Texas State University System and Texas State University (20-0812) and of The University of Texas System and The University of Texas at Austin (20-0811), derive their "legal authority" from the statutes establishing and governing the Systems and their component institutions. The Systems in turn may exercise "powers that the Texas Legislature has expressly conferred upon [them] and those implied powers that are reasonably necessary to carry out [their] statutory

duties." *Tex. State Bd. of Exam'rs of Marriage & Fam. Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 33 (Tex. 2017) (generally describing the scope of a state administrative agency's authority). Relatedly, they may adopt rules that "are authorized by and consistent with [their] statutory authority." *Id.* (citations omitted). However, they may not "erect and exercise . . . a new and additional power or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes." *Pub. Util. Comm'n of Tex. v. GTE-Sw., Inc.*, 901 S.W.2d 401, 407 (Tex. 1995).

A. Governing Statutes and Board Rules

The Texas Education Code grants expansive authority to public institutions of higher education and their governing boards to manage their affairs and meet their educational obligations. Generally speaking, a governing board "is expected to preserve institutional independence," "shall enhance the public image of each institution under its governance," and "shall nurture each institution under its governance to the end that each institution achieves its full potential within its role and mission." TEX. EDUC. CODE § 51.352(a)(1), (2), (4). Further, "each institution of higher education has the general responsibility to serve the public and, within the institution's role and mission to," among other things, "provide for scientific, engineering, medical, and other academic research;" "protect intellectual exploration and academic freedom;" and "strive for intellectual excellence." *Id.* § 51.354(4)–(6).

Other statutes apply to specific university systems and their respective component institutions. Relevant here, the Education Code vests the "organization, control, and management" of the Texas State University System in a nine-member Board of Regents. *Id.* § 95.01. The Texas State Board "is responsible for the general control and management of the universities in the system and may erect, equip, and repair buildings; purchase libraries, furniture, apparatus, fuel, and other necessary supplies; employ and discharge . . . employees; fix the salaries of the persons employed; and perform such other acts as in the judgment of the board contribute to the development of the universities in the system or the welfare of their students." *Id.* § 95.21(a). In carrying out that responsibility, the Board may "promulgate and enforce such rules, regulations, and orders for the operation, control, and management of the university system and its institutions as the board may deem either necessary or desirable." *Id.* § 95.21(b). Among other powers, the Board "may determine the conditions on which students may be admitted to the universities, the grades of certificates issued, the conditions for the award of certificates and diplomas, and the authority by which certificates and diplomas are signed." *Id.* § 95.24.

Similarly, the Education Code vests the government of the UT System in a nine-member Board of Regents. *Id.* § 65.11. The UT Board "is authorized and directed to govern, operate, support, and maintain each of the [System's] component institutions"; "to prescribe for each of the component institutions courses and programs leading to such degrees as are

customarily offered in outstanding American universities"; and "to award all such degrees." *Id.* § 65.31(a)–(b). In carrying out those responsibilities, the Board may "promulgate and enforce such other rules and regulations for the operation, control, and management of the university system and the component institutions thereof as the board may deem either necessary or desirable." *Id.* § 65.31(c).

Exercising their authority to delegate a power or duty to a designated agent, *id.* §§ 65.31(g), 95.21(b), the UT and Texas State Boards adopted rules relevant to these proceedings. The Texas State System's rules delegate to the president of each component institution "authority to grant degrees, certificates and diplomas upon the recommendation of the respective faculty, deans, and provosts." Tex. State Univ. Sys., *Rules and Regulations*, ch. 1, ¶ 2.41 (amended 2019). The rules also expressly govern degree revocation in cases of "fraud, mistake, or academic dishonesty":

> Revocation. The Board hereby provides notice that the granting of any degrees, certificates or diplomas is specifically conditioned upon the truth of representations made by the student in the admission process and also upon honesty in completion of his or her academic work. When the Board determines that a degree, certificate, diploma, or admission to the institution and/or the academic program was obtained through fraud, mistake, or academic dishonesty, the Board may

> revoke the degree, certificate, or diploma, provided the Component has afforded the degree, certificate, or diploma recipient due process of law.

Id. ¶ 2.42 (amended 2019).[9]

The UT System's rules direct each of the System's component institutions to adopt rules and regulations governing student conduct and discipline in accordance with a model policy. *See* Univ. of Tex. Sys., *Rules and Regulations of the Board of Regents, Rule 50101: Student Conduct and Discipline* (amended 2017). The University adopted such rules, which include detailed provisions governing student disciplinary proceedings. One of the authorized disciplinary sanctions is "revocation of degree or withdrawal of diploma," which "may be imposed when the violation involves academic dishonesty or otherwise calls into question the integrity of the work required for the degree."[10]

B. Analysis

In concluding that the above-described statutes

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[9] At the time of the administrative proceedings against K.E., the pertinent rules were numbered 2.31 and 2.32, but they were substantively identical to the rules currently in effect.

[10] The rules in effect when S.O. enrolled in 2003 and those in effect when the investigation commenced in 2013 contain essentially identical language with respect to degree revocation.

do not authorize the Boards to revoke a former student's degree, the court of appeals first held in *K.E.* that Section 95.21's broad grant of authority with respect to "the operation, control, and management" of the Texas State System and its component institutions, construed in and limited by its context, concerns "the day to day operations of the university and the management of its personnel" and thus does not encompass degree-revocation power. 613 S.W.3d at 228–29. Similarly, in *S.O.*, the court of appeals noted that the statute authorizing the UT Board to adopt rules for "the operation, control, and management" of the System and its component institutions "says nothing about the board's authority to discipline a former student." 613 S.W.3d at 253–54. In both cases, the court further rejected the argument that the power to revoke a degree may be implied from the express power to award one, holding that the former is not necessary to accomplish the latter. *Id.* at 255–56; 613 S.W.3d at 230. In so holding, the court of appeals in *K.E.* found persuasive that "the power claimed to be implied necessarily raises . . . substantial constitutional questions regarding due process." 613 S.W.3d at 230.

As an initial matter, we find it helpful to make two clarifying points. First, the court of appeals, as well as K.E. and S.O., conflates to some extent what we view as two independent inquiries. The first is the issue before us—whether the Boards have statutory authority to revoke a previously conferred degree. If so, the second is whether the Boards must afford the former student due process in doing so. But the answer to the latter inquiry has no bearing on the answer to

the former.[11] Indeed, there is no real dispute that K.E. and S.O. were entitled to due process under our precedent.[12] In *University of Texas Medical School v. Than*, we held that the stigma associated with a medical student's dismissal for academic dishonesty implicated a protected liberty interest "that must be afforded procedural due process." 901 S.W.2d 926, 930 (Tex. 1995).[13] A University graduate confronting revocation of her degree for academic misconduct faces similar reputational harm and negative effects on her ability to practice her chosen profession. And although K.E. claims the University's disciplinary procedures failed to satisfy due process, she also asserts the officials lacked authority to revoke her degree regardless of how much process she received. In sum, whether a former student has a constitutionally protected interest in her degree is relevant not to the existence of a university's statutory authority to revoke that degree but to whether the student was presented sufficient notice and opportunity to be heard before that authority was exercised. *See id.* at 931

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[11] The dissent similarly focuses on a university degree as intangible property belonging to the recipient. *Post* at 6–7 (Blacklock, J., dissenting). That is certainly relevant to the due-process inquiry, but not the statutory-authority inquiry.

[12] In addition, the Texas State Board rule addressing degree revocation expressly requires due process.

[13] By contrast, we have held that a graduate student's dismissal from a state university for *academic* reasons does not carry sufficient stigma to impair a protected liberty interest under the Texas Constitution. *Tex. S. Univ. v. Villareal*, 620 S.W.3d 899, 907 (Tex. 2021).

(holding that, in light of all the surrounding circumstances, the student's due-course-of-law rights were violated by his exclusion from a portion of the evidentiary proceedings against him).

Second, although the effect of K.E.'s and S.O.'s status as former students to whom the Universities had already conferred degrees—as opposed to current students facing expulsion—is at the heart of the parties' dispute, the University officials rely solely on events that transpired while K.E. and S.O. were students in pursuit of their respective degrees as the basis for revoking those degrees. The University officials do not claim, and for good reason, that they may take such action against K.E., S.O., or any other former student based on conduct occurring after a degree is conferred. Instead, they argue that they may rescind a degree upon determining that it was not earned— and thus should not have been awarded—in the first place. We thus consider only whether the University officials may revoke the degrees of former students who are found to have engaged in academic misconduct while enrolled at the Universities. We hold that they have authority to do so.

As the parties agree, the statutes governing the Systems make no express mention of degree revocation. But they do task the Texas State Board with "the general control and management of the universities in the system," empower the Board to "perform such other acts as in the judgment of the board contribute to the development of the universities in the system or the welfare of their students," and authorize the Board to "determine . . . the conditions

for the award of certificates and diplomas." TEX. EDUC. CODE §§ 95.21, .24. Similarly, the statutes authorize the UT Board to "govern, operate, support, and maintain each of the [System's] component institutions"; to prescribe the courses and programs leading to various degrees; and "to award all such degrees." *Id.* § 65.31(a)–(b). And each Board may "promulgate and enforce such rules, regulations, and orders for the operation, control, and management of the university system and its institutions as the board may deem either necessary or desirable." *Id.* § 95.21; *see also id.* § 65.31(c). The language of these provisions, like provisions discussing the powers and duties of other public university systems' governing boards, is expansive and lacking in detail, leaving it to the systems and component institutions to fill in the gaps. *Cf. Pruett v. Harris Cnty. Bail Bond Bd.*, 249 S.W.3d 447, 453 (Tex. 2008) ("When a statute expressly authorizes an agency to regulate an industry, it implies the authority to promulgate rules and regulations necessary to accomplish that purpose."). And as the dissenting justice in the court of appeals noted in *K.E.*, the "heart" of that broad power involves the University's authority to make academic decisions. 613 S.W.3d at 236 (Kelly, J., dissenting).

To that end, the University officials unquestionably and undisputedly have authority under these provisions to enact disciplinary rules and policies regarding academic misconduct and to conclude, upon providing sufficient process, that students who have engaged in such misconduct should be expelled because they do not meet the requisite conditions for the award of a degree. *See Than*, 901

S.W.2d at 929; *Foley v. Benedict*, 55 S.W.2d 805, 809 (Tex. [Comm'n Op.] 1932) ("A student who is admitted to the University receives the privilege of attending that institution subject to the reasonable rules and regulations promulgated by the board of regents and existing at the time of his entrance into the school."). And the only difference between expelling a current student for academic misconduct and revoking the degree of a former student for the exact same academic misconduct is one of timing. That distinction is immaterial to the issue presented and erroneously hinges the university's bare authority to address its students' academic misconduct on when that misconduct is discovered.

Indeed, if timing were as significant as K.E. and S.O. suggest, we struggle to determine when a university passes the point of no return. Is it at the graduation ceremony? When the diploma memorializing the conferral of the degree is printed? When the last box is checked on an administrative form indicating that all requirements have been satisfied? When a doctoral student completes the defense of her dissertation? A degree is not merely a piece of paper; it is a "university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards." *Waliga v. Bd. of Trs. of Kent State Univ.*, 488 N.E.2d 850, 852 (Ohio 1986); *see also Doe v. Salisbury Univ.*, 107 F. Supp. 3d 481, 492 (D. Md. 2015) ("When a school confers credentials, the school places its imprimatur on a student; degrees and credits are a school's implicit endorsement of someone's academic qualifications and personal

character, whether they be a current or former student."). Here, the Texas State University officials concluded that K.E. engaged in academic misconduct in pursuit of her degree, such that she did not in fact meet the necessary conditions to be awarded that degree and thus is not entitled to a certification that she did. Their authority to do so, like the authority of the UT officials to make that determination as to S.O. depending on the outcome of the proceedings, fits comfortably within the governing statutes.[14]

While precedent on the specific issue presented is nonexistent in Texas and sparse elsewhere, courts applying similarly worded grants of authority have uniformly determined that public universities have degree-revocation power.[15] For example, in *Waliga*, the

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[14] The University officials argue that the Board rules, which we have held carry "the same force as an 'enactment of legislature,'" confer authority on the University to revoke a degree independently of the governing statutes. *Hall v. McRaven*, 508 S.W.3d 232, 235 (Tex. 2017) (quoting *Univ. of Hous. v. Barth*, 403 S.W.3d 851, 855 (Tex. 2013)). We disagree. The Board cannot by rule grant a power to itself that is outside the authority conferred on the Board by the Legislature.

