

No. 19-0440

In the Supreme Court of Texas

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

Petitioners,

v.

IVAN VILLARREAL,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The TSU Defendants' petition asks the Court to resolve the question left open in *University of Texas Medical School at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995), and hold that an academic dismissal from a public university does not implicate the due-course-of-law clause of the Texas Constitution, Pet. vii, 1, 8-12.

Villarreal never suggests that this issue is unworthy of review. He instead posits that the TSU Defendants did not “[c]onclusively [e]stablish” that his dismissal was “[p]urely [a]cademic,” as opposed to disciplinary. Resp. 14 (emphasis omitted); *cf. Than*, 901 S.W.2d at 930 (holding that a disciplinary dismissal from a public university is subject to due-course-of-law protections). But there is no fact question that precludes review of the important question presented. Villarreal was dismissed from the Thurgood Marshall School of Law (“TMSL”) for failing to maintain a 2.0 cumulative grade point average during his first year of law school, plain and simple. The Court should grant the petition to pronounce that a student may not maintain constitutional due-course-of-law claims under these circumstances. Allowing the First Court of Appeals’s decision to stand risks providing every failing public-school student with a second bite at the apple in court.

But even if the First Court was correct in holding that an academic dismissal implicates a constitutionally protected liberty interest, the court’s deeply flawed holdings regarding Villarreal’s procedural and substantive due-course-of-law claims independently deserve review.

ARGUMENT

I. VILLARREAL WAS DISMISSED FROM TMSL FOR ACADEMIC FAILURE—NOT MISCONDUCT.

Villarreal was dismissed from TMSL on account of his grades. His 1.97 cumulative grade point average fell below the school's 2.0 minimum requirement for first-year law students. Pet. 2. But Villarreal was not disciplined or charged with any type of misconduct in connection with his dismissal. *Id.* at 2-5, 11. He even was invited to recommence his law-school education at TMSL after waiting two years. *Id.* at 5.

To sow confusion, Villarreal spends the bulk of his response detailing the TSU Defendants' investigation into irregularities surrounding TMSL's 2014 Criminal Law exam. Resp. 5-14, 17-21. But 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. *Cf.* Resp. 15-17. Neither Villareal nor any other student was punished in connection with that exam. Pet. 3-4.

On these facts, there is no question that Villarreal's dismissal was "academic," as opposed to "disciplinary." *See 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.]"); *accord 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."). Indeed, a dismissal for "bad

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

Villarreal’s reliance upon *Than*, *Horowitz*, and *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985), is misplaced. Each case examined whether the defendant-university satisfied due-process 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.

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. 8-12; *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. 14. The Court should grant the petition and hold that an academic dismissal does not implicate due-course-of-law protections.

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. 12-14. The

evidence shows that Villarreal received *more* process than he was due in connection with his dismissal—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. 17. But *Than* was a disciplinary-dismissal case, which required the school to provide the plaintiff-student with the 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 remotely 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 on account of 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. 2-5. The “C+” he earned in that course actually was the best grade he received. *Id.* at 2.

Villarreal’s focus on the TSU Defendants’ alleged “bad faith” management of the Criminal Law exam controversy, Resp. 17-19, is misplaced. To begin with, neither Villarreal nor any other student’s grade was lowered as a result of the TSU Defendants’ investigation into that exam. Pet. 4. But regardless, the TSU Defendants’ handling of the 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.” *Villarreal v. Tex. S. Univ.*, 570

S.W.3d 916, 926 (Tex. App.—Houston [1st Dist.] 2018, pet. filed) (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. 15-16. 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. 19-21. But that investigation did not negatively affect Villarreal’s grade or his GPA. Pet. 4. And as Justice Massengale pointed out, there is no allegation of discrimination or malice against Villarreal (or any identifiable group of students) that could 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). To the contrary, the evidence 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. 2-5, 16. The TSU Defendants were not obligated to "conclusively demonstrate" that this was the best resolution of the exam situation to prevail on their plea to the jurisdiction. *Cf. Villarreal*, 570 S.W.3d at 925.

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 evidence that anyone acted in bad faith. Villarreal cannot maintain a substantive-due-course-of-law challenge on these facts.

PRAYER

The Court should grant the TSU Defendants' petition for review, reverse the First Court's judgment, and render judgment dismissing Villarreal's claims.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On December 9, 2019, this document was served electronically on Jerad Wayne Najvar, lead counsel for Respondent, via jerad@najvarlaw.com.

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CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this brief contains 1,396 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Evan S. Greene
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