06-0792

In the Supreme Court of Texas

BRYAN GLEN HOLE, BRYAN ROBERT HIGGINS, JOHN MAGRUDER, KRISTOPHER J. OGORCHOCK, DANIEL R. DELA VINA, DRAKE D. PROWSE, WILL WARDEN, JARED JENKINS, HERIBERTO VEYRAN, CESAR YARRITU, JOSHUA LAUGHLIN, JACOB E. GRACIA, ROBERT O. CROW, JR., JASON BELL, MICHAEL A. GARZA, E. LLOYD WILLIS, NATHAN BLACKWELDER, ADAM BLACKWELDER, DOMINIC BRAUS, ROYCE NORMAN, ERIC GONZALEZ, MICHAEL FOX, AND BARRETT BREEDLOVE,

Petitioners,

v.

TEXAS A&M UNIVERSITY,

Respondent.

On Petition for Review to the
Tenth Court of Appeals at Waco

RESPONSE TO PETITION

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ISSUES PRESENTED

Response to Petitioners' Issue 1:

1a. The trial court shut down the school's disciplinary process before any student received a university appeal and before some even had an initial hearing. Its eventual judgment on "due process" grounds speculated about what additional process each student would have been afforded, about the outcome of some initial hearings, and about the ultimate appeals. Was the court of appeals correct that the trial court's early intervention was not yet constitutionally ripe?

1b. Petitioners lost on their "free speech" claim in the trial court and did not advance it to the court of appeals. Can they now raise it as grounds for a petition for review? [Not briefed]

Response to Petitioners' Issue 2:

2a. The district court made no declarations interpreting the University's rules, and plaintiffs did not file a cross-appeal on that ground. Do those un-awarded declarations support jurisdiction on appeal? [Not briefed]

2b. In any event, does the UDJA—contrary to *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440 (Tex. 1993), and *Patterson v. Planned Parenthood*, 971 S.W.2d 439 (Tex. 1998)—expand the subject-matter jurisdiction of the courts by relaxing the constitutional requirement of ripeness?

Respondent's Issue:

3. Is the court of appeals's judgment of dismissal also supported by alternate grounds, including sovereign immunity, standing, or mootness? [Not briefed]

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The petition does not warrant review. The live controversy is whether some of the Petitioners should receive attorney's fees for having styled their "due process" claim under the Uniform Declaratory Judgments Act (UDJA). No question remains about how the university's rules will be applied to *these* students—all 23 students have graduated, and none were given a sanction that jeopardizes his degree.

Petitioners' theory—which presumes that the UDJA relaxes the constitutional ripeness requirement, *see* Pet. 12—simply defies Texas law. This Court has already held

that the UDJA does not expand the jurisdiction of the courts, *Tex. Ass'n of Bus. v. Tex. Air Control Board*, 852 S.W.2d 440, 444 (Tex. 1993), and it has already applied a constitutional ripeness analysis to declaratory-judgment claims like those at issue here, *Patterson v. Planned Parenthood*, 971 S.W.2d 439, 441 (Tex. 1998). Those settled principles control this case, and the petition should be denied.

STATEMENT OF FACTS

A. Texas A&M University Investigated Hazing in Petitioners' Unit of the Student Corps of Cadets.

In October 2002, the student commanding officer of the Parson's Mounted Cavalry (the Cav, a unit of the Corps of Cadets) reported hazing in his unit. The follow-up investigation revealed systematic hazing: that older students administered axe-handle licks to other students; that this physical abuse was part of the initiation and promotion rituals of the organization; and that older students would punish younger ones by putting them in a "box" or a "stall" to subject them, among other indignities, to having horse feces poured on them.[1] Even before the trial court put an early end to the University's ongoing hearing process, fifteen Petitioners had already admitted to the conduct for which they faced disciplinary action.[2]

B. The Hearing Process for Serious Disciplinary Infractions at Texas A&M Has Five Phases, from a Notice Letter Through an Appeal.