[15] The dissent finds it telling that the first published opinion specifically addressing this issue was decided relatively recently, in 1986. *See post* at 14 (Blacklock, J., dissenting) ("1986 seems a strange starting point for judicial analysis of the 'traditional and time-honored role' of the governing boards of universities."). Of course, courts had no reason to opine on whether universities have degree-revocation power until lawsuits were filed alleging that they do not. Other sources indicate that degree revocation by public universities, based on conduct occurring while the recipient was a student but not discovered

Ohio Supreme Court considered whether Kent State University, through its board of trustees, could "revoke improperly awarded degrees" in light of universities' statutory authority to "confer" degrees and "do all things necessary for the proper maintenance and successful and continuous operation of such universities." 488 N.E.2d at 851–52. Holding that the university could do so "where (1) good cause such as fraud, deceit, or error is shown, and (2) the degree-holder is afforded a fair hearing at which he can present evidence and protect his interest," the court concluded that "[t]he power to confer degrees necessarily implies the power to revoke degrees erroneously granted." *Id.* at 852.

Other courts have followed suit. The United States District Court for the Western District of Virginia, applying Virginia law, held that "[b]ecause degree revocation is reasonably necessary to effectuate the Board's [express] power to confer degrees and to regulate student discipline, that power must be implied, giving the Board the authority to revoke a degree for good cause and after due process." *Goodreau*

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until later, is nothing new. *See* Tex. Att'y Gen. Op. ORD-477, at 3–5 (1987) (addressing requests by the UT System, the Texas A&M University System, and Texas Tech University for an opinion on whether the Open Records Act shielded the identity of individuals whose degrees had been rescinded since January 1, 1977); *Crook v. Baker*, 813 F.2d 88, 91 & n.2 (6th Cir. 1987) (expressing "surprise[] at the dearth of case law dealing with . . . the question whether court action is necessary [to rescind the grant of a degree]" and noting the university's contention "that the record shows that the University of Michigan and many other universities have in fact rescinded the grant of degrees").

v. Rector & Visitors of Univ. of Va., 116 F. Supp. 2d 694, 703 (W.D. Va. 2000). The Supreme Court of North Dakota, applying a state constitutional provision granting the State Board of Higher Education "full authority to control and administer the State's higher education institutions," explained that with such authority "comes the authority to award academic degrees," which in turn "naturally comes with the implied authority to revoke an improperly awarded degree upon good cause and a fair hearing." *Brown v. State ex rel. State Bd. of Higher Educ.*, 711 N.W.2d 194, 198 (N.D. 2006). Courts applying New Mexico law, Maryland law, Michigan law, and Tennessee law have reached similar conclusions. *See Hand v. Matchett*, 957 F.2d 791, 794 (10th Cir. 1992) (applying New Mexico law) (holding that implicit in the New Mexico State University Board of Regents' power to confer degrees "must be the authority to revoke degrees"); *Doe*, 107 F. Supp. 3d at 492 (applying Maryland law) ("Schools hold an implied power to control school records and to revoke credentials conferred upon students . . . where such actions are in response to a former student's conduct that occurred during the student's enrollment, and as long as the school acts with good cause and after due process."); *Crook v. Baker*, 813 F.2d 88, 91–92 (6th Cir. 1987) (applying Michigan law) (citing *Waliga* and holding that the University of Michigan's Board of Regents, which has "general supervision" of the university under the Michigan Constitution, has the power to rescind the grant of a degree); *Faulkner v. Univ. of Tenn.*, No. 01-A-01-9405-CH00237, 1994 WL 642765, at *5 (Tenn. Ct. App. Nov. 16, 1994).

The court of appeals here deemed these cases inapposite in light of "jurisprudential differences in interpreting agency authority." 613 S.W.3d at 230–31 (noting that under Ohio law, as stated in *Waliga*, a power of a state agency may be implied from an express power "where it is reasonably related to the duties of an agency"); 613 S.W.3d at 255–56 (same). We nevertheless find them persuasive for several reasons.

First, the court of appeals went a step too far in describing Texas law regarding agency authority, concluding that a power may not be implied unless in its absence an express grant of authority "will itself be *defeated*." 613 S.W.3d at 230; *see also* 613 S.W.3d at 255. We have never endorsed such a standard; rather, as discussed, an agency has those "implied powers that are reasonably necessary to carry out its statutory duties." *Tex. State Bd. of Exam'rs of Marriage & Fam. Therapists*, 511 S.W.3d at 33. Further, the breadth of the constitutional and statutory grants of power to universities is remarkably similar among the states whose courts have addressed degree revocation. And those courts are united in the conclusion, as well as the reasoning behind it, that the power to revoke a degree for academic misconduct "naturally comes from," *Brown*, 711 N.W.2d at 198, is "necessarily implie[d by]," *Waliga*, 488 N.E.2d at 852, is "[i]mplicit in" and "a necessary corollary to," *Hand*, 957 F.2d at 794–95, or is "reasonably necessary to effectuate" the express power to grant one, *Goodreau*, 116 F. Supp. 2d

at 703.[16]

In the absence of supporting case law, K.E. and S.O. cite a 1969 Texas Attorney General opinion addressing whether the UT Board had authority to "declare null and void" a previously conferred Ph.D. in the face of findings that the graduate's dissertation was, among other things, "mainly plagiarism." Tex. Att'y Gen. Op. No. M-466, at 1–2 (1969). The Attorney General concluded that because the Legislature did not expressly "prescribe an administrative procedure whereby degrees awarded students may be cancelled or rescinded by the administrative board," a degree "can only be set aside or annulled by a Court of competent jurisdiction." *Id.* at 9. Attorney General opinions are persuasive, but not controlling, *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996), and we disagree with the opinion's analysis for several reasons.

First, the Attorney General referenced the statutory provision granting the board authority to confer degrees and grant diplomas but said nothing

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[16] The dissent deems such cases unpersuasive for a different reason than the court of appeals: some of them cite a 1723 decision of the Court of King's Bench—erroneously, in the dissent's view—to buttress their conclusion. *See, e.g.*, *Waliga*, 488 N.E.2d at 852 (discussing *The King v. Univ. of Cambridge (Bentley's Case)* (K.B.1723), 8 Modern Rep. (Select Cases) 148). *Bentley's Case* is irrelevant to the courts' primary conclusion that the constitutional and statutory provisions governing public universities give rise to the implied authority to revoke an unearned degree. *See, e.g.*, *id.*; *Crook*, 813 F.2d at 91; *Brown*, 711 N.W.2d at 198; *Hand*, 957 F.2d at 794–95.

about the provision broadly authorizing the board to "enact such by-laws, rules and regulations as may be necessary for the successful management and government of the University." *See* Act approved Apr. 23, 1895, 24th Leg., R.S., ch. 111, § 1, 1895 Tex. Gen. Laws 169, 169, *reprinted in* 10 H.P.N. Gammel's *The Laws of Texas 1822–1897*, at 899 (Austin, Gammel Book Co. 1898) (amended and recodified 1971). Second, the opinion relies on an at-best outdated view of a state agency's implied authority, concluding that the board could not have implied authority to annul a degree once conferred because the Legislature did not impose a "mandatory duty" to confer a particular degree in the first place. *See Corzelius v. R.R. Comm'n*, 182 S.W.2d 412, 415 (Tex. App.—Austin 1944, no writ). To the extent some cases contain language indicating that agency authority may be implied if reasonably necessary to fulfill an express statutory *duty* but not an express statutory *power*, it is by now well settled that an agency has those powers "necessarily implied from the statutory authority conferred *or* duties imposed." *Student Hous. Auth. v. Brazos Cnty. Appraisal Dist.*, 460 S.W.3d 137, 143 (Tex. 2015) (emphases added); *see also Stauffer v. City of San Antonio*, 344 S.W.2d 158, 160 (Tex. 1961). The Attorney General's erroneous distinction between duties and discretionary powers in this context significantly impacted its analysis.

Further, the Attorney General's conclusion that a "[c]ourt of competent jurisdiction" is the only appropriate forum for revocation of a degree is inconsistent with our recognition that "[j]udicial interposition in the disciplinary decisions of state

supported schools raises problems requiring care and restraint." *Than*, 901 S.W.2d at 931 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). The need for such restraint is particularly acute when those disciplinary decisions involve the exercise of academic judgment. *Villareal*, 620 S.W.3d at 907 (noting that "courts are ill equipped to evaluate the academic judgment of professors and universities").[17] The Attorney General opinion also ignores the fact that conferring a degree amounts to a *continuing* certification regarding the recipient's fulfillment of the university's requirements. That characteristic distinguishes revocation of a degree from rescission of other transactions requiring court intervention, like a sale of property. *Crook*, 813 F.2d at 93. Overall, we are unpersuaded by the Attorney General opinion's reasoning.[18]

In sum, we hold that the Boards' broad statutory authority to govern and administer the

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[17] While not dispositive, the practical realities of the avenue championed by the Attorney General opinion and the dissent cannot be ignored. The result would effectively be that when a university concludes a former student procured a degree by academic dishonesty—and thereby did not in fact earn the degree—the university would have to file a lawsuit against the former student for cheating.

[18] As the University officials note, the Attorney General opinion concludes by stating that a university may still "tak[e] the legal position that by reason of the alleged fraud it will no longer recognize the degree in question and insofar as it is concerned has cancelled the same." M-466, at 9. The dissent appears to agree. *See post* at 9 n.3 (Blacklock, J., dissenting).

Systems and their component institutions, to determine the conditions for the award of degrees, and to award degrees necessarily encompasses the authority to determine that a student did not meet those conditions, and thus did not in fact earn a degree, because of academic misconduct. Whether that determination occurs before or after a degree has been formally conferred is immaterial so long as the underlying conduct occurred during the student's tenure at the university and due process is provided.[19]

IV. Prospective vs. Retrospective Relief in 20-0812

Notwithstanding our conclusion that the University officials have statutory authority to revoke K.E.'s Ph.D., K.E. further alleges that the disciplinary proceeding she underwent violated her due-process rights.[20] *See Than*, 901 S.W.2d at 929–30. She seeks

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[19] In 20-0811, the University officials also argue that S.O.'s claims should be dismissed as unripe. Because we hold that they are barred by sovereign immunity, we dismiss them for that reason without addressing the ripeness issue.

[20] We note that K.E. has not challenged the revocation decision as unsupported by substantial evidence. As the parties correctly recognize, institutions of higher education are not state agencies under the Administrative Procedure Act, which therefore provides no statutory entitlement to judicial review of those institutions' decisions. TEX. GOV'T CODE § 2001.003(7)(E). However, we have recognized an "inherent right of appeal" in narrow circumstances, such as "[w]hen a vested property right has been adversely affected by the action of an administrative body so as to invoke the protection of due process." *Brazosport Sav. & Loan Ass'n v. Am. Sav. & Loan Ass'n*, 342 S.W.2d 747, 750 (Tex.

injunctive relief ordering the University officials to reinstate her degree and "remove any notation that states or suggests [her] degree was revoked." The University officials argue that these claims remain barred by sovereign immunity because K.E. seeks only "backwards-looking" retrospective relief to rectify an "already-complete governmental action." We disagree.

It is true that ultra vires claimants "may seek only prospective injunctive remedies." *Chambers–Liberty Cntys. Navigation Dist. v. State*, 575 S.W.3d 339, 348 (Tex. 2019) (citing *Heinrich*, 248 S.W.3d at 369). But that is exactly what K.E. seeks. She asserts that the University officials acted ultra vires in revoking her Ph.D. without providing due process and requests restoration of her degree on a forward-looking basis. If she succeeds on that claim,[21] she is entitled to such relief. Indeed, the University

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1961). We explained in *Brazosport* that such a right includes the opportunity to prove that the agency's "action was illegal or without support in substantial evidence." *Id.* at 752; *see also Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 566 (Tex. 2000) (explaining that a substantial-evidence review is limited to determining whether "more than a mere scintilla" of evidence supports the agency's determination). Whether K.E. may pursue an ultra vires claim premised on a lack of substantial evidence to support the revocation decision, and the proper outcome of such a review, is not before us.

[21] The University officials do not argue in this Court that the dueprocess claim is facially invalid. *See Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015) (noting that "immunity from suit is not waived if the constitutional claims are facially invalid"). We express no opinion on the merits of the claim.

officials' position on this issue is troublingly inconsistent with the arguments they make regarding their authority to revoke K.E.'s degree in the first place. As discussed, we agree with the University officials that academic degrees "are a university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards." *Waliga*, 488 N.E.2d at 852. That "certification" is not an isolated event but a continuing one. Just as a university need not continue making a false certification "to the world at large" that a recipient earned a degree when she in fact did not, it may not continue making a certification that a recipient did *not* earn a degree when that conclusion has not been made in accordance with the law.

