

No. 19-0440

In the Supreme Court of Texas

TEXAS SOUTHERN UNIVERSITY; DANNYE HOLLEY, IN HIS
INDIVIDUAL & OFFICIAL CAPACITIES; EDWARD
MALDONADO (A/K/A SPEARIT), IN HIS INDIVIDUAL &
OFFICIAL CAPACITIES; GABRIEL AITSEBAOMO, IN HIS
INDIVIDUAL & OFFICIAL CAPACITIES,

Petitioners,

v.

IVAN VILLARREAL,

Respondent.

On Petition for Review from the
First Court of Appeals, Houston

PETITIONERS' REPLY BRIEF ON THE MERITS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Villarreal dodges the principal issue presented in the TSU Defendants' petition: does an academic dismissal from public graduate school infringe upon a liberty interest protected by the due-course-of-law clause? This is an open and important question of Texas law. And the TSU Defendants' opening brief showed that such dismissals do not warrant constitutional protection under first principles and existing precedent. Villarreal does not address these arguments.

Instead, Villarreal sows confusion by focusing upon supposed irregularities surrounding a Criminal Law exam and arguing that fact questions remain concerning whether his dismissal from Thurgood Marshall School of Law was "academic" or "disciplinary." *Cf. Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 930-31 (Tex. 1995) (holding that a disciplinary dismissal from a public graduate school is subject to due-course-of-law protections). But Villarreal was not accused of cheating or any other misconduct in connection with that exam. His lawsuit complains about *other* students' supposed cheating, which the TSU Defendants investigated and resolved. Villarreal, on the other hand, was dismissed from TMSL for failing to meet its 2.0 cumulative-grade-point-average requirement. His was a quintessential academic dismissal. Accordingly, there is no fact question precluding review of the principal issue presented. The Court should grant review and hold that an academic dismissal does not implicate the due-course-of-law clause.

But even if the First Court of Appeals was correct in concluding that academic dismissals warrant constitutional protection, the court's deeply flawed holdings regarding Villarreal's procedural- and substantive-due-course-of-law claims

independently deserve review. As for the procedure claim, Villarreal received more process than he was due before he was dismissed, including notice and multiple opportunities to challenge his grades. As for the substance claim, the record shows that Villarreal was dismissed for failing to meet TMSL's minimum academic requirements, plain and simple. Villarreal does not allege—much less offer evidence—that the TSU Defendants had improper, non-academic bases for dismissing him from school. On those undisputed facts, Villarreal's claims should have been dismissed.

But the First Court accepted Villarreal's argument that he enjoys a constitutional right to a personally satisfactory investigation into circumstances surrounding the Criminal Law exam—even though the TSU Defendants' investigation was *not* directed at Villarreal, resulted in *no* punishments, and wound up only *raising* students' grades. No authority remotely supports the First Court's boundless expansion of the due-course-of-law clause, which would empower every Texas public-school student with a constitutional right to participate in managing schoolwide affairs.

ARGUMENT

I. The Court Should Grant Review To Hold That an Academic Dismissal from Public Graduate School Does Not Implicate the Due-Course-of-Law Clause.

A. Villarreal was dismissed from TMSL for academic failure—not misconduct.

Since this Court’s decision in *Than*, Texas law has remained unsettled regarding whether an academic dismissal from public graduate school implicates the due-course-of-law clause. 901 S.W.2d at 931 (“Because we conclude that Than’s dismissal involved a disciplinary matter, we need not decide and express no opinion on what, *if any*, procedural due process must be afforded when academic dismissals are involved.” (emphasis added)); *see also* Pet. Br. 9-11. The TSU Defendants’ opening brief showed that such dismissals do not warrant due-course-of-law protections for two reasons: first, an academic dismissal does not deprive a student of his chosen career or any other protected interest; and second, such a dismissal is based upon evaluative judgment that does not lend itself to factfinding review. Pet. Br. at 13-16.