Broadly speaking, the University's disciplinary hearings proceed in five phases: (1) a notice letter that begins the process and informs the student of the date at which he

[1] PX.1, "Investigation Report" (Oct. 29, 2002).

[2] The corresponding record references are collected on pages 19 to 21 of the Appellant's Brief.

can review materials and attend a "pre-hearing";[3] (2) an opportunity to review the evidence the school has against the student; (3) a "pre-hearing" at which the student can learn more about the process and, if he so chooses, indicate that he accepts responsibility for the charges;[4] (4) a hearing before a panel of administrators in which the student can present exculpatory evidence and be assisted by a personal representative; and (5) an appeal before a different panel (consisting of both students and faculty members) which can reconsider whether the student is culpable and what sanction is appropriate.[5] The appellate panel can reconsider whether the student should be punished at all and can hear additional evidence.[6]

C. This Litigation Interrupted the School's Internal Process.

Within days, the trial court shut down this process. At that point, six students remained at the third phase, having had a pre-hearing but not yet a formal hearing; no decision had yet been made about their culpability. Seventeen had proceeded to the fourth phase with an initial hearing; one of those, however, had not yet been sanctioned because the trial court order intervened while the panel was deliberating.[7] Of those who

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[3] *E.g.*, PX.55 (one such letter).

[4] *See* 8.RR.132; *see also* PX.62, at 2629 (student accepting responsibility for some charges).

[5] *See* PX.7 (appellate rules) [attached at Tab A].

[6] *See* PX7, at Rule 58.5 [attached at Tab A].

[7] No student was expelled. Of the sixteen sanctions set by the hearing panels (but not yet reviewed by an appellate panel), two were non-suspension remedies (a "deferred" suspension and a "conduct" probation, neither of which involves time away from classes), thirteen were temporary suspensions, and one was dismissal until a date certain at which point the student could apply for re-admission. *See* 7.CR.1235-36 (table); *see also* PX.62 (disciplinary files).

had moved through the fourth phase, several had already filed the paperwork to initiate their university appeals, which stayed the effect of the sanctions until after those appeals.[8] No student had yet completed that final phase.

The trial court's final judgment enjoined the University from disciplining any plaintiff unless it followed a meticulous process set out in the order—encompassing many concepts borrowed from criminal procedure (such as "self-incrimination" and an "exclusionary rule") and others that dictated substantive outcomes (such as a statute of limitations and granting immunity to some students).[9] It also awarded UDJA attorney's fees of more than $350,000 to Petitioners Hole, Breedlove, Gonzalez, Fox, and Magruder. The court of appeals reversed and dismissed, holding that the trial court's judgment exceeded its jurisdiction because the underlying controversy was not ripe. *Tex. A&M Univ. v. Hole*, 194 S.W.3d 591, 593 (Tex. App.—Waco 2006, pet. filed).

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[8] PX7, Rule 58.1 [attached at Tab A].

[9] 6.CR.1075-92.

SUMMARY OF THE ARGUMENT

The petition advances a ripeness question that just might—if Petitioners receive the remand that they now seek and also prevail in the court of appeals (and perhaps in a later petition)—support their award of attorney's fees. The petition will have no effect on any real-world "due process" for Petitioners because all 23 of them have already graduated and they received no sanctions that would have jeopardized their degrees.

The court of appeals was correct to dismiss. The court of appeals's holding that the UDJA does not give plaintiffs a free pass on the ripeness question is controlled by this Court's precedents. The UDJA does not expand the subject-matter jurisdiction of the courts. *Tex. Ass'n of Bus.*, 852 S.W.2d at 444. Ripeness implicates subject-matter jurisdiction, and this Court has already applied constitutional principles of ripeness to UDJA claims. *Patterson*, 971 S.W.2d at 441. Petitioners' invitation to reopen those settled questions should be rejected.