Our opinion in *Than*, in which we held that a medical student "was not afforded adequate procedural due process before his expulsion" for cheating on an exam, supports this conclusion. 901 S.W.2d at 929. There, we affirmed a permanent injunction ordering that, pending a new hearing on the charge of academic dishonesty, the university remove from the student's transcript the "F" grade he received in the class and remove from his records "the penalty of expulsion." *Id.* at 934. Similarly here, if the trial court determines that K.E. was not afforded adequate procedural due process before the University officials revoked her degree, an injunction ordering the degree reinstated and the penalty removed from her records pending a new hearing would be appropriate. *See id.*

V. Remaining Claims

As discussed, in 20-0811 the trial court denied the University officials' plea to the jurisdiction as to the declaratory-judgment claims regarding the officials' authority to revoke S.O.'s degree—and granted summary judgment for S.O. on those claims—but the court granted the jurisdictional plea as to S.O.'s other claims. The court of appeals affirmed the order as to the subset of claims that S.O. appealed, and S.O. does not seek review of those rulings here. Accordingly, no claims remain to remand to the trial court. In the event that the University officials pursue disciplinary proceedings against S.O. and ultimately decide to revoke her degree, S.O. may seek judicial relief at that time if she believes she was not afforded due process. *See id.* at 930 (holding that the stigma associated with a medical student's dismissal for academic dishonesty implicated a protected liberty interest "that must be afforded procedural due process").

In 20-0812, however, the trial court denied the University officials' plea to the jurisdiction in its entirety, and the court of appeals affirmed. Because we have held that K.E. seeks prospective relief with respect to her due-process claims and the University officials offer no other basis in this Court to disturb the court of appeals' judgment as to those claims, they remain pending and must be remanded for further proceedings.

VI. Conclusion

We hold that the University officials have statutory authority to revoke the degree of a former

student for engaging in academic misconduct while a student at the University. K.E.'s and S.O.'s claims for declaratory relief to the contrary are thus barred by sovereign immunity. Accordingly, we reverse the court of appeals' judgments with respect to those claims and dismiss them for lack of jurisdiction. In 20-0812, we affirm the court of appeals' judgment with respect to K.E.'s due-process claims and remand the case to the trial court for further proceedings.

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Debra H. Lehrmann
Justice

OPINION DELIVERED: March 31, 2023

Supreme Court of Texas

No. 20-0811

University of Texas at Austin President Jay Hartzell, et al.,
Petitioners,

v.

S.O.,
Respondent

On Petition for Review from the
Court of Appeals for the Third District of Texas

~ *consolidated for oral argument with* ~

No. 20-0812

Texas State University President Denise M. Trauth, et al.,
Petitioners,

v.

K.E.,
Respondent

On Petition for Review from the
Court of Appeals for the Third District of Texas

JUSTICE BOYD, concurring.

The dissenting opinion correctly observes that two questions are "essential to a proper understanding of the issue"these cases present: "first, what is a college degree? And second, what does it mean to revoke a degree? "Post at ___. The dissenting opinion also correctly answers the first question: a college degree is "in some ways property," it is "intangible property held by the graduate as the fruit of a bilateral transaction with the university," and it "change[s] hands" when it is conferred, and thereafter belongs to one who receives it. *Post* at ___.

But the proper resolution of these ultra-vires claims ultimately depends on the second question. The Court's majority and dissenting opinions appear to disagree over what it means to "evoke" a degree, probably because "evoke" could refer to many different actions a university could take. *See Revoke*, Black's Law Dictionary (11th ed. 2019) (defining "revoke"to mean to "annul or make void by taking back or recalling," to "cancel, rescind, repeal, or reverse," or to "recant". To resolve these claims, however, we need not explore all the possible meanings of "revoke." Instead, we need only consider what the universities actually did or expressed an intent to do and decide whether they had the authority to do it. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009) (explaining that an ultra-vires claim must "allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act".

In S.O.'s case, we know only that the University of Texas informed S.O. that it intended to hold a disciplinary hearing to decide whether she had

violated university rules and that S.O. filed this suit in response seeking a declaration that the university lacks authority to "revoke" her degree. We don't know what the university would have done (or would have asserted the right to do) if it had concluded that S.O. violated university rules or decided to "evoke"her degree. We do know the answer to that question in K.E.'s case: after the Texas State University board ordered its president to "revoke" K.E.'s degree, the president took three discrete actions: (1) she placed a notation on K.E.'s transcript that the University had revoked her degree; (2) she requested that K.E. no longer represent that she holds the degree; and (3) she requested that K.E. return her diploma.

Whatever it may mean to "revoke" a degree, the universities possess authority to take the three actions Texas State took in K.E.'s case. Even the dissenting Justices agree that the universities possess unilateral authority "to add a notation to a student's file or transcript—documents within the university's control—indicating a finding of fraud or deceit in the achievement of the degree." *Post* at ___ n.3. And no one disputes that the universities have authority to request that K.E. return her diploma and no longer represent that she holds the degree. What they likely do not possess is unilateral authority to physically take her diploma or force her to stop making such representations.

Perhaps the university could ask a court to order K.E. to comply with the University's requests, perhaps K.E. could ask a court to order the university to set aside any finding of a disciplinary violation, or

perhaps K.E. could ask a court to declare that the university' placement of a notation in her file declaring her degree void has no legal effect. Or perhaps sovereign immunity or another defense would bar one or more of those claims.

In their current posture, however, these cases don' present those issues. See *Post* at ___ n.3. For present purposes, we need only decide whether the universities acted ultra vires by scheduling a disciplinary hearing to decide whether S.O. violated university rules, noting on K.E.'s transcript that her degree had been revoked, and requesting that K.E. return her diploma and no longer represent that she holds the degree. Because the universities had authority to take those actions, I agree with the Court that S.O. and K.E. have failed to allege valid ultra-vires claims.

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Jeffrey S. Boyd
Justice

OPINION FILED: March 31, 2023

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No. 20-0811

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On Petition for Review from the
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JUSTICE BLACKLOCK, joined by JUSTICE DEVINE, dissenting.

According to a diploma on the wall in my office, "The University of Texas at Austin has conferred on [me] the degree of Bachelor of Arts . . . and all the rights and privileges thereto appertaining." My diploma certifies a historical fact: My degree was "issued by the Board of Regents upon recommendation of the faculty," and it was "awarded on this eighteenth day of May, 2002." Like millions of other Texans, my college degree made possible most of what I have since done in my professional life. I can hardly begin to calculate its value.

This precious asset was "conferred on" me and "awarded" to me on a particular date, in exchange for my completion of the University's requirements and, of course, my payment of tuition. By memorializing that the University has "conferred" the degree on me and "awarded" the degree to me, my diploma demonstrates something very simple—and I would have thought unremarkable—about the nature of my degree: It is mine. It belongs to me, not to the University, and like other valuable assets in my possession, it cannot unilaterally be taken from me by those who later decide I never should have had it. Our Constitution establishes courts, not universities, to adjudicate disputes about ownership and possession of property.

Many will be surprised to learn from the Court's decision that they hold their college degrees not permanently, as their own property, but contingently, only so long as their alma maters continue to believe they should have received them. I would have thought that after I graduated and left the University of Texas, the school retained no authority whatsoever over me or

my property. I can find no such power over the rights of graduates mentioned in the voluminous Texas statutes governing universities. Universities certainly have abundant statutory authority to manage their own *internal* affairs, but they have no power to manage the affairs of their graduates. If the Legislature wanted state universities to possess the extraordinary power to unilaterally adjudicate the rights of graduates, surely it would say so. It has not.

The power to decide whether a holder of property must return it to the grantor is quintessentially a judicial power. Universities are not judicial agencies. Modern universities routinely set up internal tribunals that mimic some of the trappings of courts, with varying degrees of fidelity, but these proceedings can impact only the rights of people subject to the university's internal jurisdiction—such as students, faculty, and staff. These mock trials are a way for universities to provide a semblance of due process as part of their executive-branch management of the university's internal affairs. Adjudicating the legal rights of people in the outside world is an entirely different matter. Nothing in Texas law confers such a power on state universities.

The Court suggests that overwhelming precedent from other states favors its conclusion that revoking degrees held by graduates is a necessary part of the internal management of a university. It is true that several such cases exist, but the foundation of all of them is a 1986 Ohio case that does not engage deeply with the nature of college degrees or the character of a graduate's property right in a degree.

Waliga v. Bd. of Trs. of Kent State Univ., 488 N.E.2d 850 (Ohio 1986). The Ohio case, in turn, relies on an English case from the year 1723. *King v. Cambridge Univ. (Bentley's Case)* (1723) 92 Eng. Rep. 818; 2 Ld. Raym. 1334; 8 Mod. Rep. (Select Cases) 148. In truth, the Ohio case relies on one sentence—plucked out of context—from the English case. As demonstrated below, *Bentley's Case* from the King's Bench has much to teach us about the nature of university degrees under the common law and about the traditional processes by which degrees could be revoked. But the lessons of *Bentley's Case* undermine, rather than support, the Court's conclusion that a modern university's power of self-governance includes the unilateral authority to revoke the degrees of its graduates.

The only resource in Texas legal history bearing on the question presented is a 1969 Attorney General Opinion, with which I largely agree. Tex. Att'y Gen. Op. No. M-466 (1969). The Attorney General Opinion concludes that a state university wishing to rescind a graduate's degree must do what any other regretful grantor of property must do to rescind the grant. It must ask a court to require the property's return. That is correct. A party seeking rescission of someone else's property is quite obviously not managing its own internal affairs. It is seeking to manage the affairs of the party resisting its claims, and for this it typically needs the judicial power of a court. Nor is it exercising a power that flows naturally from the power to confer the property in the first place. The power to bestow something of value on another normally does not entail the power to unilaterally take it back. This kind of

"self-help" remedy is rarely found in the law. It is so rare that I would expect it to be stated clearly in the governing statutes if the Legislature indeed gave it to universities.

Whether the separation of powers would permit the Legislature to bestow the essentially judicial function of degree revocation on a university is itself an interesting question. The only question before the Court, however, is whether the Texas Legislature has done so. I see nothing in the governing statutes that would authorize a state university to unilaterally determine the legal rights of graduates who have no ongoing affiliation with the school. I therefore respectfully dissent.

I.

The parties do not engage deeply with two questions I find essential to a proper understanding of these cases. First, what is a college degree? And second, what does it mean to revoke one? All involved seem to agree that a degree is, at least in some limited sense, the property of the degree holder. The parties offer little argument about the nature of the thing over which they are fighting. Both the universities and the Court acknowledge that a degree is in some ways property, to which some unspecified degree of due-process protection attaches. *Ante* at 17 n.11, 28 n.20. But elsewhere, the Court says that a degree is merely the "university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards." *Ante* at 21 (quoting *Waliga*, 488 N.E.2d at 852). If a degree is merely the

"university's certification to the world"— essentially the university's speech rather than the graduate's property—then I would agree that whether the degree persists is a question within the university's control. After all, it is up to the university to decide what it will certify and what it will not certify.

I cannot join this line of reasoning, however, because I doubt that a degree is merely the "university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards." This strikes me as an apt definition of a *diploma*, but it does not adequately capture the nature of the intangible asset that the diploma says now belongs to the graduate—the degree itself. My diploma certifies to the world that I have fulfilled the institution's standards. It further certifies that, because I have done so, I now possess a degree. While the diploma is the University's certification that I have earned the degree, the degree itself is much more. As I see it, the degree is intangible property held by the graduate as the fruit of a bilateral transaction with the university. After the degree is conferred, the transaction has been consummated and the property has changed hands. Graduates then possess their degrees as a species of property, in a way that they could never possess the university's ongoing "certification."

But even if we think of a degree as a "continuing certification regarding the recipient's fulfillment of the university's requirements," as the Court does, *ante* at 21, it is at most a continuing certification that the recipient was *found* to have fulfilled the requirements

at the appointed time. As my diploma reflects, the University certified that, on the recommendation of the faculty, a degree was conferred on me on a particular date. That will always be true. The faculty may later come to regret their recommendation, and the University may later decide my degree was awarded in error, but that does not change the truth of the certification stated on my diploma.

In any event, it is my diploma—not my degree—that "certifies" my fulfillment of the University's requirements. I see no basis—other than *ipse dixit* from foreign jurisdictions—for the Court's view that a college degree is, at bottom, merely a continuing certification by the university that the degree *should have* been awarded. Adopting such an impoverished understanding of the nature of these degrees—these precious credentials for which we pay so much and work so hard—allows the Court to reach the conclusion it reaches. But this paltry conception of a degree is plainly insufficient. My diploma tells me that my degree is much more than the University's certification that I fulfilled its requirements. As my diploma certifies, I now possess something of value—a degree, to which "rights and privileges" appertain, which has been "conferred on" me and "awarded" to me. The degree and the certification of its having been conferred are two different things. My degree is intangible, but it is something of great value that now belongs to me, quite apart from the diploma's certification of the fact of its conferral.[1]

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[1] *Accord Bentley's Case*, 92 Eng. Rep. at 819 (concluding that a degree is "a dignity and a freehold"); *infra* at 18–19.