Villarreal has no answer for these arguments. He instead argues that the TSU Defendants have not “conclusively establish[ed]” that his dismissal was academic, as opposed to disciplinary. *See* Resp. Br. 39 (emphasis omitted). This is Villarreal’s burden alone to bear. But he alleges no fact that would even suggest that his dismissal was disciplinary. Villarreal was dismissed from TMSL based on his grades and nothing more. His 1.97 cumulative grade point average fell below the school’s 2.0 minimum requirement for first-year law students. Pet. Br. 2. To use Villarreal’s own

words describing an academic dismissal, his failure to satisfy TMSL's "generally-applicable scholarship standards" formed the basis for the TSU Defendants' "evaluative" decision that he lacked the ability to become a lawyer. *Cf.* Resp. Br. 35. Villarreal was not disciplined in any fashion in connection with his dismissal. He even was invited to recommence his law-school education at TMSL after waiting two years. Pet. Br. 5.

What's more, Villarreal did *not* participate in the allegedly improper review sessions that form the basis for his lawsuit. His entire point is that *other* TMSL students enjoyed an unfair advantage over him in Criminal Law. *See* Resp. Br. 49-54. At bottom, Villarreal fails to explain what "disputed material facts" possibly could lead to a conclusion that his dismissal was disciplinary, rather than academic, and therefore subject to due-course-of-law protections. *Cf. id.* at 29. While Villarreal asserts that "he is not challenging [TMSL's] GPA requirement itself as a legitimate academic policy," *id.* 38, that policy provided the sole basis for his dismissal from law school.

In sum, there is no question that Villarreal was academically dismissed under the applicable authorities. *See Than*, 901 S.W.2d at 931 ("Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct."); *accord Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89-90 (1978) ("[An academic dismissal] rest[s] on the academic judgment of school officials that [the student] did not have the necessary . . . ability to perform adequately as a [professional.]"). Indeed, Villarreal's dismissal

for “bad grades” is *the* quintessential “academic dismissal[.]” *Tex. Tech Univ. Health Scis. Ctr. v. Enoh*, 545 S.W.3d 607, 622 (Tex. App.—El Paso 2016, no pet.).

Villarreal’s reliance upon *Than*, *Horowitz*, and *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), is misplaced. Each case examined whether the defendant-university satisfied due-process or due-course-of-law standards *after* concluding (or assuming) that the plaintiff-student had a constitutionally protected interest at stake. *See Than*, 901 S.W.2d at 930; *Horowitz*, 435 U.S. at 84-85; *Ewing*, 474 U.S. at 223.¹

Here, the TSU Defendants’ point is that a purely academic dismissal does not implicate a constitutionally protected interest—and therefore, neither does it implicate the due-course-of-law clause. Pet. Br. 9-16; *see also Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015) (“Before any substantive or procedural due-process rights attach . . . the [plaintiffs] must have a liberty or property interest that is entitled to constitutional protection.”). By focusing on facts surrounding the adequacy of the TSU Defendants’ investigation into the Criminal Law exam to answer *the antecedent question* of whether Villarreal’s grades-based dismissal implicates the due-course-of-law clause, it is Villarreal who is “putting the cart before the horse.” *Cf. Resp. Br. 33*.

¹ Villarreal also points to *Foley v. Benedict*, 55 S.W.2d 805 (Tex. [Comm’n Op.] 1932) (orig. proceeding). But *Foley* concerned a challenge to rules adopted by the University of Texas’s Board of Regents, which are subject to review for abuse of the Board’s statutory authority. *Id.* at 810. *Foley* did not consider the due-course-of-law clause.

Villarreal’s additional suggestion that “it is unnecessary for the Court to attempt to definitively categorize the nature of [his dismissal],” *id.* at 42, demonstrates his misunderstanding of the TSU Defendants’ petition. It *is* necessary to categorize Villarreal’s dismissal because an academic dismissal should not receive due-course-of-law protection, Pet. Br. 9-16, whereas a disciplinary dismissal does receive such protection under existing precedent.

Accordingly, the Court should grant the petition and hold that an academic dismissal does not implicate a liberty interest protected by the due-course-of-law clause.