When Petitioners chose to go to court in the first instance—rather than permitting at least *the decision-making phase* of the University's process to move forward—they put the courts in an awkward position. They asked the courts to speculate about how the university would apply its rules and even about the procedure that would be followed by upcoming appellate panels (before *different* students and faculty members). The predictable result was a conclusory, overbroad judgment that sets out bright-line rules inappropriate to the "due process" context and an injunction that goes far beyond ordering additional process. The court of appeals was right to conclude that the judiciary had been asked to intervene too soon to reach an appropriately nuanced judgment.

ARGUMENT

I. THE PETITION IS BASED ON A THEORY OF THE UDJA THAT WAS REJECTED IN *TEXAS ASSOCIATION OF BUSINESS V. TEXAS AIR CONTROL BOARD*.

The petition concedes that "there is no doubt that the Uniform Declaratory Judgments Act does not confer jurisdiction on a trial court." Pet. 11 (emphasis removed). Yet it asserts that the UDJA loosens the constitutional test for justiciability on matters such as ripeness. *See* Pet. 12 (advocating a standard based on "ripening seeds" rather than ripeness itself). It does not.

The UDJA does not alter the constitutional ripeness requirement. Nor has the Court ever made such a holding. To the contrary, it has rejected the view that the UDJA expands the subject-matter jurisdiction of the courts by loosening requirements such as standing. *Tex. Ass'n of Bus.*, 852 S.W.2d at 444. "Ripeness, like standing, is a threshold issue that implicates subject matter jurisdiction." *Patterson*, 971 S.W.2d at 442 (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998)). And the Court has applied the normal constitutional ripeness analysis to claims brought under the UDJA. *Patterson*, 971 S.W.2d at 441. The Court should reject Petitioners' invitation to abandon that settled law.

II. Petitioners' Claims Were Not Constitutionally Ripe Because They Forced the Courts To Speculate About Too Many Critical Facts.

A. The Petition Erects a Straw Man—the Court of Appeals Did Not Announce or Apply Any "Exhaustion of Remedies" Rule.

The petition repeats the phrase "exhaustion of remedies" as though it had been used at some point by the court of appeals. It was not. The court of appeals never invoked the doctrine of "exhaustion of remedies."

What did the court of appeals do? Its very brief opinion on rehearing is worth reading. Petitioners asked the court of appeals to grant rehearing because one of the plaintiffs (Michael Garza) had never filed for a university appeal and had instead chosen to let the time for an appeal expire before the TRO was issued.[10] The court of appeals held that, on this record, his claims were not ripe:

> Texas A&M University argues that we correctly dismissed Garza's claims as unripe because he chose not to contest his punishment through the university appellate process. The University forcefully argues that to allow a student to avoid the disciplinary process and then challenge it in court undermines the ripeness doctrine by allowing a court to engage in abstract disagreements and to interfere with a decision before "it has been formalized and its effects felt in a concrete way."
>
> TAMU further argues that, in evaluating ripeness of a declaratory judgment claim, courts apply the general principles of ripeness, not a relaxed notion of the ripeness doctrine. It maintains that this court properly found Appellees' claims were not ripe for adjudication because, by avoiding the University's appellate process, necessary facts were not developed and the outcome of the disciplinary process remains uncertain.

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[10] The petition says that "Michael Garza . . . had no further opportunity to appeal. He had completely finished the disciplinary process by the time his claim was asserted." Pet. 10 n.3. What the petition means by "completely finished" is that Garza chose to accept his punishment and not file any appeal at all. Indeed, Garza voluntarily withdrew from school before the first day of the trial and did not re-enroll for more than two years (on the day before the appellate oral argument). He has since completed his coursework and graduated.

> We agree with TAMU. Because Michael Garza, like the other plaintiffs, did not complete the university disciplinary process, his due process claims are not ripe for adjudication. We deny Appellees' motion for rehearing.