That is what I take a degree to be. But then what does it mean to revoke a degree?[2] The parties do

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[2] The concurrence would hold that what is really at stake here is not whether a university actually has the authority to revoke degrees, but whether these universities have the authority to take the particular administrative actions they took when attempting to do so: (1) placing a notation on a transcript that the degree has been revoked, (2) requesting that the plaintiffs no longer represent that they hold a degree, and (3) requesting that the plaintiffs return their diplomas. *See ante* at 2 (Boyd, J., concurring). But the plaintiffs do not argue that the universities lacked the power to take these predicate administrative actions designed to accomplish revocation of a degree, such as letter-writing or transcript-notation. Instead, the argument is that the universities lack the power to revoke degrees at all, so there is no administrative action that would accomplish revocation. By analogy, a plaintiff challenging a state agency's administrative action might argue that the agency (1) lacks authority to do the substantive thing its administrative action claims to be doing or (2) lacks authority to take the procedural steps it used to carry out its action. Either would be a valid line of attack, but the claims in this case fit comfortably within the first category. The issue here is not *how* the universities communicate or memorialize their decisions to revoke a degree. The issue is whether the universities have the *power* to revoke degrees at all. The parties' arguments bear this out. *See, e.g.*, 20-0811, Petitioner's Brief on the Merits, at 6 ("The power to revoke an improperly conferred degree likewise fits comfortably within Defendants' academic authority."); 20-0811, Respondent's Brief on the Merits, at 43 ("[T]he Court must affirm that portion of the trial court's judgment declaring that UT Officials lack express and implied authority to revoke a degree."); 20-0812, Petitioner's Brief on the Merits, at 5 ("The power to revoke an improperly conferred degree likewise fits comfortably within the TXST Defendants' academic authority."); *and* 20-0812, Respondent's Brief on the Merits, at 1 ("The central question in this case is whether the Legislature has granted Texas State University any authority over a former student, namely the power to revoke a former student's previously

not say, but I take it to mean the following. To revoke a degree would be to make this statement by the graduate false: "I have a degree from X University." Assume the statement is true unless the degree is revoked. If the degree is revoked—in a way that is legally binding on the graduate—then the statement becomes false. This is not an abstract matter. The ability to state truthfully that "I have a degree from X University" is a very important thing, for which people pay many thousands of dollars and devote years of time and effort. If the statement is rendered false by the legally binding revocation of my degree, then if I continue to say it, I am misleading others and perhaps liable for fraud. If, on the other hand, a university without the authority to revoke my degree merely claims to have done so, the statement is not rendered false. If the university lacks the power to revoke degrees, then I may continue to say I have a degree without misleading others, irrespective of the university's position on the matter.[3]

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conferred degree.").

[3] I do not doubt that state universities have authority to conduct internal investigations into past student conduct and to come to their own conclusions, which are not binding on graduates, about whether previously awarded degrees should have been awarded. This clearly falls within their internal powers of "operation, control, and management [over] the university system." *E.g.*, TEX. EDUC. CODE § 65.31(c). Likewise, a university's powers of internal management would include the power to add a notation to a student's file or transcript—documents within the university's control—indicating a finding of fraud or deceit in the achievement of the degree. Whether a graduate who is the subject of such a finding by a university has recourse to challenge it in court is not a question

II.

With these preliminary questions addressed, I turn to the statutory question presented. The Court finds two places in statute that it believes confer on state universities the power to revoke degrees. The first is the statutory power to *grant* degrees. The second is the universities' general power to manage their internal affairs. Neither supports the authority the Court grants the universities today.

The universities have explicit statutory authority to award degrees. TEX. EDUC. CODE § 65.31(b) (University of Texas); *id*. § 95.24 (Texas State University). Once a degree is awarded, however, does the graduate's possession of the degree remain subject to the universities' oversight? The statutes are silent. Authority to revoke degrees might exist by implication, despite the statutes' silence, but only if the implied power to revoke a degree is "reasonably necessary to carry out" the express power to confer degrees. *Tex. State Bd. of Exam'rs of Marriage & Fam. Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 33 (Tex. 2017).

Surely it is not. The absence of degree-revocation power has no effect on the power to confer degrees. A university is perfectly capable of examining current students, determining their eligibility for

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raised by the cases before this Court. These cases ask only whether state universities have statutory authority to unilaterally revoke the degree itself, which I take to mean the authority to render the graduate a liar if the graduate continues to say "I have a degree" after a university deems the degree revoked.

graduation, and conferring degrees accordingly without the ability to, afterwards, exercise unilateral control over the graduate's continued possession of the degree. As observed above, in most instances the power to confer something of value on another decidedly does *not* carry with it the power to unilaterally dispossess the grantee. One who confers something of value on another does not normally retain the right to act as judge, jury, and executioner in a later dispute about whether the transaction was procured by fraud. When it comes to the transfer of property, the power to grant property and the power to revoke it are more like opposite poles than they are like fellow travelers. It is possible for both powers to belong to one party, but it is in no sense *necessary*— or even likely—that they do.

The Court also finds degree-revocation authority implied within the universities' broad statutory authority to manage their internal affairs. For example, Texas State University is "responsible for the general control and management of the universities in [its] system." TEX. EDUC. CODE § 95.21(a). It may "perform such other acts as in the judgment of the board contribute to the development of the universities in the system or the welfare of their students." *Id.* And its board of trustees has the authority to promulgate rules "for the operation, control, and management of the university system and its institutions as the board may deem either necessary or desirable." *Id.* § 95.21(b).

The University of Texas has similarly broad authority. It may "promulgate and enforce such other

rules and regulations for the operation, control, and management of the university system and the component institutions thereof as the board may deem either necessary or desirable." *Id.* § 65.31(c). It may also "prescribe the number of students that shall be admitted to any course, department, school, college, degree-program, or institution under its governance." *Id.* The governing boards of both schools may "exercise the traditional and time-honored role for such boards as their role has evolved in the United States." *Id.* § 51.352(a). They are further empowered to "enhance the public image of each institution under [their] governance," *id.* § 51.352(a)(2), and "strive for intellectual excellence," *id.* § 51.354(6).

These statutes certainly convey abundant *internal* governing authority. But the moment a university seeks to employ this inward-facing authority to prejudice the legal rights of people outside its internal jurisdiction, our judicial hackles should rise. The power to "control" and "manage" the affairs of a university cannot include the power to control and manage the affairs—or the legal rights—of people or entities outside of the university.

The Court, however, relies heavily on the broadly stated statutory powers vested in the universities, such as the power to "perform such other acts as in the judgment of the board contribute to the development of the universities," to "enhance the public image of each institution," and to promote "the welfare of students." On their face, these powers bestow vast authority on universities to do all kinds of things regardless of the legal rights of outsiders. But

within their context (and in order to be constitutional), these broad grants of authority must carry with them an implied limitation: A university cannot unilaterally adjudicate the legal rights of those outside its internal jurisdiction merely because doing so would "contribute to the development of the university" or "enhance the public image" of the institution. The broad power to act for the university's benefit is, and must be, purely inward facing, purely about matters internal to the university that do not prejudice the legal rights of those in the outside world.

The Court reasons that a university's power of internal management must include the authority to investigate and act upon allegations of academic misconduct. I agree. The Court's mistake, as I see it, is to downplay the difference between expelling a current student for academic misconduct and revoking the degree of a former student for academic misconduct. The Court says the difference should not matter because it is merely "one of timing." *Ante* at 20.[4] Of course, differences of timing—such as statutes of limitation—often make all the difference when the question is how allegations of past wrongdoing may be adjudicated.

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[4] The Court struggles to locate a "point of no return," after which a university may not unilaterally revoke the degree of a former student for conduct that would bar a current student from obtaining a degree. *Ante* at 21. The obvious answer is the date on the diploma. A degree was conferred on the graduate—and thereafter belonged to him as a private citizen outside of the university's jurisdiction—as of that date.

More fundamentally, the difference is not merely one of timing. It is one of power, of jurisdiction. To use familiar judicial parlance, I agree with the Court that a university has *subject-matter jurisdiction* over allegations of academic misconduct. But unlike the Court, I would hold that a university lacks *personal jurisdiction* over its graduates, who take their persons and their legal rights—including their degrees—into an outside world that is entirely beyond the university's reach.

Courts must possess both elements of jurisdiction in order to issue judgments binding on the parties. The same rule should apply here, particularly because the power the universities seek is in many ways judicial. We ought to be very reluctant to adopt any reading of a statute that gives universities jurisdiction to adjudicate the legal rights of people outside the university. The default rule should be that graduates living in the outside world are not subject in any way to the internal-governance powers of their alma maters, and only a clear legislative statement to the contrary should be permitted to change this fundamental limitation on a university's authority, subject to the Constitution. No such legislative statement exists here, and I would not imply one as the Court does. Whether a graduate will continue to possess his degree is no mere question of internal university governance. It is a question of property rights existing in the world outside the university, and Texas law gives state university administrators no

authority to decide such questions.[5]

III.

For further insight, I turn to the same place the Court does— judicial precedent. None of the American cases cited by the universities and the Court pre-date the 1986 Ohio Supreme Court case of *Waliga v. Board of Trustees of Kent State University*. 1986 seems a

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[5] The Court suggests that while state universities have the power to revoke their graduates' degrees, they cannot do so for conduct occurring after graduation. *Ante* at 19. I like this rule, although I fail to see how the rest of the Court's opinion supports it. And even if the offending conduct must have taken place while the graduate was a student, no principle arising from the Court's decision would limit the degree-revocation power to cases of academic fraud. Today's universities enforce elaborate codes of conduct on threat of suspension or expulsion, and it is no startling revelation to observe the unwelcome reality that they often do so in a heated political and ideological environment. The University of Texas labels a number of actions as sanctionable misconduct, including violations of law, unauthorized possession of weapons, use of hazardous substances, theft, hazing, drug use, harassment, stalking, gambling, disruptive or violent conduct, animal cruelty, and retaliation. UNIV. OF TEX. INST'L. RULES ON STUDENT SERVS. AND ACTIVITIES § 11–401(a). Could a degree be revoked if the University later determines a graduate committed one of these acts while a student and therefore should have been denied a degree? Under the Court's decision, the answer seems to be yes. Furthermore, what about private universities? If the validity of a graduate's degree is a matter of internal university governance and rescindable by administrative decree—rather than a property right rescindable by judicial process—then private universities, whose powers are neither defined by statute nor limited by the First Amendment, may be at liberty to rescind their graduates' degrees for any reason at all, including ideological whim.

strange starting point for judicial analysis of the "traditional and time-honored role" of the governing boards of universities. TEX. EDUC. CODE § 51.352(a). In any event, nearly all the American cases rely on *Waliga*, which itself offers little thoughtful analysis of the nature of the property interest entailed by a university degree or the legal relationship (or lack thereof) between graduates and their alma maters.

The *Waliga* court, in turn, bases its analysis on a misreading of the only pre-1986 case cited to this Court, a 1723 English case about degree revocation at Cambridge called *Bentley's Case*, which appears to be the leading common law case on the subject.[6] Other courts on which the Court relies have followed suit. *E.g.*, *Crook v. Baker*, 813 F.2d 88, 93 (6th Cir. 1987).

Waliga focuses narrowly on one line from *Bentley's Case*, which says Cambridge could "revoke a degree for 'a reasonable cause.'" 488 N.E.2d at 852 (quoting *Bentley's Case*, 88 Eng. Rep. at 119). *Waliga* otherwise construes *Bentley's Case* to require only that a university provide a degree holder with sufficient due process while revoking a degree. In reality, the lessons of *Bentley's Case* are considerably more

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[6] Reporting on *Bentley's Case* appears in at least three separate records in the English Reports: first at 88 Eng. Rep. 111; again at 92 Eng. Rep. 370; and finally at 92 Eng. Rep. 818. This is in part because the case was argued to the King's Bench at least twice. *See Bentley's Case*, 92 Eng. Rep. at 373. Throughout this opinion, the volume of the English Reports cited is adjusted to reflect which record of the case is being cited. Like the Gospels, each report of *Bentley's Case* adds detail the others lack, but all of them tell a consistent story.

complex and, when properly understood, stand at odds with the outcome reached by American courts 250 years later.