B. Villarreal lacks a constitutionally-protected “property” interest in his law-school education.

As Villarreal acknowledges, the First Court of Appeals did not address his alternative contention that he maintains a constitutionally-protected “property” interest in his law-school education. Resp. Br. 44. Villarreal’s attempt to press that argument as an independent basis to affirm the First Court’s judgment is waived, as he failed to raise that issue in his response to the TSU Defendants’ petition for review. *See* Tex. R. App. P. 53.3(c)(2).

Regardless, as Villarreal also appears to acknowledge, there is no state law, rule, or policy that establishes an entitlement to a graduate-level education in Texas. *See* Resp. Br. 44; *see also Honors Acad., Inc. v. Tex. Educ. Agency*, 555 S.W.3d 54, 61 (Tex. 2018) (“To have a constitutionally protected property interest, a person must have a legitimate claim of entitlement rather than a mere unilateral expectation.” (internal quotation marks omitted)); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577

(1972) (“[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”).

Neither can Villarreal claim a property interest in his education “springing from his contractual rights arising from TMSL’s Rules and Regulations,” Resp. Br. 44, because he failed to satisfy TMSL’s minimum GPA requirement set forth in those very rules, Pet. Br. 2; *see also Nat’l Health Res. Corp. v. TBF Fin., LLC*, 429 S.W.3d 125, 131 (Tex. App.—Dallas 2014, no pet.) (“The elements of a breach of contract claim [include] . . . performance or tendered performance by the plaintiff[.]”).

In short, Villarreal cannot maintain a due-course-of-law claim based upon any purported property right.

II. The First Court’s Procedural-Due-Course-of-Law Analysis Was Flawed and Warrants Review.

The TSU Defendants also demonstrated that the First Court of Appeals erred in holding that Villarreal could maintain procedural-due-course-of-law claims, assuming such claims exist in the context of academic dismissal. Pet. Br. 16-19. The evidence shows that Villarreal received *more* process than he was due—namely, notice explaining the TSU Defendants’ reasoned decision to dismiss Villarreal from school. *Id.*; *see also Horowitz*, 435 U.S. at 85-86, 90.

Villarreal again points to *Than* to support his procedural challenge. Resp. Br. 47-49. But *Than* was a disciplinary-dismissal case, which required the school to provide the plaintiff-student with a chance to respond to evidence that he had cheated on an

exam. *Than*, 901 S.W.2d at 932-33. Villarreal’s grades-based dismissal is not analogous. He was not owed an “opportunity to characterize his conduct[,]” *Goss v. Lopez*, 419 U.S. 565, 584 (1975), because Villarreal was not dismissed based on any misbehavior or misdeed. Nevertheless, Villarreal *did* receive notice regarding his dismissal and multiple opportunities to discuss his grades—including his Criminal Law grade. Pet. Br. 2-5. The “C+” he earned in that course was the best grade he received. *Id.*

Villarreal’s focus on the TSU Defendants’ alleged “bad faith” management of the Criminal Law exam controversy, Resp. Br. 49-52, is misplaced. To begin, Villarreal was *not* the subject of that investigation. And the TSU Defendants ultimately concluded that no student cheated and that no student received an unfair advantage on the exam. Pet. Br. 3-4. But to address any lingering notion of impropriety relating to Professor Maldonado’s review sessions, the TSU Defendants implemented a class-wide remedy that resulted only in raising students’ grades on the exam. *Id.* at 4-5. Villarreal had the opportunity to lodge a protest at that time, but he accepted his “C+” —until he filed this lawsuit. *Id.*

Villarreal’s assertion that he maintained an additional due-course-of-law right “to offer constructive review or criticism of material aspects of the administration’s [investigation],” Resp. Br. 50, is unprecedented and unworkable. That would empower each Texas public student with a constitutional right to participate in managing schoolwide affairs—even concerning matters that had, at most, a “marginal impact” on the student. *Villarreal v. Tex. S. Univ.*, 570 S.W.3d 916, 930 (Tex. App.—Houston [1st Dist.] 2018, pet. filed) (Massengale, J., concurring).