Hole, 194 S.W.3d at 594 (op. on reh'g) (quoting *Patterson*, 971 S.W.2d at 443).

The court of appeals applied a conventional ripeness analysis. There was no confusion about the existence of a formal "exhaustion of remedies" requirement. Instead, the court noted that "by avoiding the University's appellate process, necessary facts were not developed" and thus "his due process claims are not ripe for adjudication." *Id.* That straightforward application of law to facts does not warrant review.[11]

B. Petitioners Ask the Courts To Speculate About the Pivotal Facts.

The court of appeals's conclusion about ripeness follows from this record. Petitioners' "due process" theories asked the courts to speculate about what process they would actually have been provided *in the very hearings that the trial court stopped*. Thus, the court was asked to guess how the University *would have* applied its rules, how each future hearing *would have* unfolded, and how the appellate process—which had not even begun and which would involve distinct hearing panels composed of both students and faculty—*would have* disposed of the cases.

The trial court's judgment was based on those guesses, among others. Because there was not a complete factual record as to any single plaintiff, the judgment and

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[11] Petitioners suggest that the petition warrants review because the court of appeals decision was mentioned in *City of Anson v. Harper*, 2006 WL 1914611 (Tex. App.—Eastland July 13, 2006, no pet.). *Anson* discusses how ripeness helps to define the separation of powers. It was a takings case—not a school-discipline case—and should have no bearing on whether to grant review here.

injunction aggregated them into a nameless mass, imposing a one-size-fits-all process requirement on the school. Indeed, the injunction imposed procedures in the academic context that—in many ways—exceed the protection afforded civil litigants, including an "exclusionary rule" that would prevent the student's own admissions of misconduct from being considered. The court of appeals vacated that indefensible judgment and dismissed, holding that the *facts* necessary to make an appropriate judgment—one tailored to the facts—had simply not developed and thus the claim was not ripe for judicial determination.

The court of appeals was correct that Petitioners' claims were not ripe. Ripeness focuses "on whether the case involves 'uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Patterson*, 971 S.W.2d at 442 (quoting 13A WRIGHT ET AL., FED. PRAC. & PROC. §3532.1, at 130 (2d ed. 1984)). Texas courts may not constitutionally entertain a matter that is not ripe because to do so would be to render a prohibited advisory opinion. *Patterson*, 971 S.W.2d at 442-43; *Tex. Ass'n of Bus.*, 852 S.W.2d at 444; *see also* TEX. CONST. art. II, §1. Thus, "[a] case is not ripe when its resolution depends on contingent or hypothetical facts, or upon events that have not yet come to pass." *Patterson*, 971 S.W.2d at 443 (citing *Camarena v. Tex. Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988)).

Because no plaintiff completed the University's five-phase hearing process, it was speculation on the part of the trial court as to how—or even whether—each plaintiff might ultimately be disciplined. This case is thus much like *Waco Independent School District v. Gibson*, in which the plaintiffs sought to challenge a recently implemented

policy that would have conditioned grade advancement on satisfactory performance on a standardized test or, if the student failed the test, the school district's remediation program. 22 S.W.3d 849, 850 (Tex. 2000). The Court held that the plaintiffs' claims were not ripe. *Id.* at 852-53. It noted that, even if the record suggested that minority students would disproportionately fail the test, the claims were still not ripe because the record did not establish how they would fare in the remediation program. *Id.* at 853.

Here, too, Petitioners did not establish what will result from the University's internal appeals process. The University's appellate process offers both written submissions and an oral hearing before a new panel (including both students and faculty members), as well as the chance to introduce pertinent evidence. After those university appeals, some students might be awarded a new hearing; other students may have their sanction reduced to a non-suspension; still other students might be entirely absolved of responsibility. The court and the parties simply do not know. For that reason, the court of appeals's judgment of dismissal was correct.

PRAYER

The petition should be denied.

Respectfully submitted,

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