Before delving into *Bentley's Case*, it is worth asking why we would bother analyzing a 1723 English case in a modern statutory-interpretation dispute. The answer is simple. The Legislature has provided that the powers of our state's universities are to be understood in light of a university's "traditional and time-honored role." TEX. EDUC. CODE § 51.352(a). As the only resource pre-dating 1986 to which the Court is directed on the question of a university's time-honored role—and as the foundational authority for all the modern American cases on the subject—*Bentley's Case* plays an unusually important role here for a case of its vintage. Moreover, I cannot find a single decision from this Court's history that sheds light on either the nature of a college degree or on a public university's authority to revoke one. Given the influential role *Bentley's Case* has played in the development of the American precedent on the topic and the absence of any other persuasive authority, a proper understanding of *Bentley's Case* seems not just helpful but required.[7]

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[7] An additional reason to consult *Bentley's Case* is that it is part of the "common law of England," which was adopted into Texas law as soon as our state achieved independence from Mexico and remains part of our state's law today. *See* Repub. of Tex. Const. of 1836, art. IV, § 13 ("The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require."); *see also* TEX. CIV. PRAC. & REM. CODE § 5.001(a) ("The rule of decision in this state consists of those

The University of Cambridge traces its founding to 1209 A.D. From Henry III to Elizabeth I, the English Crown chartered Cambridge as a corporation, provided legal protections for its teachers and students, and augmented Cambridge's legal status above that of a normal corporation by charging it with certain functions usually reserved for government.[8] As the power of Parliament grew relative to the Crown, the legal efficacy of the royal charters came under doubt. So, in 1571, Parliament officially incorporated both Cambridge and Oxford, reaffirming the traditional legal protections and privileges previously guaranteed by royal charter. *See* An Act for Incorporation of Both Universities 1571, 13 Eliz. c. 29 (Eng.).[9]

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portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state.").

[8] *E.g.*, Charter of 20 Edward I Confirming the Privileges of the University of Cambridge (Feb. 6, 1291/92) (Latin language document), available at https://cudl.lib.cam.ac.uk/view/MS-UA-LUARD-00007-AST/1 (last visited March 29, 2023).

[9] *See also* 4 EDWARD COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 227 (1644) ("[T]o the intent that the ancient privileges, liberties, and franchises [of Cambridge] . . . might be had in greater estimation, and be of greater force and strength . . . it was enacted by authority of Parliament 1. That each of the universities should be incorporated . . . 2. That all letters patent . . . should be good and effectual [and] 3. That the chancellor, masters, and scholars . . . should several have . . . all manner of liberties . . . and privileges, which [Cambridge] had held, occupied, or enjoyed . . . according to the true intent and meaning of the said letters patent.").

One privilege bestowed by law on Cambridge was the right to exercise judicial power within prescribed jurisdictional limits. By the time *Bentley's Case* was argued before the King's Bench in 1723, Cambridge had long held the authority—conferred explicitly by Act of Parliament—to operate a court. 3 WILLIAM BLACKSTONE, COMMENTARIES *83. The University's chancellor or vice-chancellor sat as its judge. *Bentley's Case*, 92 Eng. Rep. at 818.[10] The court at Cambridge enjoyed "sole jurisdiction, in exclusion of the king's courts, over all civil actions and suits whatsoever, when a scholar or privileged person [was] one of the parties." 3 WILLIAM BLACKSTONE, COMMENTARIES *83–84. Despite the court's apparently wide subject-matter jurisdiction, its authority appears to have been constrained by two important limiting principles. First, one of personal jurisdiction: "the party proceeded against must in general be a resident member of the university." *Id.* at *83 n.9. Second, a geographical limitation: the cause of action must have accrued "within the town [of Cambridge] and its suburbs." *Id.*

The Cambridge court was, in every relevant sense, exercising judicial power as we conceive of it today. Though Blackstone labelled it a "private court," such tribunals only bore that label because their

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[10] To this day, Cambridge's own recounting of its history notes that the university maintained a court over which its university administrators acted as judge. *See* UNIV. OF CAMBRIDGE, *About the University: Moves to Independence*, https://www.cam.ac.uk/about-the-university/history/moves-toindependence (last visited March 27, 2023).

jurisdiction was "private and special, confined to particular spots, or instituted only to redress particular injuries." *Id.* at *71. Subject to the limitations described above, Cambridge's courts were otherwise able to exercise the usual powers of a court of that time.

Bentley's Case proceeded as follows. An action was initiated in the Cambridge court of the vice-chancellor to revoke Bentley's degree for non-payment of debt. Bentley—then a resident scholar at Cambridge and a head of one of its academic departments—was issued a summons, which he ignored. Evidence was collected through affidavits and depositions. After Bentley repeatedly refused to submit to the Cambridge court's jurisdiction, a default judgment was issued against him on the debt charge, and Cambridge revoked his degrees. The King's Bench later granted Bentley's mandamus petition in what we call *Bentley's Case*, which had the effect of restoring his degrees, but only on procedural grounds. 92 Eng. Rep. at 820.

Bentley's Case bears on the matter at hand in at least three important ways. First, the King's Bench treated Bentley's degree as "a freehold and a dignity"—in other words, a species of property belonging to Bentley, which could not be taken from him without judicial process. *Id.* at 819. Today, the word "freehold" still connotes ownership and control of property, similar to how it was understood in 1723.[11]

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[11] *Compare Freehold*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An estate in land held in fee simple, in fee tail, or for term of life, any real-property interest that is or may

But the word "dignity" conveyed more in those days than it might to the modern eye. Blackstone defined a "dignity" as a kind of property interest, an "incorporeal hereditament" that one could own, not unlike how real and personal property are owned. 2 WILLIAM BLACKSTONE, COMMENTARIES *16–18. An "incorporeal hereditament" was "a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same." *Id.* at *20. The judges in *Bentley's Case* were acutely concerned with ensuring that the appropriate *judicial* process had been followed before Bentley was divested of the "freehold" and "dignity" represented by his Cambridge degree. 92 Eng. Rep. at 819.

Second, the only reason Cambridge could revoke Bentley's degree without resort to outside judicial process was that—quite unlike modern state universities—Cambridge had been given specific authority by both the Crown and Parliament to exercise judicial power. In other words, Cambridge was authorized by law to operate a court—not the kind of ad hoc tribunal playing at due process in a modern university, but a real court exercising the judicial power of the sovereign to adjudicate the property rights of those, like Bentley, who lived within its jurisdiction. The King's Bench in *Bentley's Case* was

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become possessory."), *with Freehold*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1755) ("That land or tenement which a man holdeth in fee, fee-tail, or for term of life. Freehold in deed is the real possession of lands or tenements in fee, fee-tail, or for life. Freehold in law is the right that a man has to such land or tenements before his entry or seizure.").

not reviewing the internal-governance decisions of administrators hired to manage the university's affairs. It was reviewing the judicial action of an inferior court established by law to neutrally adjudicate disputes over property and other legal rights. Modern universities do not—and cannot—play the judicial role Cambridge played in 1723.

The King's Bench did affirm that Cambridge possessed the judicial power to revoke degrees, but this holding in no way suggests that modern state universities—which lack any statutory authority remotely resembling Cambridge's—possess an implied, "time-honored" power to unilaterally revoke degrees. Instead, the "time-honored" rule reflected by *Bentley's Case* is that revocation of a degree dispossesses the graduate of a valuable property right, which can only be accomplished by a neutral judicial process, not by the unilateral decree of university officials. Indeed, the King's Bench held Cambridge's court to all the standards of due process applicable to common law courts of the time, and this requirement formed the basis for a ruling in Bentley's favor. *Bentley's Case*, 92 Eng. Rep. at 378 ("[P]roceedings in the vice-chancellor's court . . . must be intended to be agreeable to the rules of the common law" and "this Court will relieve him, if he has been proceeded against and degraded, without being heard, which is contrary to natural justice.").

This leads to the third lesson from *Bentley's Case*. The reason Bentley was subject to the jurisdiction of Cambridge's court was not that he held a Cambridge degree. It was only because he lived

within Cambridge's corporate limits as a resident scholar at the University that Bentley—and his degree—were subject to Cambridge's judicial power. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *83 n.9 ("[T]he party proceeded against must in general be a resident member of the university."). Thus, even assuming (incorrectly) that state universities could exercise judicial power within their own spheres, *Bentley's Case* provides no support for the notion that a university's jurisdiction traditionally extends to graduates with no ongoing connection to the university. Quite the opposite. *Bentley's Case* indicates that even a university granted broad judicial power within its boundaries—a power modern state universities lack—did not traditionally have authority to adjudicate the legal rights of graduates in the outside world.

* * *

The point is not just that *Bentley's Case* provides no true support for the Ohio court's decision in *Waliga* or for the later decisions of the American courts that have followed suit. Instead, the more important point is that *Bentley's Case*—the only "time-honored" authority cited to this Court regarding the "traditional and time-honored role" of universities—affirmatively undermines the foundation of the Court's reasoning. The Court proceeds as if revocation of a degree is essentially a matter of internal university governance, a kind of internal, educational "disciplinary decision" with which courts should be loath to interfere. *Ante* at 26–27. *Bentley's Case* is entirely to the contrary. It teaches that a degree is the graduate's property, that

it cannot be taken from its holder without judicial process, and that the power of a university does not extend to those who live and work beyond its borders. We ought to be guided by these time-honored principles, and we ought to interpret modern Texas statutes about the "traditional" power of universities in light of them. Instead, the Court gives the University of Texas in 2023 more power to revoke the degrees of its graduates than the University of Cambridge had in 1723. I must respectfully dissent.

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James D. Blacklock
Justice

OPINION FILED: March 31, 2023

APPENDIX B

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00131-CV

Appellants University of Texas at Austin President Jay Hartzell; University of Texas at Austin Registrar Mark Simpson; University of Texas Dean of Students Soncia Reagins-Lilly; University of Texas Regents Kevin Paul Eltife, R. Steven Hicks, Christina Melton Crain, Jodie Lee Jiles, David J. Beck, Kelcy L. Warren, Janiece M. Longoria, Nolan Perez, and James Conrad Weaver, in their official capacities// Cross-Appellant, S. O.

v.

Appellee, S. O.// Cross-Appellees, University of Texas at Austin President Jay Hartzell; University of Texas at Austin Registrar Mark Simpson; University of Texas Dean of Students Soncia Reagins-Lilly; University of Texas Regents Kevin Paul Eltife, R. Steven Hicks, Christina Melton Crain, Jodie Lee Jiles, David J. Beck, Kelcy L. Warren, Janiece M. Longoria, Nolan Perez, and James Conrad Weaver, in their official capacities[1]

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[1] Pursuant to Rule 7.2 of the Texas Rules of Appellate Procedure, current University of Texas President Jay Hartzell has been automatically substituted for former President Gregory L. Fenves. Current University of Texas Regents Christina Melton

**FROM THE 419TH DISTRICT COURT
OF TRAVIS COUNTY
NO. D-1-GN-16-000517, THE HONORABLE
KARIN CRUMP, JUDGE PRESIDING**

O P I N I O N

S.O. sued the University of Texas at Austin President Jay Hartzell; University of Texas at Austin Registrar Mark Simpson; University of Texas Dean of Students Soncia Reagins-Lilly; and University of Texas Regents Kevin Paul Eltife, R. Steven Hicks, Christina Melton Crain, Jodie Lee Jiles, David J. Beck, Kelcy L. Warren, Janiece M. Longoria, Nolan Perez, and James Conrad Weaver, all in their official capacities (collectively, the University officials) seeking declaratory and injunctive relief prohibiting the University officials from holding an internal disciplinary proceeding for the purpose of deciding whether to revoke S.O.'s doctoral degree in organic chemistry that was conferred by the University of Texas at Austin (the University) in 2008. The University officials filed a plea to the jurisdiction, which the trial court granted in part and denied in part. In this appeal, the University officials challenge the trial court's denial of their plea to the jurisdiction seeking dismissal of S.O.'s claims that the University officials' conduct is *ultra vires* based on sovereign

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Crain, Jodie Lee Jiles, Kelcy L. Warren, and Nolan Perez have been automatically substituted for former Regents Paul L. Foster, Jeffery D. Hildebrand, Ernest Aliseda, and Sara Martinez Tucker. Current University of Texas at Austin Registrar Mark Simpson has been automatically substituted for former Registrar Vincent Shelby Stanfield.

immunity. We will affirm.

BACKGROUND

S.O. earned her doctoral degree in organic chemistry from the University of Texas at Austin in 2008. In 2012, the University instituted a disciplinary investigation into allegations of academic misconduct related to S.O.'s dissertation and, in 2014, attempted to revoke S.O.'s degree.[2] The University informed S.O.