At bottom, the TSU Defendants' handling of the Criminal Law exam had nothing to do with the notice that Villarreal was owed and received in connection with his cumulative-grade-point-average-based dismissal from TMSL. As Justice Massengale explained, "[t]here is no allegation that the law school failed to provide fundamental procedural protections to Villarreal in the implementation of [the school's GPA] policy." *Id.* at 926 (Massengale, J., concurring). Villarreal cannot maintain procedural-due-course-of-law claims on this record.

III. The First Court's Substantive-Due-Course-of-Law Analysis Was Flawed and Warrants Review.

The TSU Defendants also showed that the First Court of Appeals erred in concluding that Villarreal could maintain substantive-due-course-of-law claims, again assuming such claims exist. Pet. Br. 19-21. The evidence demonstrates that Villarreal was dismissed pursuant to TMSL's non-waivable 2.0 cumulative-grade-point-average requirement. *Id.* at 2-5. His grades-based dismissal easily satisfies the professional-judgment standard applicable to any substantive-due-course-of-law challenge. *See Ewing*, 474 U.S. at 225 ("When judges are asked to review the substance of a genuinely academic decision[] . . . they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.").

Villarreal once again points to the TSU Defendants' alleged mishandling of the Criminal Law exam to support his substantive challenge. Resp. Br. 53-60. But that

investigation was not directed at Villarreal, and the resolution did not impact Villarreal's course grade or his GPA. Pet. Br. 5.

Moreover, as Justice Massengale pointed out, there is no allegation of discrimination or malice against Villarreal (let alone evidence) that could possibly support a finding that the TSU Defendants departed from accepted academic norms in resolving the Criminal Law exam controversy. *Villarreal*, 570 S.W.3d at 930 n.14 (Massengale, J., concurring). The evidence instead shows that the TSU Defendants undertook a substantial investigation into the allegedly improper review sessions, confirmed the reliability of the exam, but nonetheless implemented a class-wide remedy that was designed only to raise students' grades. Pet. Br. 2-5.

The TSU Defendants were not obligated to "conclusively demonstrate" that they conducted a perfect investigation or that they adopted the best remedy to prevail on this claim. *Cf. Villarreal*, 570 S.W.3d at 924-25; Resp. Br. 52 (asserting that the TSU Defendants "failed to meet the high burden necessary to secure summary dismissal"). To the contrary, university faculties are entitled to "the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation." *Ewing*, 474 U.S. at 225 n.11; *accord Patel v. Tex. Tech. Univ.*, 941 F.3d 743, 747 (5th Cir. 2019) ("Courts must accept, as consistent with due process, an academic decision that is not beyond the pale of reasoned academic decision-making when viewed against the background of the student's entire career."); *Doe v. Univ. of N. Tex. Health Sci. Ctr.*, No. 02-19-00321-CV, 2020 WL 1646750 at *4 (Tex. App.—Fort Worth April 2, 2020, no pet. h.) (mem. op.) ("[C]ourts are ill-equipped to second-guess academic decisions and

. . . we may engage in that second-guessing only if there are allegations or proof that a decision was based on something other than professional academic judgment.”).

Under these authorities, the Court must accept the TSU Defendants’ handling of the exam and the school’s ultimate decision to dismiss Villarreal for failing to meet TMSL’s minimum academic standards, as these decisions fell within the broad realm of academic judgment. Villarreal cannot use the courts for quality control over the TSU Defendants’ management of academic affairs. But that is precisely what Villarreal seeks to do through this lawsuit. Resp. Br. 55-61.

In short, the record demonstrates that the TSU Defendants used professional judgment in dismissing Villarreal from TMSL pursuant to the school’s 2.0 grade-point-average requirement. And there is no allegation or evidence that anyone acted with malice or any other constitutionally impermissible purpose. Villarreal cannot maintain a substantive-due-course-of-law challenge on these facts.

P R A Y E R

The Court should grant the TSU Defendants’ petition for review, reverse the First Court’s judgment on the due-course-of-law claims, and render judgment dismissing Villarreal’s claims.

Respectfully submitted.

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On June 17, 2020, this document was served electronically on Jerad Wayne Najvar, lead counsel for Respondent, via jerad@najvarlaw.com.

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