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[2] According to her pleadings, S.O.'s dissertation involved studying the synthesis and analysis of organic molecules. S.O. alleged that she "was required to—and did—characterize the chemical compounds in her experiments with four different tests that were required by [her graduate advisor]." S.O. alleged that "[u]ltimately, [she] did not create natural products through her proposed method, nor was she required to do so to earn her degree." S.O. alleged in her pleadings that with her graduate advisor's input and approval, she reported "the results from the synthetic routes towards the natural products in her dissertation and was awarded her degree." S.O. alleged that her dissertation research had been scrutinized at many different points in time before the University awarded her degree. S.O. alleged that her data and conclusions were supported by overlapping experiments she performed under the supervision of her graduate advisor; that she presented and defended her dissertation to a committee of five professors from the University Chemistry Department; and that her work was presumably further scrutinized by her graduate advisor when he submitted a paper based in part on her work for publication in 2011. S.O. alleged that the allegations of academic misconduct arose after a different graduate student working with S.O.'s graduate advisor in 2012 reviewed the previously published work, along with S.O's data and the data of another graduate student, and then conducted experiments that "led him to believe that parts of the work submitted [by the graduate advisor] to the journal article was somehow erroneous or otherwise inaccurate." S.O.'s pleadings allege that "once this graduate student

that her degree had been revoked on February 12, 2014. Two days later, S.O. filed suit against certain University officials (the first lawsuit) asserting that the University's procedures related to its investigation and decision regarding her degree did not comport with the minimum constitutional standards guaranteed by the Texas Constitution's due course of law provision. *See* Tex. Const. art. I, § 19. That day, S.O. and the University entered into a Rule 11 agreement specifying that the University would restore S.O.'s degree "subject to further discussions regarding additional process." The University officials then filed a plea to the jurisdiction in which they argued that, because the University had restored S.O.'s degree and initiated a student disciplinary proceeding to consider the allegations against her, S.O. had been provided all the relief she sought in her lawsuit, rendering it moot. The trial court granted the plea to the jurisdiction, and this Court affirmed. *See Orr v. The University of Tex. at Austin*, No. 03-14-00299-CV, 2015 WL 5666200, at *1 (Tex. App.—Austin Sept. 23, 2015, no pet.).

After dismissal of the first lawsuit, the University proceeded with its investigation and, in January 2016, informed S.O. that it intended to hold a disciplinary hearing concerning allegations that S.O. had violated the University's "Institutional Rules," which could subject her to disciplinary sanctions. S.O. then brought the underlying proceeding in which she

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questioned the data" in 2012, her graduate advisor brought a complaint to the University alleging that S.O. had engaged in scientific misconduct.

sought declaratory and injunctive relief prohibiting the University officials from holding an internal disciplinary proceeding for the purpose of deciding whether to revoke her Ph.D. degree. S.O. alleged that such action was *ultra vires* conduct and a violation of her constitutional rights to due process and equal protection. S.O. also sought a temporary injunction to prevent the University from conducting any proceedings related to her Ph.D. degree pending resolution of her claims. The University officials filed a plea to the jurisdiction in which they asserted that the trial court lacked jurisdiction over S.O.'s claims because they were not ripe. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000) ("The ripeness doctrine prevents premature adjudication of hypothetical or contingent situations.").

In February 2016, the trial court held a hearing on S.O.'s request for a temporary injunction and on the University officials' plea to the jurisdiction. The trial court did not at that time grant temporary injunctive relief nor did it rule on the University officials' plea. In March 2016, S.O. filed a motion for summary judgment. While that motion was pending, the University informed S.O. that it would conduct its disciplinary hearing on October 21, 2016.[3] When the University did not go forward with the proceeding on October 21, 2016, the trial court signed an order reciting that S.O.'s claims were not ripe for review and granting the University officials' plea to the jurisdiction. The trial court dismissed S.O.'s claims,

[3] The hearing did not occur on October 21, 2016, and was rescheduled to take place on April 28, 2017.

and S.O. appealed the dismissal to this Court. S.O. argued that (1) the trial court erred in concluding that her request for a declaratory judgment that the University officials were acting *ultra vires* was not ripe for review and dismissing it for lack of subject matter jurisdiction, and (2) assuming the University officials' actions were not *ultra vires*, the rules the University intended to apply to the disciplinary proceeding would not provide her with adequate due process protection given the nature of the interest at risk and were, for that reason, unconstitutional. This Court held that, of the two issues presented, only the first was properly before it. *See S.O. v. University of Texas at Austin President Gregory L. Fenves*, No. 03-16-00726-CV, 2017 WL 2628072, at *2 (Tex. App.—Austin June 15, 2017, no pet.) (mem. op.) (hereinafter "*S.O. 2017*") ("The trial court made no ruling on the merits of S.O.'s complaints regarding whether the internal disciplinary hearing rules afford her due process."). This Court held that S.O.'s claims for a declaration under the Uniform Declaratory Judgments Act that the University officials' conduct is *ultra vires* were ripe for adjudication, *id.* at * 4, reversed the trial court's order granting the plea to the jurisdiction, and remanded the cause to the trial court.

On remand, S.O. filed an amended petition in which she sought the same declaratory relief as in her original petition.[4] The University officials filed a

[4] S.O. dropped her request for a declaration that a particular professor not be permitted to participate in any proceedings against S.O. "because of an apparent conflict" that she alleged disqualified or otherwise made that professor

second plea to the jurisdiction asserting that they "have authority to conduct an internal process to determine whether the allegations of misconduct are substantiated and, if so, what sanction is proper." Thus, they argued, their conduct was not *ultra vires*, and S.O.'s *ultra vires* claims were barred by sovereign immunity. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 369-70 (Tex. 2009) (sovereign immunity extends to state officials acting in their official capacity). The University officials also asserted that S.O.'s constitutional challenges to any future disciplinary hearing were not ripe and, to the extent her claims constituted efforts to establish the procedures applicable to a disciplinary proceeding, those claims sought to control state action and were barred by sovereign immunity. S.O. filed a motion for summary judgment asserting that she was entitled to summary judgment on her requests for eight declarations because each declaration involved only a question of law. After a hearing on the plea and the motion, the trial court signed an order granting the University officials' plea to the jurisdiction "as to declarations attempting to establish and/or challenge the procedures applicable to her disciplinary proceeding" and denying the plea "as to [S.O.'s] *ultra vires* claim regarding whether Defendants are acting without authority to revoke a degree." The trial court signed a separate order that granted S.O.'s motion for summary judgment as it pertained to her request for declaratory relief regarding the University officials' authority to revoke her degree, i.e., the *ultra vires* claims. The University officials perfected this appeal and, in two

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"ineligible to participate with fairness or impartiality."

issues, challenge the trial court's denial of their plea to the jurisdiction as to S.O.'s claims that the University officials' actions are *ultra vires*. The University officials argue that because they are not acting *ultra vires*—i.e., because they have the authority to conduct a disciplinary hearing to determine whether to revoke S.O.'s degree—S.O.'s claims for declaratory relief as to whether they are acting without authority to revoke a degree are barred by sovereign immunity. S.O. filed a cross-appeal challenging the trial court's ruling on two of her requests for declarations unrelated to her *ultra vires* claims and the trial court's denial of her request for attorneys' fees pursuant to the Uniform Declaratory Judgments Act. *See* Tex. Civ. Prac. & Rem. Code § 37.009.

DISCUSSION

The University Officials' Appeal

In their second issue, the University officials argue that the trial court erred in concluding that the University lacks the legal authority to revoke a previously conferred degree and, consequently, their conduct was not *ultra vires* and S.O.'s claim was barred by sovereign immunity. Our analysis of whether S.O.'s claim is within the trial court's jurisdiction begins with her live pleadings. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The plaintiff has the initial burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause—in this case, with respect to her claim of *ultra vires* acts by the University officials, allegations of fact that would

demonstrate that they acted without legal authority or failed to perform a purely ministerial act. *See id.* (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)). When, as here, the plea to the jurisdiction challenges the sufficiency of the pleadings rather than any of the jurisdictional facts alleged by the plaintiff, the court should make the jurisdictional determination as a matter of law based solely on the facts alleged, which are taken as true and construed liberally in favor of jurisdiction. *First-Citizens Bank & Tr. Co. v. Greater Austin Area Telecommc'ns Network*, 318 S.W.3d 560, 564 (Tex. App.—Austin 2010, no pet.); *University of Tex. v. Poindexter*, 306 S.W.3d 798, 806 (Tex. App.—Austin 2009, no pet.) (citing *Miranda*, 133 S.W.3d at 226). Whether the plaintiff has met the burden is a question of law, which we review *de novo*. *Miranda*, 133 S.W.3d at 226. We construe the pleadings liberally, taking them as true, and look to the pleader's intent. *Id.*

Sovereign immunity extends to state officials acting in their official capacity. *See Heinrich*, 284 S.W.3d at 369-70. An exception to sovereign immunity applies when a party alleges that the government officer acted "without legal authority or failed to perform a purely ministerial act." *Id.* at 372. To fall within this exception to immunity, however, "a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *Id.* An officer acts without legal authority if he "exceeds the bounds of his granted authority or if his acts conflict with the law itself." *Houston Belt & Terminal Ry. Co.*

v. City of Houston, 487 S.W.3d 154, 158 (Tex. 2016). If the plaintiff alleges, or ultimately can prove only acts within the officer's legal authority and discretion, the claim seeks "to control state action" and is barred by sovereign immunity. *Id.*; *KEM Tex., Ltd. v. Texas Dep't of Transp.*, No. 03-08-00468-CV, 2009 WL 1811102, at *2 (Tex. App.—Austin June 26, 2009, no pet.) (mem. op.).

In her live pleadings, S.O. sought a declaration pursuant to the Uniform Declaratory Judgments Act that the University officials' conducting an internal proceeding to decide whether to revoke her Ph.D. degree was unauthorized.[5] S.O. has pleaded a cognizable *ultra vires* claim if her allegations establish that the University officials' conduct exceeded the bounds of their granted legal authority. *See Houston Belt & Terminal Ry.*, 487 S.W.3d at 158. To determine whether S.O. has asserted a valid *ultra vires* claim that invoked the district court's subject-matter jurisdiction, we construe the provisions of the relevant statute that defines the scope of the University officials' legal authority, apply them to the facts that S.O. has alleged, and ascertain whether those facts constitute acts beyond the University officials' legal authority. *See Heinrich*, 284 S.W.3d at 372-73; *Texas*

[5] S.O. also alleged that the University officials are violating her constitutional rights to due process and equal protection but, as previously noted, the trial court found that it lacked subject matter jurisdiction over any requested declarations attempting to establish or challenge the procedures applicable to the disciplinary hearing and granted the plea to the jurisdiction as to those declarations. S.O.'s constitutional claims are not before this Court.

Dep't of Transp. v. Sunset Transp., Inc., 357 S.W.3d 691, 701 (Tex. App.—Austin 2011, no pet.).

The parties agree that the relevant statutory provision is section 65.31 of the Texas Education Code. *See* Tex. Educ. Code § 65.31. This section provides, in pertinent part:

> (a) The board is authorized and directed to govern, operate, support, and maintain each of the component institutions that are now or may hereafter be included in a part of The University of Texas System.
>
> (b) The board is authorized to prescribe for each of the component institutions courses and programs leading to such degrees as are customarily offered in outstanding American universities, and to award all such degrees. It is the intent of the legislature that such degrees shall include baccalaureate, master's, and doctoral degrees, and their equivalents, but no new department, school, or degree-program shall be instituted without the prior approval of the Coordinating Board, Texas College and University System.
>
> (c) The board has authority to promulgate and enforce such other rules and regulations for the operation, control, and management of the university system and the component institutions

> thereof as the board may deem either necessary or desirable. The board is specifically authorized and empowered to determine and prescribe the number of students that shall be admitted to any course, department, school, college, degree-program, or institution under its governance.

Id. § 65.31(a), (b), (c).[6] Section 65.31 further provides that the board may "by rule delegate a power or duty *of the board* to a committee, officer, employee, or other agent of the board." *Id.* § 65.31(g) (emphasis added). The University officials also point to section 51.352(d)(4) of the Texas Education Code, which provides that the "governing boards"[7] of institutions of higher education shall "set campus admission standards consistent with the role and mission of similar institutions nationwide having a similar role and mission, as determined by the coordinating board."

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[6] The term "board" refers to a board consisting of nine regents appointed by the governor, which is authorized by statute to "provide for the administration, organization, and names of the institutions and entities in The University of Texas System in such a way as will achieve the maximum operating efficiency of such institutions and entities." *See* Tex. Educ. Code § 65.11.

[7] A "governing board" is defined by statute as "the body charged with policy direction of any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education, including but not limited to boards of directors, boards of regents, boards of trustees, and independent school district boards insofar as they are charged with policy direction of a public junior college." *Id.* § 61.003(9).

Id. § 51.352(d)(4). The parties join issue as to whether these statutes, when properly construed, authorize the University to revoke a former student's degree after it has been conferred.

Because statutory construction is at the heart of this dispute, we begin our analysis be reviewing the pertinent statutory-construction principles. *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008). Statutory construction presents a question of law that we review *de novo*. *Id.* We discern legislative intent primarily from the statute's language because it is "'the truest manifestation' of what lawmakers intended . . . ." *Id.* (quoting *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651-52 (Tex. 2006)). If statutory language is unambiguous, we will interpret and apply the statute according to its plain meaning unless a different meaning is apparent from the context or the plain meaning leads to absurd results. *In re Ford Motor Co.*, 442 S.W.3d 265, 280 (Tex. 2014) (orig. proceeding). In determining a statute's meaning, we construe the statute as a whole rather than construing specific provisions in isolation. *Id.* We look at the entire act in determining the Legislature's intent with respect to specific provisions. *Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628 (Tex. 2011). Undefined terms are afforded their ordinary meaning unless a different or more precise definition is apparent from the context of the statute, *see* Tex. Gov't Code § 311.011(a); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011), because we cannot give an undefined term a meaning that is disharmonious or inconsistent with other provisions in

the statute, *see Texas Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002).

With these principles in mind, we determine whether the relevant statutory provisions authorize the University to revoke a degree after it has been conferred on a former student. Notably, the specific statutory provision dealing with degrees, subsection 65.31(b), states that the board is authorized to "award" degrees but includes nothing that could reasonably be construed as an express grant of authority to strip a former student of a diploma or degree after it has been conferred. *See* Tex. Educ. Code § 65.31(b). Subsection 65.31(c) authorizes the board to promulgate and enforce rules and regulations for "the operation, control, and management of the university system and component institutions." *Id.* § 65.31(c). This provision empowers the board to determine and enforce the manner in which the *university system* and its *component institutions* are operated, controlled, and managed. The provision says nothing about the board's authority to discipline a former student. Similarly, section 51.352(d)(4) addresses campus admission standards and does not speak to degrees or diplomas in any respect. *Id.* § 51.352(d)(4). A state agency has only the authority expressly provided by statute or necessarily implied to carry out the express powers the Legislature has given it. *See Public Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 315 (Tex. 2001); *see also Public Util. Comm'n v. GTE-Sw., Inc.*, 901 S.W.2d 401, 407 (Tex. 1995) ("The agency may not, however, on a theory of necessary implication from a specific power, function, or duty expressly delegated, erect and exercise what really amounts to a new and

additional power or one that contradicts the statute, no matter that the new power is viewed as being expedient for administrative purposes." (quoting *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137-38 (Tex. App.—Austin 1986, writ ref'd n.r.e.)). An agency is "a creature of the legislature and has no inherent authority." *GTE-Sy.*, 901 S.W.2d at 406.

The University officials argue that the Board of Regents' Rules and Regulations, promulgated pursuant to the statutory grant of authority in Texas Education Code subsection 65.31(c), have the same force and effect as statutes. *See Fazekas v. University of Houston*, 565 S.W.2d 299, 304 (Tex. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) ("Since the Board of Regents of the University of Houston is authorized by statute to enact bylaws, rules and regulations necessary to the government of the University, its rules are of the same force as would be a like enactment of the legislature."). The Board of Regents Rules and Regulations direct the University to adopt institutional rules. Thus, the University officials contend that the Board of Regents' own rules and regulations serve as a statutory grant of authority to the University officials to adopt institutional rules permitting the University to discipline a former student by revoking a previously conferred degree. As an initial matter, the premise that a Board of Regents rule has the same "force and effect" as a statute does not lead to the conclusion that the Board of Regents can augment its statutory grant of power, as circumscribed by the Legislature, by promulgating a rule. *See Pruett v. Harris Cnty. Bail Bond Bd.* 249 S.W.3d 447, 452 (Tex. 2008) ("An agency may adopt

only such rules as are authorized by and consistent with its statutory authority." (citing *Railroad Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992)); *Harlingen Family Dentistry, P.C. v. Texas Health & Human Servs. Comm'n*, 452 S.W.3d 479, 482 (Tex. App.—Austin 2014, pet. dism'd) ("An agency's rules must comport with the agency's authorizing statute."). The Board of Regents' Rule that the University officials rely on, Board of Regents Rule 50101, does not itself purport to authorize disciplining a former student. It simply directs the University to "adopt rules and regulations concerning *student* conduct and discipline." *See* The University of Texas System Rules and Regulations of the Board of Regents, Rule 50101 (emphasis added). An institutional rule that addresses or authorizes disciplining *former* students would be beyond the scope of the very Board of Regents Rule that the University officials rely on. None of the statutes or rules relied on by the University officials constitute an express grant of authority for the University to revoke a degree after it has been conferred.

The University officials suggest that if not express, such power may be implied. *See Public Util. Comm'n of Tex. v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 315 (Tex. 2001) (agency's implied powers are limited to those "necessary to carry out the express responsibilities given to it by the Legislature"). The law prohibits agencies from exercising what is effectively a new power, or a power contradictory to the statute, based merely on a claim that the power is expedient for the agency's purposes. *Id.* (citing *GTE-Sw., Inc.*, 901 S.W.2d at 407). The test is whether the

power to be implied is necessary for the agency to perform a function or duty that the Legislature has required of it in *express* terms. The critical question to be answered is whether the power must be implied in order to allow the agency to effectively carry out the functions that have been specifically assigned to it. *See Texas Mun. Power Agency v. Public Util. Comm'n*, 253 S.W.3d 184, 192-93 (Tex. 2007) (noting that "agency's powers are limited" to those "expressly conferred by the Legislature" and those implied that are reasonably necessary to carry out agency's express responsibilities); *City Pub. Serv. Bd. v. Public Util. Comm'n*, 9 S.W.3d 868, 873-74 (Tex. App.—Austin 2000) (explaining that it is "axiomatic that" agency "has no inherent power, but only such powers as are delegated to it by the legislature in clear and *express* statutory language, together with any implied power that may be necessary . . . to perform a function or duty that the legislature has required of the agency in *express* terms" and that agency powers "must be construed narrowly when they are claimed to authorize governmental interference with established or traditional property rights"), *aff'd*, 53 S.W.3d 310, 312, 325 (Tex. 2001). We may not, therefore, imply the power to revoke a degree on the ground that it is necessary to accomplish the University's express power to award degrees unless the express grant of authority would itself be *defeated* absent an attendant authority to revoke the degree at a later date. *See GTE Sw., Inc. v. Public Util. Comm'n*, 10 S.W.3d 7, 12-13 (Tex. App.—Austin 1999, no pet.) (providing that grants of power to agencies must be construed narrowly when claimed to interfere with property rights and that power may be implied only if express

powers could be defeated in absence of implied powers). The University officials do not argue that that is the case. Moreover, familiar rules of statutory construction reject such an implication. Statutory grants of power to administrative agencies must be construed narrowly when they are claimed to authorize governmental interference with established or traditional property rights. *See* 3 Norman J. Singer & J.D. Shambie Singer, *Statutes & Statutory Construction*, § 65.2 (7th ed. 2008).

The University officials point to courts in other jurisdictions that have found that their state universities have the implied right to revoke a degree irrespective of statutory language and maintain that these other cases are "persuasive." This Court is not, however, tasked with surveying other jurisdictions and considering how courts in other states have resolved the question of their institutions' authority to revoke conferred degrees. Rather, our job is to discern the Legislature's intent as expressed in the plain language of the Texas Education Code. That cases from other jurisdictions are inapposite to our analysis is highlighted by jurisprudential differences in interpreting statutory authority. For example, the University officials rely heavily on *Waliga v. Board of Trustees of Kent State University*, 488 N.E.2d 850 (Ohio 1986), an Ohio Supreme Court case holding that Kent State University had the "authority and power" to revoke degrees. The court stated:

> Any action which is necessary for the proper maintenance and successful operation of a state university is

> authorized, *unless it is prohibited* by statute. In the event that a degree is procured through fraud, or a degree is awarded erroneously, it is certainly within the implied authority of the university to revoke it. A power of a state agency may be fairly implied from an express power where it is *reasonably related* to the duties of the agency.

Waliga, 488 N.E.2d at 851 (citations omitted) (emphasis added). While an Ohio court apparently may imply any powers "reasonably related" to an agency's duties, we are constrained to imply only those powers necessary for the performance of powers expressly authorized. *See Texas Mun. Power Agency*, 253 S.W.3d at 192-93; *cf. Hand v. Matchett*, 957 F.2d 791, 795-96 (10th Cir. 1992) (applying New Mexico law and relying on *Waliga* to conclude that ability to revoke degrees is "necessary corollary" to power to confer those degrees).[8] Cases from other jurisdictions

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[8] While the University officials also cite to *Gati v. University of Pittsburgh of Commonwealth System of Higher Education*, 91 A.3d 723 (Pa. 2014), as persuasive authority, we note that the majority did not decide the issue of degree revocation but suggested that such relief might be sought in court in connection with litigation on the merits concerning the former student's entitlement to permanent injunctive relief. *Gati*, 91 A.3d at 735 n.1 (Wecht, J., concurring). *But see Goodreau v. Rector & Visitors of Univ. of Va.*, 116 F.Supp.2d 694, 703 (W.D. Va. 2000) (citing *Waliga* and concluding that power to revoke degree must be implied because, in court's view, it is reasonably necessary to effectuate power to confer degrees and regulate student discipline).

interpreting different statutes and employing different rules of statutory construction are not relevant to our analysis.[9]

S.O.'s pleadings alleged an *ultra vires* claim against the University officials, specifically, that they acted without legal authority by instituting an internal proceeding to decide whether to revoke her previously conferred degree. Thus, her claims do not implicate sovereign immunity, and the trial court properly concluded that it had subject-matter jurisdiction over her claims. It was not error for the trial court to deny the University officials' plea to the jurisdiction as to these claims. We overrule the University officials' second issue.

In their first issue, the University officials assert that the trial court lacked subject-matter jurisdiction because in *S.O. 2017* this Court held that the issue before the trial court—whether the University officials were acting *ultra vires*—was not

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[9] The University officials also rely on *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987), which is analytically distinguishable. In that case, the court noted that Michigan is "one of the few states to give independent constitutional status to its universities" and the Michigan constitution provides that "the University is a separate constitutional 'body corporate known as the Regents of the University of Michigan' which Regents have 'general supervision' of the University." Based on that unique status, the court held that the University of Michigan has the authority to revoke degrees in the absence of contraindicative constitutional, statutory, or case law. In Texas, however, the opposite is the case—as an agency of the State, the University has only the powers expressly granted by the Legislature along with those powers that may properly be implied.

justiciable until revocation of S.O.'s degree had occurred. That was not this Court's holding. *S.O. 2017* was an appeal from a trial court order granting the University officials' plea to the jurisdiction in which they asserted that S.O.'s claims that they were acting *ultra vires* were not ripe for review. The trial court agreed and dismissed the case for lack of subject-matter jurisdiction. The trial court's order stated that it had reserved ruling on the plea to the jurisdiction to allow for the University's internal disciplinary hearing to take place on March 4, 2016. The order states that on October 11, 2106, the parties informed the court that the hearing had not yet occurred but was scheduled to take place on October 21, 2016. The trial court informed the parties that it would rule on the plea to the jurisdiction if the hearing did not go forward as scheduled. When the parties later informed the court that the hearing would not go forward on October 21, 2016 after all, the trial court ruled on the plea to the jurisdiction. The trial court granted the plea to the jurisdiction, concluding that S.O.'s claims that the University officials were acting *ultra vires* and had violated her right to due process were not ripe for review and therefore the court lacked subject- matter jurisdiction. *See S.O.*, 2017 WL 2628072, at *1-2.

S.O. then perfected an appeal in which she raised two issues. First, S.O. asserted that the trial court erred in concluding that her request for a declaratory judgment that the University officials were acting *ultra vires* was not ripe for review and dismissing that claim for lack of subject-matter jurisdiction. Second, S.O. asserted that, assuming the University officials' actions were not *ultra vires*, the

rules the University intended to apply to the disciplinary hearing would not provide her with adequate due process protection given the nature of the interest at risk and, for that reason, were unconstitutional. This Court held that "[o]f these two issues, the only one properly before the Court is the first issue, which challenges the trial court's ruling that S.O.'s claims were not ripe." *Id.* at *2. This Court reversed the trial court's judgment that S.O.'s *ultra vires* claims were not ripe for adjudication and remanded the cause to the trial court to address the merits of the *ultra vires* claims. This Court expressly stated that the controversy between S.O. and the University officials regarding their authority to conduct an internal disciplinary proceeding to determine whether to revoke her degree was justiciable, meaning that S.O. was not required to wait until the University had revoked her degree to assert a justiciable claim that their conduct was *ultra vires*. *See id.* at *3 (holding that S.O.'s claim of *ultra vires* conduct by University officials was ripe regardless of outcome of internal disciplinary proceeding). The Court held that the outcome of the disciplinary proceeding was not relevant to whether S.O. had pleaded a valid *ultra vires* claim and, consequently, S.O. was not required to wait until the conclusion of an internal disciplinary proceeding or wait until the University revoked her degree, to seek a declaration that conducting such a proceeding would be an *ultra vires* act by the University officials. *See id.* ("The nature of the controversy, therefore, is whether the University officials' act of conducting a disciplinary proceeding to consider revoking S.O.'s degree is *ultra vires*, regardless of its outcome."). The Court identified

the justiciable controversy as follows:

> A declaration concerning whether the University officials are acting with or without legal authority will resolve S.O.'s UDJA claim. A justiciable controversy therefore exists regarding whether the University officials are acting beyond their statutory authority. That controversy provides a jurisdictional basis for a UDJA action seeking a declaration regarding the University officials' authority to conduct the internal disciplinary proceeding at issue in this case.

Id. The trial court's judgment squarely addressed and answered that precise question, concluding and declaring that the University officials had neither the express nor implied authority to revoke S.O.'s degree and thereby affirming that their conduct was *ultra vires.*

In sum, this Court reversed and remanded the case to the trial court precisely because the trial court erred when it determined that it did not have subject matter jurisdiction over S.O.'s *ultra vires* claim before the University officials actually revoked her degree. Footnote four of the Court's opinion,[10] on which the

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[10] Footnote four states: "To the extent S.O.'s pleadings complain of or seek a declaration regarding the actual revocation of her degree, an event that has not occurred, that claim is not ripe." *S.O. v. University of Texas*, No. 03-16-00726-CV, 2017 WL

University officials rely, does not state or imply that S.O.'s *ultra vires* claims are not justiciable until the University has revoked her degree. Instead, the Court was addressing the fact that S.O.'s pleadings included complaints about the manner in which the University had initially declared her degree "revoked" on February 12, 2014, and allegations that the University's procedures related to its investigation and decision regarding her degree did not comport with the minimum constitutional standards guaranteed by the Texas Constitution's due course of law provision. *See id.* at *1. Footnote four served to clarify this Court's holding on justiciability and did not purport to comment on the merits of due process complaints about the manner in which the University had conducted, or proposed to conduct in the future, any internal disciplinary proceeding that had or could result in revocation of S.O.'s degree.[11] The Court's footnote advised the parties and the trial court that any due process complaints asserted by S.O. were premature unless and until the University actually conducted proceedings that resulted in revocation of her degree. *See id.* at *3 n.4. We overrule the University officials' first issue.

S.O.'s Cross-Appeal

2628072, at *3 (Tex. App.—Austin June 15, 2017, no pet.).

[11] After the University purported to revoke S.O.'s degree in 2014, S.O. and the University officials entered into a Rule 11 Agreement specifying that the University would restore S.O.'s degree "subject to further discussions regarding additional process."

In her first issue on cross-appeal, S.O. asserts that the trial court abused its discretion by failing to award her attorneys' fees pursuant to the Uniform Declaratory Judgments Act. *See* Tex. Civ. Prac. & Rem. Code § 37.009. Section 37.009, addressing costs and fees under the UDJA, provides that "[i]n any proceeding under this chapter, the court may award costs and reasonable attorney's fees as are equitable and just." *Id.* The grant or denial of attorneys' fees in a declaratory judgment action lies within the discretion of the trial court, and its judgment will not be reversed on appeal absent a clear showing that it abused that discretion. *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985). In the exercise of its discretion to award attorneys' fees in declaratory judgment actions, the trial court may award attorneys' fees to the prevailing party, may decline to award attorneys' fees to either party, or may award attorneys' fees to the nonprevailing party, regardless of which party sought declaratory judgment. *See Ochoa v. Craig*, 262 S.W.3d 29, 33 (Tex. App.—Dallas 2008, pet. denied). Whether to award or decline to award attorneys' fees is, however, entirely in the trial court's discretion, even if the party seeking fees has presented evidence that would support an attorneys' fee award should the trial court, *in its discretion*, decide to make such an award. *See Texas Mun. Power Agency v. Public Util. Comm'n*, 100 S.W.3d 510, 515 n.5 (Tex. App.—Austin 2003, pet. denied) ("Therefore, we note that the trial court retains *absolute discretion* to decline to award attorney's fees under the UDJA . . . ." (emphasis in original)). We do not disturb an award or denial of attorneys' fees under the UDJA absent a showing of abuse of discretion by the trial court.

Georgiades v. Di Ferrante, 871 S.W.2d 878, 882 (Tex. App.—Houston [14th Dist.] 1994, writ denied). The trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

At the hearing on S.O's motion for attorneys' fees, the trial court stated:

> I want to discuss this a little bit because I want everybody to understand I did consider attorney fees before I issued my orders. I believe that [S.O.] has been extremely well represented throughout many years of litigation in this Court, and I don't say that lightly. I think that she has had consistent, terrific representation. Nevertheless, there was a legitimate dispute about a question of law, and I truly believe that both parties were entitled to come and seek a determination by the Court.
>
> [T]he fact that other courts and other states have looked at this certainly doesn't make it easy. It makes it perhaps even more difficult and provides certainly justification for a lot of work and a lot of time that was clearly provided in representation, and [S.O.] in what clearly was a very, very, very important issue to her and to the university as well.
>
> And so I believe both sides needed to

> come and do what they did, and so both sides prevailed on significant issues, and I considered that. I believe that is, indeed, equitable and just, and many factors and considerations were considered in determining that that was the most equitable result, so the request for attorney fees is respectfully denied.

On appeal, S.O. emphasized that this litigation has been ongoing for a significant period of time and that she prevailed in significant and meaningful respects. S.O. also argues that the University officials have been acting *ultra vires* and that "principles of equity do not tolerate rewarding unauthorized and illegal conduct, nor do they incentivize it." The record demonstrates that the trial court carefully considered the actions of both parties and, rather than find that the University officials had intentionally engaged in *ultra vires* conduct, the trial court noted that the legal question before it was both novel and difficult, and that both sides were justified in pursuing their competing positions. The declaratory judgment claims in this case presented issues of first impression requiring statutory interpretation. The trial court communicated its view that, having considered the circumstances, it was equitable and just for each party to bear their own attorneys' fees and costs. We cannot conclude that this constituted an abuse of the trial court's absolute discretion to decline to award attorneys' fees pursuant to section 37.009. *See Brazoria County v. Texas Comm'n on Envtl. Quality*, 128 S.W.3d 728, 744 (Tex. App.—Austin 2004, no pet.). We overrule S.O.'s first issue on cross-appeal.

In her second issue on cross-appeal, S.O. asserts that the trial court erred by denying her motion for summary judgment on the two following requests for declaratory relief:

> **Declaration IV:** the 2003 University Catalog in effect when S.O. was a graduate student constitutes a binding contract with the University.
>
> **Declaration V:** for disciplinary proceedings against S.O., the University may not enforce any rules amended, modified, or adopted after S.O. graduated from the University, as doing so would be unconstitutional and contrary to Texas law.

In her brief, S.O. states that the trial court denied her request for these declarations in a February 11, 2019 summary-judgment order. A review of the court's order, however, makes it plain that the trial court did not dispose of S.O.'s request for these two declarations on summary judgment but, rather, determined that it did not have subject-matter jurisdiction to address the merits of the requested declarations. Specifically, the summary-judgment order states "As set forth in a separate Order of this Court, the Court lacks jurisdiction to grant relief under requests for Declarations II-VIII." The separate order referred to is the trial court's order on the University officials' plea to the jurisdiction. The court's plea-to-the-jurisdiction order stated that "the Court is of the opinion that Defendants' Second Plea to the Jurisdiction should be

denied *as to the claims which fall under the ultra vires exception to sovereign immunity* but granted as to all other claims for relief." (Emphasis added). Thus, the trial court determined that S.O.'s requests for Declarations IV and V were barred by sovereign immunity. S.O.'s briefing does not address the trial court's conclusion that these requests for declaratory relief are barred by sovereign immunity. Instead, she addresses only the merits of her requested relief, which she characterizes as requests for declarations about "which is the governing contract between her and [the University]." The UDJA does not enlarge the trial court's jurisdiction but is "merely a procedural device for deciding cases already within a court's jurisdiction." *Texas Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011). Accordingly, for the trial court to have jurisdiction, the underlying action must be one for which immunity has expressly been waived. *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22 (Tex. 2011). Although the UDJA waives sovereign immunity in particular cases, S.O.'s request for a declaration regarding an alleged contract between the parties does not fall within the scope of those express waivers. For example, the state may be a proper party to a declaratory judgment action that challenges the validity of a statute. *Heinrich*, 284 S.W.3d at 373 n.6 (citing Tex. Civ. Prac. & Rem. Code § 37.006(b)); *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994). But S.O. is not challenging the validity of a statute. Instead, she is seeking a declaration that the University is bound by a particular contract with her. *See Texas Logos, L.P. v. Texas Dep't of Transp.*, 241 S.W.3d 105, 120-21 (Tex. App.—2007, no pet.) (suits seeking to enforce

performance under contract or to impose contractual liabilities are suits against the state barred by sovereign immunity). S.O. does not direct us to any provision of the UDJA or any other provision that expressly waives immunity for her claims. The trial court properly determined that S.O.'s request for Declarations IV and V were barred by sovereign immunity and did not err by dismissing them for lack of subject-matter jurisdiction. We overrule S.O.'s second issue on cross-appeal.

CONCLUSION

Having overruled the University officials' two appellate issues and having also overruled S.O.'s two issues on cross-appeal, we affirm the trial court's judgment.

_____

Thomas J. Baker, Justice

Before Justices Goodwin, Baker, and Kelly
Concurring and Dissenting Opinion by Justice Kelly

Affirmed

Filed: September 4, 2020

APPENDIX C

CAUSE NO. D-1-GN-16-000517

[DATE STAMP]
Filed in the District Court
of Travis County, Texas
OCT 18 2016
At 4:12 PM.
Velva L. Price, District Clerk

S.O.
Plaintiff,

v.

UNIVERISTY OF TEXAS AT AUSTIN,
PRESIDENT GREGORY L. FENVES, et al.
Defendants.
(in their Official Capacities Only)

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
419th JUDICIAL DISTRICT

ORDER ON DEFENDANTS' PLEA
TO THE JURISDICTION

On February 17, 2016, the Court heard Defendants' Plea to the Jurisdiction and Plaintiff's Request for Temporary Injunction in the above captioned and styled cause. Plaintiff appeared through her attorneys of record, David Kenneth Sergi and

Anita Kawaja, and announced ready. Defendants appeared through their attorneys of record, Michael J. Patterson and Angela V. Colmenero, and announced ready. The record of testimony was duly reported by Della Rothermel, the court reporter for the 250th Judicial District Court.

After an evidentiary hearing, the Court signed an Agreed Order related to Plaintiffs disciplinary hearing. The Court reserved ruling on Defendant's Plea to the Jurisdiction to allow for the disciplinary hearing to take place on March 4, 2016, or another date shortly thereafter.

On October 11, 2016, the parties appeared on Defendant's Motion for Protection of Discovery and Motion to Stay Discovery Pending Until Resolution of Defendant's Plea to the Jurisdiction. At that time, the parties informed the Court that the disciplinary hearing had not yet taken place but was rescheduled, after multiple attempts, to take place on October 21, 2016. The Court informed the parties that it would rule on Defendant's Plea to the Jurisdiction if the disciplinary hearing did not go forward, as scheduled, on October 21. 2016. On October 14, 2016, the parties informed the Court that the disciplinary hearing will not take place on October 21. 2016.

After considering Defendants' Plea to the Jurisdiction. Plaintiff's Response and the reply thereto, the pleadings on file, the arguments of counsel, and the applicable law, the Court is of the opinion that Plaintiff's claims are not ripe for review and Defendants' Plea to the Jurisdiction should be and

is hereby GRANTED.

IT IS THEREFORE ORDERED that Defendants' Plea to the Jurisdiction is GRANTED and Plaintiff's claims against Defendants are hereby dismissed without prejudice to refiling of the same.

All relief not expressly granted herein is denied.

This Order disposes of all parties and claims and is a final and appealable judgment.

SIGNED this 18th day of October, 2016.

_____
PRESIDING JUDGE
KARIN CRUMP

APPENDIX D

FILE COPY

RE: Case No. 20-0811
DATE: 9/1/2023
COA #: 03-19-00131-CV
TC#: D-1-GN-16-000517

STYLE: HARTZELL v. S.O.

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause.