NO. 19-0440

# 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*

*No. 01-17-00867-CV*

## Respondent's Brief on the Merits

**Jerad Wayne Najvar**
Texas Bar No. 24068079
jerad@najvarlaw.com
**Austin M.B. Whatley**
Texas Bar No. 24104681
austin@najvarlaw.com
NAJVAR LAW FIRM, PLLC
2180 North Loop West, Ste. 255
Houston, Texas 77018
Telephone: (281) 404-4696
Facsimile: (281) 582-4138
*Counsel for Respondent*

## IDENTITY OF PARTIES AND COUNSEL

To those persons listed by the Petitioners, Respondent Villarreal further identifies Najvar Law Firm PLLC associate, Austin M.B. Whatley, as co-counsel to Respondent:

Austin M.B. Whatley
NAJVAR LAW FIRM PLLC
2180 North Loop West, Ste. 255
Houston, TX 77018
austin@najvarlaw.com

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

## STATEMENT OF THE CASE

Petitioners have correctly stated the nature of the case.

## ISSUES PRESENTED

Respondent is dissatisfied with the Petitioners' statement of the issues. The issues at this early juncture of this case are more accurately presented as follows:

1. Whether the inquiry into a cheating scandal presents a purely academic question or a question more akin to a disciplinary dismissal, or something new entirely, implicating a cognizable liberty interest;
2. Even aside from a liberty interest, whether a property interest or a privilege or immunity protected by the Texas Constitution supports Villarreal's procedural and substantive due course of law claims;
3. Whether the Court of Appeals correctly held that petitioners failed to conclusively negate procedural due process claims where:
    a. the evidence reflects that petitioners affirmatively avoided providing the information necessary for Villareal to evaluate his situation and the process/objections necessary to raise in response thereto; and/or
    b. material fact issues must be resolved before concluding as a matter of law that Petitioners supplied Respondent with constitutionally sufficient notice and process;

4. Whether the Court of Appeals correctly held that petitioners failed to conclusively negate Villarreal's substantive due process claims because material fact issues must be resolved.
5. As an alternative basis for remand, whether Villarreal is entitled to a continuance of a decision on the plea to the jurisdiction to permit necessary discovery.

## STATEMENT OF FACTS

Petitioners'[1] brief omits many facts material to the issues presented. Villarreal provides a fuller summary here.

### I. Class Sections/Grading 1Ls/Comprehensive Exam Policy

Respondent (Plaintiff) Ivan Villarreal entered Texas Southern University's Thurgood Marshall School of Law ("TMSL") as a 1L in August 2014. Some background regarding the class composition and 1L grading policies is necessary to understand the facts that follow.

#### a. Class composition

The 1L class was composed of approximately 160 students, divided into four sections of approximately 40 students each. *See* C.R. 377, 538. Among other mandatory courses, all 1Ls were enrolled in Criminal Law. C.R. 538. Each of the four Sections had its own Criminal Law professor. The Criminal Law professor for Section 4—Villarreal's section—was Kindaka Sanders. *Id.* Petitioner (Defendant) Professor Edward Maldonado, who claims "SpearIt" as his "professional name," C.R. 392, taught Criminal Law for Section 2. C.R. 538.

#### b. 1L "uniform" comprehensive exams and mandatory grading curve

[1] Petitioners are sometimes collectively referred to herein as "TSU."

TMSL administers "uniform" exams to the 1L class and applies a first-year grading curve spelled out in the Student Rules and Regulations. C.R. 336-39.

A student's total score for a first-year course is composed of two elements: the professor's grade and the 60-item uniform multiple-choice test that is given to all 1L students. C.R. 337. The professor's grade, based on exams (other than the uniform exam) and other criteria unique to the section (such as classroom participation) provides 50 percent of the student's final total score, and "the remaining 50 percent is based on the student's score on" the uniform exam. C.R. 337. However, even the professor's portion of the grade *is scaled based on the performance on the uniform exam*.[2] TMSL describes the calculation as follows:

> A student's raw score on the multiple-choice test is the total number of questions answered correctly.
>
> The following procedures are used to create a total score for a course:
>
> 1. The raw multiple-choice scores are converted to a scale of measurement that had a mean of 50 and a standard deviation of 10.

[2] Thus, while it is true that a 1L student's course grade is comprised 50% by the uniform exam and 50% by the professor's score, performance on the uniform exam across the entire 1L class, and the resulting curve applied, also infects the professor's portion of the grade. Thus, the importance of the uniform exam for each course is even more amplified than petitioners' recitation would suggest. *Cf.* Pets' Br. at 2.

2. The professor's grades in a section are converted to a scale of measurement that had the same mean and standard deviation as those students' scaled multiple-choice scores.
3. A student's total scaled score in a course is the sum of that student's scaled multiple-choice score and scaled professor grade.

C.R. 337. TMSL explains why the total scaled score for a course relies so heavily on the "uniform" exam:

> The First Year Uniform Exam Policy was adopted to mimic the testing format of courses tested nationally on the "multi-state" portion of bar examinations and to insure fairness to students because it prevents significant grading pattern differences by first year professors. Hence, students with the same admission credentials have the same opportunity to excel, do average work, or fail no matter which section (currently four sections) the law school assigns them.

C.R. 336. The manual emphasizes the need to "establish fairness and uniformity with the law school grading structure," explaining that "[a] well-defined and structured grading system is necessary to determine if both [the student and the law school] are achieving their mutual primary goal." C.R. 337-38.

TMSL then takes all of the total scaled scores for the course and divides them "into score ranges to produce the percentage of A's, B's, C's, D's, and F's that were consistent with Thurgood's policies for this course. The B's and D's are further divided into three groups to allow for the assignment of plus and minus grades. The A's are divided into two groups,

A and A- and the C's into C+ and C." *Id.*; *see also* C.R. 384 (Defendant Aitsebaomo stating "[u]ntil Dr. Bolus completes his analysis and report for the entire first year class, the scores are only raw data yet to be assigned a letter grade.").

Students must achieve a 2.0 grade point average at the conclusion of the first year in order to continue at TMSL. C.R. 343.

TMSL policy prohibits classroom instruction during the Reading Period and Final Examination Period immediately prior to the comprehensive exams. C.R. 463.

## II. Compromised Questions on December 2014 Criminal Law Comprehensive Exam.

### a. Smuggled photographs surface

The "uniform" criminal law exam at issue in this case was administered in December 2014. While the Defendants have not disclosed specific dates related to the "investigation" described further below, Defendant Dean Holley stated that Professor April Walker, the Criminal Law professor for Section 1, informed him in January 2015 that Defendant SpearIt had conducted off-campus review sessions during the prohibited period before the exam. C.R. 83. Professor Walker also provided Holley with a set of photographs she had obtained depicting review materials used

at one or more of these unauthorized SpearIt sessions. C.R. 82 (answer to Interr. No. 8).

These photographs (C.R.475-86) are comprised of twelve separate images which appear to have been taken by one or more students at one or more of SpearIt's sessions.[3] Each photograph depicts a page with one or more multiple choice questions printed or displayed. Five of these photographs are clearly part of a series taken by the same student; part of his or her hand, and distinctive blue jeans, are visible in the series. *See* C.R. 475, 476, 477, 479, 480, 481. The student appears to be seated, and is deliberately holding each page so as to photograph its contents. In one image the student is holding a pencil (C.R. 476); in another, he or she is pointing with a finger to an answer choice. C.R. 477. These (C.R. 475-81) are all photographs of hard copy review materials, and the font is Times New Roman.

An additional photograph appears to be of another page of a hard copy document, but the font is different than the printed questions in the previous photos. C.R. 482.

[3] Respondent filed a copy of these photographs with the Court of Appeals on a CD, because the e-filing process reduced legibility and color distinction.

The last three photographs are not of hard-copy review materials, but actually depict multiple choice questions *displayed on someone's computer screen*. C.R. 484-86.

Defendant TSU has not produced the original electronic files of these images, but only scanned images of these photographs. These scanned images bear at least three distinct sets of marks/notations. It appears that at least one set of marks was present on the documents at the time the photographs were taken (namely, the marked answer choices that appear on several pages in a lighter gray color), and it appears that additional notations were made after these photographs were printed and reviewed.

The marks that appear to have been made after the photographs were taken and printed appear in different colors. Someone with a black pen made notations out to the side of numerous questions identifying the question on the actual Criminal Law Comprehensive Exam to which the review question corresponds. Someone with a red pen wrote "Compromised Questions" at the top of the first page (C.R. 475) and then made various notations as they apparently were comparing these review materials with the actual compromised Exam, noting in several places that the answer choices were exactly the same as they appeared on the actual exam.

Defendants have never indicated who made these marks, but it appears they were made by someone comparing these review materials with the actual test questions, whether that was Professor Walker or someone else in the administration after Walker gave them to Defendant Holley.

**b. SpearIt's selective review sessions**

Defendant Holley was therefore aware of these photos from SpearIt's review sessions in January 2015. He later solicited an analysis from Dr. Roger Bolus in February, and finally acknowledged the matter to students in March, but only after an email from the 1L class president forced his hand. Those events are discussed further below. But first, it is helpful to relate relevant details as to SpearIt's activities arranging these unauthorized sessions prior to the December 2014 Criminal Law exam.

According to SpearIt's own declaration (submitted with the petitioners' plea), Professor Walker (of Section 1) was the "Criminal Law Uniform Exam Coordinator" for Fall 2014. SpearIt acknowledges that "Professor Kindaka Sanders, Professor Salinas, and [SpearIt], voted to use the 2013 Criminal Law Exam in 2014, and informed … Professor Walker[] of that decision on November 17, 2014." C.R. 394 (emphasis added). SpearIt acknowledges that, about two weeks later, he conducted three off-campus Criminal Law reviews. While SpearIt is stingy with the details,

documents provided by TSU in response to Villarreal's requests for production are illuminating.

Emails reveal that Defendant SpearIt was conspiring in late November 2014 with an as-yet-undisclosed student in Section 2 to organize a series of review sessions for the Criminal Law "uniform" exam.

Defendant Dean Aitsebaomo wrote to SpearIt on November 26, 2014:

> Dear Professor SpearIt:
>
> > Thank you for your request to conduct additional criminal law review teaching sessions for your students on Monday, Tuesday, Wednesday, and Thursday of next week during the final examination period.... [P]lease be aware that the Reading Period and the Final Examination period are set aside by the Law School for students to reflect and study for all of their examinations without any further classroom teaching interventions. Therefore, our policy precludes any further classroom teaching sessions during the period. If, however, any individual students desire to seek further clarification on particular issues with you, such students may continue to do so with you either electronically or in person while at your office hours.

C.R. 463.

But SpearIt was not deterred, replying: "so by this logic we would be fine as long as we meet OFF campus since this is not a classroom. is (sic) this what it comes to??" *Id.* (TSU 670) (incorrect punctuation supplied by "SpearIt"). Dean Aitsebaomo replied: "Please do not 'meet OFF campus' with the students." *Id.* Aitsebaomo copied Defendant Holley and his administrative assistant, Ms. Pendenque, on the email.

Despite this admonition, SpearIt flouted the rule. An email later on November 26 from an undisclosed Section 2 student, addressed to Section 2, reads:

> I have gotten with SpearIt about extra sessions next week….
>
> These sessions will include MULTIPLE CHOICE QUESTIONS that you MAY see on the comp. Just keep that in mind when you are deciding.
>
> SCHEDULE AS OF RIGHT NOW BETWEEN SPEARIT AND SECTION 2:
> Monday: 12:30pm-2:30pm
> Tuesday: 10:00am-12:00pm
> Wednesday: 11:00am-1:00pm
> Thursday: 11:00am-1:00pm

C.R. 569 (capitalization in original).

However, SpearIt emailed the undisclosed student again on November 29, stating cryptically that things would "ha[ve] to be done smoothly" because he had no permission from the administration. C.R. 462. SpearIt invited the mystery student to discuss arrangement by telephone, and it appears the student called his cell phone. *Id.*

That email exchange occurred at 10 a.m. A few hours later, SpearIt warned Aitsebaomo in an email: "[P]lease tread cautiously regarding advising me outside these four walls. I pardon the transgression, but it is a mistake to think you have jurisdiction in my private affairs, so please reconsider this before advising me beyond my school duties." C.R. 463.

The next day, November 30, 2014, the as-yet-undisclosed student emailed this update to Section 2:

> Just an update about crim sessions this week in preparation for the comp.
>
> Due to administration issues, we will NOT be allowed to meet on campus. I've literally jumped through every loop but no budge. **So, we will be meeting outside of school**.
>
> Questions will be given to each of those who attend. I can not put ALL details on here but if you are hesitant about coming because you are not positive if it will be beneficial…please ask [name redacted by petitioners] or [name redacted by petitioners] for some details to help you make a decision. I can't add everything on here for school policy purposes…but please ask them for any further details on this matter.
>
> Because this is all a bit complicated…please be ready to work with the mentality that the location arrangements may change. Things may not run smooth. However, if getting multiple choice questions that could be seen again on another exam seems beneficial…then the complications will be worth it.

C.R. 570 (first two emphases in student's original email; third emphasis added).[4] The email then states that they will meet the following day (Monday, Dec. 1) at Celtic Garden, a bar in midtown, at 12:30 pm. *Id.* It appears to continue onto a second page discussing arrangements for

[4] The only copy of these emails that TSU even has comes from a complaint filed by another Section 2 student with the Academic Standards Committee. It appears that student may not have submitted the second page of this email, and TSU apparently never asked for it otherwise

additional meetings, but the rest of the email has not been disclosed by TSU.[5]

As noted above, SpearIt has admitted, in response to Plaintiff's interrogatories, that he presided over three criminal law review sessions during the week of the exam, at Celtic Garden and two other bars. C.R. 572. SpearIt says that 20-25 students participated at each session, though he refuses to identify any particular student or to explain how many unique students attended one or more session. *Id.*

## III. TMSL Cooks, then Covers Up, the Bolus Report.

Dean Holley asserts that, after Professor Walker complained to him and provided the photographs, he conducted an "investigation" into the matter. C.R. 470. What the investigation consisted of is unclear, however, as Dean Holley has admitted that he did not interview a single person other than SpearIt himself (as discussed further below). In that purported interview, Holley did not ask SpearIt for a copy of all review materials used or distributed at the sessions, nor did he ask SpearIt to identify any students who attended. In fact, Dean Holley could not produce a single

[5] In fact, the only copy of these emails that TSU even has comes from a complaint filed by another Section 2 student with the Academic Standards Committee. It appears that student may not have submitted the second page of this email, and TSU apparently never asked for it otherwise

document generated during the claimed "investigation," and he admits he did not question a single student.

Instead, on February 10, 2015, Holley emailed statistician Roger Bolus, stating "I am reviewing an allegation that one section of the criminal law takers had prior access to about thirteen questions on the exam." C.R. 473. Holley identified the 13 questions on the Exam that he was referring to, and asked Bolus to "track whether any section performed better on those items than their overall performance." *Id.* Importantly, Bolus noted that he planned to use the "non-compromised items as the 'control' for [his] analysis," and asked Holley if he was "quite sure that these are the only items that might have been compromised." *Id.* Holley wrote: "There is a <u>likelihood</u> that other items may potentially be compromised but the items you have are the ones we were provided <u>evidential proof of</u>." *Id.* (emphasis added). By "evidential proof," Dean Holley was apparently referring to the photos he obtained from Professor Walker, because he did not seek to discover whether any additional questions were compromised.

Bolus returned his analysis the following day (Feb. 11, 2015) in a seven-page report. C.R. 375-82. In the page-one introductory section, Bolus noted that Holley had said, "[t]he remaining 47 items may have been compromised, but there is no proof as such." C.R. 376. Therefore, Bolus treated the 47 items as his control group for comparison with the 13 items

Holley had identified as definitely compromised. *See id.* ("[W]e assume that NC items reflect the ability level of the students. We used these items as an independent variable."). Bolus's findings are revealing:

- Page three summarized the students' performance on the 13 "Cheat" items with the performance on the 47 "Non-Cheat" items, and identifies a difference that Bolus wrote was "statistically difference" (apparently meaning "statistically significant difference"), and explained that "It is possible that the 13 items in the C item set are inherently easier or, **possibly that students had access to some information which enhanced performance on them**." C.R. 378.
- Significantly, column four of Table 2 reflects that, of all the sections, Section 2 displayed the greatest difference between performance on the 13 compromised items compared to the 47 other items. *Id.*
- On page five, Bolus listed several conclusions. His first conclusion was that "On average, performance on the suspected compromised 13 item set (C) was higher than on the suspected 47 non-compromised items (NC). The finding is highly statistically significant." *Id.* He also stated that "[i]t is unclear from the data available whether this difference was due to the C item set being inherently easier **or the fact that students received pre-testing information on them which would have enhanced their performance**." *Id.* (emphasis added). Noting that he also observed a difference in the NC items (again, Section 2 performed the highest, although by a much smaller margin than with the 13 compromised items), he stated that "**the NC items themselves may have actually been compromised**." *Id.* (emphasis added).
- Page seven of the report was added later, after Bolus writes that he was informed that the Criminal Comp from 2014 was the same administered in the Fall of 2013. Bolus wrote that "[t]his fact provided the opportunity to examine, in the absence of any identified compromise, whether the items in question were truly easier than the non-compromised items." *Id.* Here, the primary conclusion Bolus highlights is that "the overall mean difference between the C and NC item sets in Fall 2013 students was to be no different from the one observed in Fall 2014." *Id.* Bolus calculated the difference between

> performance on the cheat and non-cheat items for the 2013 and 2014 classes by section and overall. He highlighted the figure for the difference overall (all four sections combined) in 2013 and 2014, and notes that the figures are "remarkably similar."[6] *Id.*

By Friday, February 27, 2015, the administration still had not communicated any of this to the students. That night, the 1L Class President, Timothy Adams, confirmed to the entire 1L class that SpearIt had held unauthorized, off-campus review sessions for select students before the Exam. Adams wrote that he had been holding his tongue on the assurance that Dean Holley was going to break the news to the class by that day, but since Holley's email had not been forthcoming, Adams felt compelled to do it himself. C.R. 492. The 1L class was informed:

> Prior to the Criminal Law comprehensive examination, Professor SpearIt held unauthorized review sessions with some of his students on several occasions at off-campus locations. These sessions were "unauthorized" because of TMSL's policy forbidding such review sessions from being conducted by professors during the designated "reading period" before the comprehensive exam. During at least one of these review sessions, 13 practice questions were disseminated to those in attendance. These practice questions were egregiously similar to some of the questions that ultimately appeared on the comprehensive exam. Consequently, some students may have unfairly benefitted by receiving these questions.

*Id.*

[6] However, a quick review of the table shows that while the aggregate difference (all sections together) was similar, there was actually significant movement within each section from 2013 to 2014—that is, except for Section 2, which stayed relatively constant.

On March 2, 2015, Dean Virgie Mouton emailed the 1L class to say that the administration had asked "our national expert who assists us each year to insure the validity and reliability of the uniform exam," who "has worked for several state bars performing the same type of item analysis," to analyze "performance by section" on the Exam. Mouton quoted this single portion of the Bolus report as his "key finding":

> Most importantly, the overall mean difference between the alleged compromised items…and the Non-compromised items…in Fall 2013 students was to be no different from the one observed in 2014. Further a comparison of the NC TO C item set performance difference between sections again showed no significant difference between sections. This finding confirms that the differences between sections are most likely random occurrences.

C.R. 496.

After requests to release Bolus's actual report, the administration released only the two pages at C.R. 516-17;[7] notably, they did not release the pages with the contrary conclusions quoted *supra*. Page five of Bolus's report (C.R. 380), which contained his actual "Conclusions," was not among the two pages released to students.

[7] Villarreal attests he reviewed these pages when they were released by the administration in 2015, and that these are the only two pages TMSL released to the class. C.R. 431; C.R. 539.

The same day Mouton sent her email, Class President Adams emailed the class and instructed all who were interested that they should file a petition with the Academic Standards Committee by March 15.

Plaintiff Villarreal did not file a petition with the Academic Review Committee in March, as he did not yet know that he would be discharged after the second semester. C.R. 431; C.R. 539. Moreover, Villarreal had read the classwide email from Dean Mouton stating that the school's "national expert" had said the compromised questions had no effect. *Id.*

Despite claiming that their expert report indicated no effect, TMSL told Bolus to re-score the Exam, omitting the 13 items known to have been compromised. Although it is entirely unclear how the re-scoring was actually calculated, it is undisputed that it was limited to attempting to address the 13 items known to be compromised based on the Walker photographs.

## IV. Plaintiff Villarreal Is Dismissed From TMSL

Plaintiff was notified of his dismissal from TMSL by letter dated June 10, 2015, for failing to maintain a cumulative required GPA of 2.0 after the 1L year. The letter stated that he ended with a 1.97 GPA. Villarreal checked his grades online and saw that his exact GPA was actually 1.976, which pursuant to Section 3(B)(3)(C) of the 2014-15 Student Rules and Regulations should have been rounded up to 1.98. C.R. 488.

Villarreal filed his first Academic Standards Petition on June 17, 2015, requesting that TMSL recognize that SpearIt's reviews affected his grade relative to other students and readmit him. C.R. 487. On or about July 6, Villarreal received a call from Professor Chukwumerije, Chair of the Academic Standards Committee, who advised that the issue raised in Villarreal's petition was not within the Committee's jurisdiction, and urging him to appeal directly to Holley. C.R. 432; C.R. 539. Villarreal did seek a meeting with Holley, as discussed below.

Villarreal filed a second petition on July 9, seeking review of all his grades. C.R. 518-22. Villarreal pointed out that Bolus's analysis was unreliable because TMSL could not be certain how many students had access to the exam questions before the test or whether additional questions were compromised but not accounted for in Bolus's report. "For this reason," Villarreal wrote, "no 'expert' can evaluate the true impact on the remaining students." *Id.*

On July 21, 2015, the Academic Standards Committee denied Villarreal's petition, writing that "[t]he Committee found that the Office of the Dean had already addressed administratively the issue of the alleged cheating in Criminal Law. Also, the Committee found that it does not have the jurisdiction to entertain petitions for readmission nor the power to waive the 2-year rule." C.R. 523 (emphasis added).

Villarreal met with Defendant Holley and told him directly that he believed students in Section 4 had received access to copies of Exam questions before the Exam, and that there was much discussion within the Section to that effect. C.R. 432; C.R. 539.

Defendant Holley claims that he "led the investigation" of SpearIt's sessions and the compromised questions "with the assistance of Deans Aitsebaomo and Mouton, and Prof. April Walker." C.R. 80. However, in response to Plaintiff's interrogatory requesting the identification of "every individual you interviewed as a part of the Investigation," Holley identified only SpearIt (meaning he did not interview a single student to determine what happened at the sessions). C.R. 82. In response to an interrogatory asking Holley "Did you ask Defendant SpearIt for: 1) the names of the Review Students; and 2) a copy of the Review Materials," Holley initially avoided answering directly, stating cryptically that "no attendance was taken during the Review Sessions," and "I obtained a copy of the Review Material from Prof. Walker." C.R. 82. In these same initial responses, Holley stated that "[t]he investigation did not determine which students attended the Review Sessions." C.R. 80. However, in supplemental responses filed *the day before the hearing on Villarreal's motion to compel*, Holley admitted that he *never asked* SpearIt to identify any student who attended any of the unauthorized sessions (C.R. 578), *nor did*

*he ask* SpearIt for any copy of the materials used or distributed at the sessions (C.R. 578). In response to Plaintiff's requests for production, Holley produced no documents regarding the investigation. C.R. 92 (Requests for Production nos. 5, 6, and 7).

## V. Trial Court Proceedings

Before any hearing could be held on Villarreal's motion to compel discovery, Defendants filed their plea to the jurisdiction on July 10, 2017. C.R. 300-395. Defendants' plea attached twelve exhibits (A-L), most notably the declarations of each individual defendant—Holley, Aitsebaomo, and SpearIt—containing various factual claims related to SpearIt's unauthorized review sessions, TMSL's "investigation" of same, the purported findings of Dr. Roger Bolus's report, and the decision to settle on a remedy limited to thirteen compromised questions. These affidavits contain certain statements and material particularly relevant to the argument below, as follows:

The **Declaration of Dannye Holley** (C.R. 363-81) states:

- "The TMSL administration conducted an investigation to evaluate these concerns." C.R. 364.
- "During the investigation, the TMSL administration reviewed the fact questions which were part of the materials Professor SpearIt provided his Criminal Law section." *Id.*
- "The investigation revealed that students who attended these review sessions were not informed by Professor SpearIt that certain of the fact questions in the review material that were

used were similar to questions that appeared on the 2013 final uniform exam. That investigation further found that the four criminal law professors decided to use the 2013 final uniform exam again in 2014." *Id.*

- Quotes what Holley refers to as the "key finding" of Dr. Bolus's report, and states that "even if the C items were previewed to a section, they did not impact the examination outcomes for those students, or the students in other sections." C.R. 365 ¶ 7.
- "We gave the first year class in writing the results of the overall review from Mr. Bolus[.]" *Id.* ¶ 8.
- In a meeting with students, "no…evidence was proffered" that students in SpearIt's section who had prior access to certain questions "knew that certain review questions would appear on the examination. Accordingly, there was no evidence presented that was sufficient to warrant a conclusion that the students cheated." *Id.*
- "Dr. Bolus's report demonstrates that the 13 compromised questions…did not impact the results[.] The TMSL administration addressed the attempt and appearance of impropriety by proving (sic) a class wide remedy of not including the compromised items as the basis for the students' Criminal Law grade." C.R. 366 ¶ 11.

Holley's declaration also incorporates several attachments, including self-serving emails he sent to the provost (C.R. 370-71, 373-74) and Dr. Bolus's full report (C.R. 375-82).

The **Declaration of SpearIt** states:

- "The review sessions were open to all students that wanted to attend." C.R. 393 (referring to the three unauthorized sessions at issue which SpearIt also lumps together with prior review sessions).
- "During the review sessions, the students were not given answers to the questions." *Id.*

- "The students that attended the review sessions were not able to remove the review materials from these sessions." *Id.*
- Professor SpearIt voted, along with the three other Criminal Law professors, to use the 2013 exam in 2014, "and informed the Criminal Law Uniform Exam Coordinator, Professor Walker, of that decision on November 17, 2014." C.R. 394.

## SUMMARY OF THE ARGUMENT

This Court's review is not warranted, especially at this juncture. The First Court of Appeals simply applied this Court's precedent with respect to review of a plea to the jurisdiction, holding that, reading the allegations in the light most favorable to Respondent Villarreal, material disputes of fact precluded summary dismissal of Villarreal's constitutional claims.

Petitioners' entire argument is premised on the Court accepting *their* view of disputed material facts—facts which are pulled primarily from Petitioners' own declarations filed with their plea. Then, based on these disputed material facts, Defendants invite the Court to conclude that (1) the events leading to Villarreal's dismissal are properly characterized as "purely academic" decisions, rather than as a disciplinary-type inquiry into a cheating scandal, and (2) the Defendants met the applicable substantive standards to satisfy both substantive and procedural due process. To the contrary, each one of these various issues presents disputed issues of material fact that must be resolved before the court can determine legal conclusions.

As such, Petitioners' brief only reinforces why the trial court's order granting the plea to the jurisdiction contravened *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004), and was correctly reversed by the First Court of Appeals. Under *Miranda*, "[i]f the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder." 133 S.W.3d at 227-28. Only where "the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue" may "the trial court rule[] on the plea to the jurisdiction as a matter of law." *Id.* All of the material facts necessary to the Defendants' arguments are vigorously disputed by Villarreal, compelling the denial of the plea.

In the alternative, at a minimum, the trial court must be ordered to continue its decision on the plea until sufficient discovery can be conducted. As an example, even assuming for the sake of argument that the standard for academic dismissal applies, the court cannot rule on whether the Defendants exercised appropriate professional judgment without knowing what led Defendants to forego any effort to ascertain how many additional questions were compromised on top of the thirteen questions that appeared in the smuggled photographs.

## I. Standard of Review of Order Granting Plea to the Jurisdiction.

A plea to the jurisdiction presents an issue of subject-matter jurisdiction and is reviewed *de novo*. *Univ. of Houston v. Barth*, 403 S.W.3d 851 (Tex. 2013).

In this case, Defendants submit evidence related to Villarreal's dismissal from school, including statements purporting to establish as a matter of fact that only thirteen questions were compromised in the SpearIt review sessions, the administration's "investigation" and "class-wide remedy," assert that the facts present only an issue of professional academic judgment, and argue that Defendants' actions are within the scope of reasonable academic decisionmaking.

"[I]f a plea to the jurisdiction challenges the existence of jurisdictional facts, [the court] consider[s] relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised[.]" *Ahmed v. Metro. Transit Auth.*, 257 S.W.3d 29, 32 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (quoting *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227 (Tex. 2004)). "In a case in which the jurisdictional challenge implicates the merits of the plaintiff's cause of action and the plea to the jurisdiction includes evidence, we review the relevant evidence to determine if a fact issue exists." *Ahmed*, *supra* (quoting *Miranda*, *supra*, at

227). "If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law." *Miranda*, 133 S.W.3d at 227–28. Importantly, while being "mindful that this determination [of jurisdiction] must be made as soon as practicable," the trial court must "exercise[] its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case." *Id.* at 227.

This Court has indicated that the standard applicable to a plea to the jurisdiction "generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c)." *Id.* at 228. That is, "after the state asserts and supports with evidence that the trial court lacks subject matter jurisdiction, we simply require the plaintiffs, when the facts underlying the merits and subject matter jurisdiction are intertwined, to show that there is a disputed material fact regarding the jurisdictional issue." *Id.* The Court must "take as true all evidence favorable to the nonmovant," and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Id.*

The Court emphasized that in cases in which the determination of subject matter jurisdiction implicates the merits of the cause of action—as here—this standard "protects the interests of the state and the injured claimants" alike because it "allows the state in a timely manner to extricate itself from litigation if it is truly immune. However, by reserving for the fact finder the resolution of disputed jurisdictional facts that implicate the merits of the claim…we preserve the parties' right to present the merits of their case at trial." *Id.*; *see also id.* (stating that the standard serves to "protect the plaintiffs from having to put on their case simply to establish jurisdiction") (internal quotations omitted).

## II. The Academic/Disciplinary Dichotomy: Determining the Nature of This Case Itself Presents a Material Fact Question Precluding Summary Dismissal.

### a. Determining the nature of a case arising from dismissal from an institution of higher education.

Cases arising from dismissal or suspension from institutions of higher education are typically characterized as either academic or disciplinary in nature. *See, e.g.*, *Than*, 901 S.W.2d 926, 930 (Tex. 1995). Defendants rely heavily on the premise that they are entitled in this case to the deference accorded to academic decisionmaking. But this is putting the cart before the horse. Two cases from the United States Supreme Court, *Board of Curators of Univ. of Missour v. Horowitz*, 435 U.S. 78 (1978), and *Regents*

*of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), provide the leading discussion as to what characterizes a particular case as academic or disciplinary. Defendants have acknowledged below and in this Court that Horowitz and Ewing are the primary cases relevant to this determination, *see also* C.R. 324-25, but their argument that Villarreal's claims call for a review of Defendants' *purely academic* judgment is superficial and, in fact, undermined by a close reading of the authority.

These leading cases only concluded that the challenged decisions were properly characterized as academic after reviewing records of full trials that established the nature of the challenged decisions and the process by which they were made (and, therefore, the nature of the "evaluative inquiry" that would be required should the court review those decisions). *Ewing*, 474 U.S. at 217 (noting "[t]he District Court held a 4-day bench trial at which it took evidence on the University's claim that Ewing's dismissal was justified"); *Horowitz*, 435 U.S. at 80 (noting that the district court had "conduct[ed] a full trial"). The records of those trials, summarized in great detail by the Supreme Court, reflects and relies upon the "subjective and evaluative" nature of the academic judgments at issue, which the Court contrasted from "the typical factual questions presented in the average disciplinary decision." *Horowitz*, 435 U.S. at 90.

The standard of review for cases deemed "academic" in nature—essentially rational basis adapted to the academic environment—arose in cases in which students challenged the institution's or professor's subjective application of generally-applicable scholarship standards. *Horowitz* involved a student challenging dismissal from medical school, which had come about after a series of subjective judgments by councils of faculty and students evaluating the plaintiff's academic performance. 435 U.S. at 80-82. The Court held that deference was appropriate given that the "evaluative nature of the inquiry" required to resolve the student's claims would necessarily tranch on the medical school's "framework for academic evaluations." *Id.* at 86, 86 n.3. *Horowitz* contrasted the subjective academic inquiry at issue there with other misconduct: "Misconduct is a very different matter from failure to attain a standard of excellence in studies. A determination of the fact involves investigation of a quite different kind." *Id.* at 87 (quoting *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19 (1913)).

In *Ewing*, the plaintiff was a student "in a special 6-year program…known as 'Inteflex,' offered jointly by the undergraduate college and the Medical School," in which an undergraduate and medical degree are awarded upon successful completion. 474 U.S. at 215. After completing the first four years, a student was eligible to take a two-day standardized

test administered by the National Board of Medical Examiners (the "NBME Part I"). *Id.* at 216. Ewing failed five of the seven subjects, receiving the lowest score ever recorded on the NBME Part I in the history of the Inteflex program. *Id.* Not only that, but Ewing had "accumulated an unenviable academic record characterized by low grades, seven incompletes, and several terms during which he was on an irregular or reduced course load," and one of his professors testified that Ewing's failure of the NBME Part I "merely culminate[d] a series of deficiencies....In many ways, it's the straw that broke the camel's back." *Id.* at 227.

Ewing challenged the school's decision not to permit him to retake the test, and the Supreme Court characterized his claim as "that the University misjudged his fitness to remain a student in the Inteflex program." *Id.* at 225. The Court rejected this claim, explaining:

> The record unmistakably demonstrates...that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, 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.

*Ewing*, 474 U.S. at 225 (emphasis added). The Court also expressed the importance of "safeguard[ing]" the "academic freedom" of state and local

educational institutions. *Id.* at 226. Finally, the Court expressly noted, "it is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing," and that the school officials "acted in good faith." *Id.* at 225.

The "academic" characterization clearly makes sense where a student challenges how a professor scores an exam answer, for example,[8] and the standard of review for such matters was borne out of the quite legitimate concern that courts were ill-equipped to interfere in the authority of academic officials to apply their professional judgment in matters of scholarship and indicators of fitness for a profession. *See, e.g.*, *Horowitz*, 435 U.S. at 89-90 ("The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal."); *id.* at 89 n.4 (quoting Fifth Circuit's characterization of academic matters as involving "review of the courts in the *uniform* application of [a university's] academic standards") (emphasis added).

[8] *E.g.*, *Keys v. Sawyer*, 353 F. Supp. 936, 940 (S.D. Tex. 1973) (cited in *Defendants' PTJ* at 24, 26-27).

While Villarreal was discharged for failing to secure a 2.0 GPA at the conclusion of his 1L year, all parties, and the court of appeals, recognize that he is not challenging the GPA requirement itself as a legitimate academic policy. *See Villarreal*, 570 S.W.3d at 926 (Massengale, J., concurring) ("Villarreal does not challenge the constitutionality of the policy of requiring a 2.0 GPA to continue his studies."). In fact, this lawsuit no more challenges Defendants' *academic* judgment than if Villarreal's allegation was that a hacker had breached the school's system and changed his grade. This challenge calls for an inquiry into TMSL's administrative response to allegations of cheating, which is in the nature of a disciplinary dismissal;[9] it does not call upon the Court to review academic-judgment decisions of the type discussed in *Ewing* and progeny. Villarreal is not claiming, for example, that the school mis-graded his answers on the Criminal Law Comprehensive exam, or challenging the minimum-GPA rule as a uniform academic policy. Villarreal's challenge involves review of the school's response to allegations of misconduct providing certain students an unfair advantage, except that here, Villarreal alleges his dismissal resulted not from *his own* misconduct but from the misconduct of a TMSL professor (and other students), which the TMSL administration failed to

[9] *See Horowitz*, 435 U.S. at 90 (contrasting review of genuinely academic judgment from "the typical factual questions presented in the average disciplinary decision").

remedy as a result of *their own* misconduct, including obfuscating the facts and failing to undertake even a cursory investigation to determine what happened, how it affected students' exam position, and how to satisfactorily remedy it. *See Villarreal*, 570 S.W.3d at 923-24, 925; *id.* at 927 (Massengale, J., concurring).

**b. TSU did not conclusively establish that Villarreal's dismissal should be characterized as purely academic for purposes of establishing the applicable constitutional interest and scrutiny.**

In *Horowitz*, the U.S. Supreme Court said that "[t]he ultimate decision to dismiss respondent was careful and deliberate." 435 U.S. at 85. *Ewing* reinforced this element, admonishing:

> It is important to remember that this is not a case in which the procedures used by the University were unfair in any respect; quite the contrary is true. Nor can the Regents be accused of concealing nonacademic or constitutionally impermissible reasons for expelling Ewing; the District Court found that the Regents acted in good faith.

*Ewing*, 474 U.S. at 225. *Eiland v. Wolf*, 764 S.W.2d 827 (Tex. App.—Houston [1st Dist.] 1989, writ denied), which Defendants relied upon at oral argument, was also decided after a trial, *id.* at 829, in which the student was seeking court review of the same types of subjective academic judgments involved in *Ewing* and *Horowitz*. *See id.* at 830-32.

No such academic policy or subjective-fitness review decision is at issue in this case. This case, instead, calls for a review of TMSL's

"investigation" and claimed remediation of a cheating scandal—precisely the type of "evaluative inquiry" at issue in *Than*, which this Court held to be a disciplinary and not academic inquiry, over the university's objections. 901 S.W.2d at 931. That is, it does not require inquiry into the subjective evaluations of any professors of Villarreal's fitness to be a lawyer, but a disciplinary-type factual inquiry where "there is a significant risk of error because the controlling facts are in dispute and university officials must often rely on circumstantial evidence and reports of others." When Villarreal's claims are appropriately viewed, that is, based on the nature of the evaluative inquiry relevant to their determination, they are revealed to be indistinguishable from the cheating inquiry in *Than*, which this Court held to give rise to a constitutional liberty interest. 901 S.W.2d at 930.

Moreover, even if there are some distinctions between the interest presented here and that in *Than*, petitioners cannot simply secure summary dismissal on a plea to the jurisdiction by pointing out a distinction. *Cf.* Pet. Br. at 14. As Petitioners recognize, *id.*, *Than* referred positively to the United States Supreme Court's longstanding recognition that "a liberty interest denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge … and generally to enjoy those privileges long recognized … as essential to the orderly pursuit of

happiness by free men." *Id.* at 929-30 (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972)) (some internal punctuation omitted). As *Than* itself reflects, then, Justice Massengale's comment in his concurrence, that the "liberty" interest in Magna Carta referred to freedom from physical restraint, *Villarreal*, 570 S.W.3d at 927-28 (Massengale, J., concurring) (cited at Pet. Br. at 13), while an interesting seminar discussion point, has no relevance in this case. *Than*'s recognition is broader than that. *See also Patel*, 469 S.W.3d at 83-84 (recognizing broader interests protected under Texas Constitution, including the as-yet-undefined privileges and immunities portion of the due-course-of-law clause).[10]

But even before *Than*, the Texas Supreme Court had already recognized a substantive limit on even quintessentially academic rules and decisions at Texas universities. *Foley v. Benedict*, 122 Tex. 193 (1932).[11] In *Foley*, the Court considered a student's petition seeking readmission to the School of Medicine at the University of Texas, presenting a more typical challenge to the school's application of the grading requirements. *Id.* at

[10] Petitioners' mere passing reference to this argument seems to acknowledge that they cannot now raise it for the first time in their merits brief. The concurrence below recognized that "[t]he briefs do not advocate any distinctive constitutional interpretations based on unique text or history associated with the Texas Constitution," 570 S.W.3d at 932, and Petitioners still have not elaborated any such argument here. If TSU wishes to draw this argument out, it will be free to do so should this case be remanded.

[11] *Foley* was decided by the Commission on Appeals, and the Supreme Court adopted the opinion in full. *Foley*, 122 Tex. at 204.

198-99. Importantly, the Court repeatedly states, as a positive matter, that substantive limits apply even to such academic matters—namely, that rules and their application must be "reasonable," "reasonably exercised," and "not … arbitrary." *Id.* at 200-01. The Court upheld the school's grade requirement, holding that "a standard of excellence which the average student in a particular field of study is able to satisfy is not an unreasonable regulation." *Id.* at 203. Continuing, *Foley* states that

> It follows that a student who is unable to maintain and meet the standard of proficiency required is not entitled to continue to attend a state-supported institution, provided the standard required is not unreasonable and arbitrary.

*Foley*, 122 Tex. at 203. *See also id.* at 204 ("The courts will not interfere therewith in the absence of a clear showing that they have acted arbitrarily or have abused the authority vested in them.") (emphasis added).

Nonetheless, it is unnecessary for the Court to attempt to definitively categorize the nature of Villarreal's claims, and the interests and obligations that may flow from them, at this stage of the proceedings. As noted above, *Ewing* and *Horowitz* only declared those students' cases to be "genuinely academic" based on a detailed understanding of the nature of the schools' decisions for which the plaintiffs sought review, when the Court was in a position to confidently state that the relevant decisions were indeed subjective academic decisions and untainted by indications of bad faith.

Petitioners have not and cannot establish as a matter of law that this case is of a piece with *Ewing* and *Horowitz*, on the strength of their own declarations, where the material facts in such declarations are positively refuted by the record, which reflects evidence of a bad-faith response to a cheating scandal. The First Court's reliance on *Than* is consistent with Villarreal's argument. *Villarreal*, 570 S.W.3d at 922. But, at a minimum, TSU cannot establish as a matter of law that this case is solely academic in nature, and secure dismissal, by ignoring the novel nature of the case. The First Court's controlling opinion indicates that the panel doubted that the case is purely academic, *Villarreal*, 570 S.W.3d at 924 ("[e]ven if we assume, as suggested by [petitioners], that Villarreal's dismissal was the result of a purely academic decision …"), and the concurrence expressly recognizes that "this case … confounds the typically observed distinction of dismissals based on academic performance from those based on student misconduct." *Id.* at 927 (Massengale, J., concurring).[12]

### c. Villarreal states a cognizable property interest

[12] There is no question that, if Villarreal had been dismissed on the basis that *he* had conspired with a professor to cheat on an exam, the disciplinary-dismissal standard would apply to his claims. Here, the nature of the factual inquiry required by his claims remains the same—facts related to the scope and effect of a cheating scandal and the school's response—only Villarreal was not a party to the scandal. It would be ironic to hold that he is foreclosed from the more favorable standard of review because he himself was not accused of cheating. Regardless, Defendants have not conclusively established that their "investigation" and response was purely academic. While the First Court did not address this question in detail, it provides another reason the Defendants were not entitled to summary dismissal.

Additionally, aside from the liberty interest, Villarreal has alleged a property interest in his continuing graduate education. While the First Court did not have to reach the issue, Villarreal has a property interest in his education for much the same reason such interest was recognized in *Goss v. Lopez*, 419 U.S. 565, 574 (1975). While law school is not required across the board like secondary education, it is required by Texas if Villarreal hopes to engage in his chosen profession in this state. Villarreal also claims a property interest springing from his contractual rights arising from TMSL's Rules and Regulations, and from the fact that he has paid thousands of dollars to TSU for his education, an investment that is lost unless he is granted re-entry and allowed to continue his education.[13]

Lastly, even if the Court were in doubt as to the presence of a liberty or property interest, or a cognizable privilege or immunity protected under the Texas Constitution,[14] the appropriate action would be to require

---

[13] Justice Massengale's comment that "liberty" does not include a "right to governmental entitlements," 570 S.W.3d at 928, is misplaced. A student who has paid thousands of dollars in tuition, in return for an education, has a property right arising under contract or quasi-contract sufficient to implicate due course of law rights. See, relatedly, Texas Southern Univ. v. Araserve, 981 S.W.2d 929 (Tex. App.—Houston [1st Dist.] 1998) (holding vendor has viable contract claims against public university where vendor has completed performance of the contract). The lack of a litigable contract claim against Petitioners does not mean Villarreal does not have a litigable constitutional right arising from such a contract. *Grounds v. Tolar Indep. Sch. Dist.*, 856 S.W.2d 417, 420 (Tex. 1993).

[14] The Texas due course of law provision applies not only to "life, liberty, [and] property," but also to "privileges or immunities," and that latter category in particular may be broader than the federal courts have interpreted the federal constitutional

Plaintiff to amend his pleadings to address the issue in greater detail. *See Texas Tech Univ. Health Sciences Center v. Enoh*, 08-15-00257-CV, 2016 WL 7230397, *9 (Tex. App.—El Paso 2016, no pet.) (noting that while it is unclear whether plaintiff had established a property interest (the only interest he pled), "[w]e cannot dismiss the case for a pleading deficiency which might be corrected," and therefore assuming a property or liberty interest).[15] This is certainly true given that the El Paso Court of Appeals identified split authority on the issue, and reflects that no binding authority in Texas holds that there is or is not a property interest. *See id.* at *8. Villarrreal therefore is entitled an opportunity to show a property interest arising from particular aspects of the student manual, given the facts here, and/or from his investment, which would depend on showing difficulty of attaining entry at another school, effect on career prospects, etc.

## III. The First Court Correctly Held That TSU Failed to Conclusively Negate Villarreal's Procedural Due Process Claims.

As Villarreal argued, even this bare minimum was denied Villarreal. At a minimum, as the panel correctly held, TSU failed to conclusively negate Villarreal's argument that the process was deficient.

---

analog. *Patel v. Texas Dep't of Licensing and Regulation*, 469 S.W.3d 69, 83-84 (2015) (majority op.); *see also id.* at 98 n.40 (Willett, J., concurring).

[15]The El Paso Court of Appeals observed that whether a property or liberty interest was established was a "significant issue[] that deserve[s] a more complete record and briefing than we have before us." *Enoh*, *supra*, at *9 n.9.

**a. Standard**

With regard to Villarreal's *procedural* due process claims, "[d]ue process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Than*, 901 S.W.2d at 930 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). In other words, procedural due process turns not merely on the number of pro-forma meetings granted, but also on the substance of the "notice" and other information provided to the plaintiff, which determines his ability to respond within the framework provided. The particular procedures "due [are] measured by a flexible standard that depends on the practical requirements of the circumstances." *Id.* The Texas Supreme Court explains that

> This flexible standard includes three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Than*, 901 S.W.2d at 930 (citing *Mathews*, 424 U.S. at 335).

In the leading federal case on this matter, the United States Supreme Court indicated less-stringent procedural protections are due in reviews of academic (as opposed to disciplinary) dismissals, and held that a formal

hearing regarding academic dismissal is not required by the Due Process Clause of the Fourteenth Amendment. *Horowitz*, 435 U.S. at 86-87. Therefore, in *Horowitz*, the plaintiff medical student was not entitled to a formal hearing to challenge the subjective, professional evaluations of her performance, poor attendance, and "lack [of] critical concern for personal hygiene" reported by her professors and physician-instructors presiding over her clinical rotations. *Id.* at 80-81.[16] The Court explained that this conclusion was made "considering all the relevant factors, including *the evaluative nature of the inquiry* and the significant and historically supported interest of the school in preserving its present *framework for academic evaluations*." *Id.* at 86 n.3 (emphasis added).

In *Than*, the Supreme Court of Texas was called upon the decide whether the University of Texas Medical School's handling of a student's discharge for alleged academic dishonesty (cheating on an exam) violated procedural due process. As will be discussed further below, *Than* is very similar in material respects to Villarreal's case, and therefore worth quoting at length. *Than* held that the inquiry into alleged cheating on the exam was a disciplinary, not academic, matter, and explained:

> At a minimum, when university officials seek to sanction a student for misconduct, our due course of law guarantee

[16] *See Wheeler v. Miller*, 168 F.3d 241, 247 (5th Cir. 1999) for a good summary of the character of the academic decision made in *Horowitz*.

> requires oral or written notice of the charges against the student and, if the student denies them, an explanation of the evidence the authorities have and an opportunity to present his or her side of the story.... Although university officials presumably act in good faith bringing charges of academic dishonesty against a student, there is a significant risk of error because the controlling facts are in dispute and university officials often must rely on circumstantial evidence and reports of others. *See Goss,* 419 U.S. at 580, 95 S. Ct. at 739. Due process requires in this case something more than the "informal give-and-take" required for short temporary suspensions.

*Than*, 901 S.W.2d at 931 (emphasis added).[17]

The Court also noted that "[w]hen, as here, a student may be expelled and deprived not only of his or her education but of professional opportunities as well, the student's interest is entitled to more deference than would be afforded for a temporary suspension." *Id.*

*Than* held that in the circumstances, "some level of process beyond the informal hearing of *Goss*" was required, but cautioned again that the process required will vary with the circumstances. *Id.* In Than's case, although recognizing that UT had "afforded Than a high level of due

[17] Under federal law, procedural due process in the disciplinary context requires "an 'informal give-and-take between the student an the administrative body dismissing him that would, at least, give the student 'the opportunity to characterize his conduct and put it in what he deems to proper context.'" *Horowitz*, 435 U.S. at 86 (quoting *Goss v. Lopez*, 419 U.S. 565 (1975)). The Fifth Circuit has recognized that, under *Than*, Texas due course of law "requires something more than the *Goss* 'informal give and take' when a graduate student is expelled for disciplinary reasons." *Wheeler v. Miller*, 168 F.3d 241, 249 n.19 (5th Cir. 1999).

process," the Supreme Court held his rights were violated because he was excluded from a portion of evidentiary proceedings. *Id.*

**b. Applied to Villarreal's claims**

After the 1L class president forced the TMSL administrators' hand, they had Dean Mouton email the 1L class on March 2, 2015 to mislead students into believing that an honest investigation of the exam compromise, and its effects on uniform exam results, had been conducted. Mouton massaged student confidence by writing that a "national expert who assists us each year to insure the validity and reliability of the uniform exam" had been engaged to analyze "performance by section" on the Exam. C.R. 496. She selectively quoted Bolus's report, and the petitioners released only two pages of it to the students, avoiding disclosure of five other pages, including the damning "Conclusions" section. Notably, petitioners did *not* advise students of the fact that, rather than investigate the scope of the compromise, they had simply acted as if the disjointed set of Walker photographs captured the entire range of compromised questions, and instructed Bolus to construct his analysis on that assumption, even over his apprehension.

In terms of the procedural due process analysis, Villarreal's case presents a direct analogy to *Than*, only the facts are much worse, with the administration rather than the plaintiff as the alleged culprit. Like Than's

inability to examine the classroom with the hearing officer, Villarreal was denied the ability to offer constructive review or criticism of material aspects of the administration's review and supposed remediation of the compromise because he was denied notice of material facts. Villarreal was not only denied the ability to review Dr. Bolus's full report, he (and all students) were denied knowledge of the fact that the pages released to students were not the complete report. He therefore never saw thereport's damning conclusions TMSL was withholding as it effectively told students to move along, there was nothing to see.

Similarly, Villarreal had no indication *why* TMSL had believed only 13 Exam questions had been compromised and what evidence this was based on. He certainly had no way of knowing at the time that TMSL apparently did not even ask SpearIt for a full copy of the review materials, and instead relied only on what turned up in a series of disjointed photographs from a student.

The Court of Appeals succinctly stated this series of actions designed to mislead students and preclude meaningful review:

> In this case, Villarreal contends that the university engaged in a cover-up by tailoring its investigation to reach a specific conclusion. According to Villarreal, the university did this by refusing to investigate the number of students who accessed the review-session questions, by refusing to ascertain the actual number of questions that were disclosed to students in advance of the exam, by providing incomplete information to the

> statistician who analyzed the review sessions' effect on student scores, and finally by revealing to students only selected quotes from the statistician's report in an attempt to mislead them to conclude that the review sessions had no effect on their grades.

*Villarreal*, 570 S.W.3d at 923. The Court of Appeals recognized that this series of alleged actions (the "bad faith mismanagement of an exam-grading controversy," *id.* at 924) deprived Villarreal of meaningful notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." The Court of Appeals correctly rejected the petitioners' argument that, in these circumstances, the mere "retention of a statistician and communications with the first-year class" were "conclusive proof that the university did not act in bad faith." *Villarreal*, 570 S.W.3d at 924. The issue of bad faith alone is a fact issue precluding summary dismissal. *Id.*

Petitioners argue that "the First Court engaged in no procedural analysis whatsoever," and advert to the "undisputed evidence that Villarreal received notice and an explanation regarding his GPA-based dismissal—including multiple opportunities to challenge his grade in Criminal Law and other 1L courses." Pet. Br. at 18; *see also id.* at 2-5. This is both superficial and internally inconsistent. The meetings with the Academic Standards Committee did not afford a process for meaningful review of the cheating scandal and its effect on Villarreal's GPA; the Chair himself deflected responsibility, stating that the ASC had no jurisdiction over such a matter,

and that it had already been addressed "administratively." CITE. Dean Holley repeated that the "classwide remedy" had been intended to address the problem, but this was misleading, as noted above, because the whole Bolus analysis and the "classwide remedy" were based on the premise that only 13 questions were compromised. Petitioners themselves acknowledge that procedural due process requires notice and a process that is "meaningful," Pet.' Br. at 17, and Villarreal received neither in light of the cover-up.[18]

## IV. The First Court Correctly Held That TSU Failed to Conclusively Negate Villarreal's Substantive Claims.

While the First Court implied its skepticism of petitioners' argument that this case calls for review of purely academic decisions, 570 S.W.3d at 924, the Court correctly held that, even under the deferential standard applicable to academic decisions, Defendants failed to meet the high burden necessary to secure summary dismissal. As much as petitioners seek to avoid grappling with the standard of review at this procedural juncture, the First Court correctly held that "the evidence submitted in support of the plea to the jurisdiction must conclusively demonstrate the

[18] Justice Massengale's statement in his concurrence—quoted at Pet. Br. at 18—errs in the same way the Petitioners err: it simply overlooks the fact that procedural due process requires *meaningful* notice and process, and a lack of *meaningful* notice and process is a violation. Affirmatively withholding material information constitutes deficient notice, regardless of how many pro-forma meetings administrators hold to deflect questions.

exercise of professional judgment." 570 S.W.3d at 924-25 (citing, *inter alia*, *Miranda*, 133 S.W.3d at 228). Thus, Petitioners' plea must be denied if any disputed issue of material fact exists with respect to whether the Petitioners' actions reflect professional, non-arbitrary, academic judgment. *See id.* at 924 (citing the standard from *Ewing*, 474 U.S. at 225); *Foley*, 122 Tex. at 203 (academic decision may not be "unreasonable and arbitrary"); *id.* at 204 (academic decisions subject to correction if the administration "acted arbitrarily or have abused the authority vested in them"). The facts thus far apparent, based primarily on the Petitioners' own documents and declarations, affirmatively negate the claim of professional academic judgment, even without the benefit of the necessary documents and depositions Villarreal has been seeking.

**a. TSU's actions injured Villarreal**

In short, Villarreal alleges that Defendants violated his substantive due process rights in at least two instances:[19] *First*, by scaling Villarreal's score against students who had prior access to not only hours of unauthorized professor-led instruction, but more importantly, a preview of *at least* 13 of the exam questions; *second*, by covering up rather than investigating the true effect of the unauthorized reviews and compromised

[19] As summarized in Villarreal's brief on appeal at 47-51.

questions, and thereby failing to assess the extent of the compromised questions so as to apply an appropriate remedy.

Villarreal's C+ in Criminal Law is not a raw score; it was determined only by a process that begins by scaling his score on the "uniform" Criminal Law exam against the scores of all other 1Ls, *including* the scores achieved by all those students (as yet unidentified) who had access to SpearIt's six extra, unauthorized hours of instruction (over three sessions) and an unfair preview of at least 13 of the Exam questions.

The Defendant's own analyst explained to Dean Holley that "the formula to calculate Scaled MC [multiple-choice] test uses ALL students[']raw MC tests," and that "the MC test is the anchor" for the way grades are scaled within each section. C.R. 524. Villarreal's *scaled* score on the Exam then drove the scaling of the professor's portion of the grade within Section 4, *see* C.R. 333-44 (2014-15 Student Rules and Regulations, describing First Year Uniform Exams and First Year Grading Curve), the scores were combined, *id.*, and after application of the mandatory First Year Grading Curve, *id.*, Villarreal landed at a C+. C.R. 537-38.

As this reveals, Villarreal's C+ was a function of Villarreal's raw Exam score as relative to the raw Exam scores of all other 1Ls. The effects of SpearIt's unauthorized reviews, and dissemination of compromised Exam questions, were baked into these results.

**b. Material disputes of fact preclude granting TSU's plea**

Defendants' plea must be denied if any disputed issue of material fact exists.

Even if the Defendants' relevant decisions had been quintessential, subjective, academic evaluations, Petitioners are not entitled to dismissal on the plea to the jurisdiction because the record already includes direct and circumstantial evidence reflecting the TMSL administration's affirmative effort to *avoid discovering* the true scope of the compromise and, instead, cover it up. A professional academic decisionmaker would at least attempt to ascertain the extent of the compromise and tailor an appropriate remedy, while maintaining a certain level of transparency (or, at a minimum, avoid affirmatively misleading students). Petitioners' head-in-the-sand, deceptive strategy is so far outside any realm of reasonable professional decisionmaking that it not only fails the deferential test, but is not even entitled to such deference because it amounts to bad faith. *Villarreal*, 570 S.W.3d at 923. Bad faith is an ordinary fact issue, and can be shown through circumstantial evidence. *See id.* at 923-24 (citing *Kone v. Sec. Fin. Co.*, 158 Tex. 445 (1958)). Dean Aitsebaomo's email to Dr. Bolus, stating that "[t]here is a <u>likelihood</u> that the other items may potentially be compromised," but instructing him to treat the other 47 questions as the control nonetheless, C.R. 473 (emphasis added), is *direct*

evidence that TMSL and the individual Defendants were more interested in sweeping this issue under the rug and papering over its effects than reasonably investigating and correcting it. Such a cover-up bespeaks an impermissible motive (perhaps to protect the school's reputation by burying a cheating scandal instead of addressing the manner in which it affected students' grades), not bona fide academic decisionmaking. Defendants' decision to withhold five of seven pages of Dr. Bolus's analysis from students—including the page with Bolus's actual conclusions—is further direct evidence of a cover-up. *See* Villarreal br. at 18-20. The conclusions hidden from students included Bolus's statement that his analysis reflects that it was possible "that students received pre-testing information on [the 13 C items] which would have enhanced their performance," and that "the NC [the other 47] items themselves may have actually been compromised." *See id.* at 19.

The Defendants also hid the first page of Bolus's report, which sets out the parameters of his analysis, including stating that the other 47 items "may have been compromised" but that he was treating them as the control group. Having hidden these key parts from students, Dean Mouton was able to refer to the other 47 questions in her email on March 2, 2015 as the "Non-compromised items," as contrasted from the 13 "alleged compromised items," and represent that there was nothing to see. C.R.

496. Given that Dean Aitsebaomo was himself aware of a "likelihood" that additional questions were compromised, but did nothing to investigate further and simply instructed Bolus to treat the 47 items as the control, the decision to withhold five pages and Mouton's email were affirmatively misleading.

In reviewing the plea, the Court is required to make all reasonable inferences in favor of Villarreal, and a reasonable inference from these foregoing is that Defendants orchestrated the communications and selective release of information about the compromise with the *intention* of misleading the students and avoiding having to address the scope of the problem.

Even without opining on the issue of bad faith, a bevy of discrete factual disputes preclude summary dismissal. For one, Dr. Bolus's report is self-contradictory, at best. And Plaintiff has designated an expert, Dr. Pearson, who has already produced a report reflecting the key conclusion that "the analysis presented in this report support the contention that some of the students were given an advantage when taking the [Exam] that the other students were not given." C.R. 536.[20] At this point, Defendants have not even designated Dr. Bolus, or anyone else, as a testifying expert witness

[20] Notably, Professor Pearson states that "a stronger analysis would result from analyzing the known section and students…in question" (requiring the identification of students that Plaintiff has been seeking through discovery since this case was filed).

who could refute Dr. Pearson's analysis. Therefore, at the present time, Defendants are not even in a position to respond to Plaintiff's expert, much less establish the absence of a fact issue *against* Plaintiff. However, if and when Defendants designate an expert, conflicting expert testimony presents a quintessential issue of fact.

Second, SpearIt claims that he did not give out the answers to the questions he reviewed at the unauthorized sessions. This is contradicted by the photographs Defendants acquired from Professor Walker, which reflect marked answer choices on those same questions.

Third, SpearIt claims that he picked up all copies of the review materials distributed at the unauthorized session. While this may or may not be true, the intended conclusion—that copies of the materials were not distributed outside those sessions—is contradicted by the very same photographs. Therefore, it is undeniable that at least one student at one or more session was able to take photographs and leave with them, and Villarreal personally informed Holley—purportedly in charge of the "investigation" of this incident—that he and other students in Section 4 believed copies of questions had made their way outside of Section 2.

Fourth, Defendants assert as a material fact that the as-yet-unidentified students who attended SpearIt's reviews did not know before they took the uniform test that the review questions would be the same as

some of the test questions. Even if true, this would not lessen the injury from the compromised questions. Setting that aside, this claim is belied by the emails in the record, where the Section 2 student arranging these sessions with SpearIt clearly was under the impression that attendees would be given questions that were likely to appear on the uniform exam. This was clearly—if only cryptically—communicated to the Section 2 students who received those emails and were directed to contact two students (names redacted) to hear more juicy details.

Fifth, even aside from bad faith or any other factual disputes, the Petitioners' purported "classwide remedy" was nonsensical *even assuming the compromise was limited to the 13 questions identified in the Walker photographs*. Petitioners tacitly acknowledge that the scandal affected grades and required correction, because they re-scored the exam without the 13 questions appearing in the photographs from SpearIt's session(s). But this is not sufficient, and is not even rational. Villarreal, for instance, appears to have done better, without cheating, on those 13 questions than on the other 47 questions,[21] so offering him a re-scored exam without those questions would negate his comparatively-better performance. That plainly

[21] Villarreal must have performed comparatively better on those 13 questions because the purported re-scoring without those 13 questions did not result in a higher grade for Villarreal. One can therefore deduce that he was effectively punished by having a group of questions on which he performed better than other students removed under the only re-scoring option offered by Petitioners.

is no way to correct for the fact that those questions were compromised by a cheating professor and students. But more directly, even if *only* 13 questions were compromised, the students with pre-exam access to nearly a quarter of the 60 test questions would enjoy a significant advantage on *the remaining 47 questions* because, already knowing the answer to the other 13, they would be able to dispatch those questions faster, leaving extra time for the rest. Therefore, those students with pre-exam access to any number of questions still had an advantage on the remaining questions as well. The purported re-scoring option did not account for this obvious advantage.

Lastly, even after the constituent material facts involved in this case are resolved, and even if this Court applies the standard for academic-discharge cases, the question whether Defendants exercised "professional judgment" under that standard presents a fact issue. *Estate of Hill v. Richards*, 525 F. Supp. 2d 1076, 1086 (W.D. Wis. 2007) ("With all of defendant's knowledge, a reasonable jury could find that defendant did not exercise professional judgment and that she was aware of a substantial risk that Hill would attempt to seriously harm herself.").

There are many more disputed material issues of fact, but it is not necessary to catalogue them all here. Any one of the issues identified above alone precludes Defendants' plea. Even where rational basis review applies, it still imposes a substantive standard that the Petitioners have not

established they met as a matter of law so as to be entitled to summary dismissal. *See Foley*, 122 Tex. at 203-04. To the extent this case calls for review of academic decisions, the Petitioners' own professional academic judgment supports Villarreal, because the Student Rules and Regulations expressly recognize that a reliable measure of the cumulative GPA is only "facilitated … by the degree to which the grading structure and definitions are rationally and fairly applied by the law faculty in the process of grading." C.R. 342. TMSL imposes a minimum GPA requirement, and adopted a uniform system of exams specifically in order to "insure fairness to students" by "prevent[ing] significant grading pattern differences" among sections, where all the 1Ls are competing with one another to remain enrolled. C.R. 336. Sweeping a cheating scandal under the rug, and refusing to ascertain its scope and proper remedy, is directly contrary to this policy and cannot be defended on academic grounds. It fails even the most deferential level of review. *See State v. Richards*, 157 Tex. 166 (1957) (stating that due process requires that it is "essential" that the state's property-taking power "be used for the purpose of accomplishing, and in a manner appropriate to the accomplishment of, the purposes for which it exists"); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (observing that even "*Williamson [v. Lee Optical]* insists upon a rational basis," and that "a hypothetical rationale, even post hoc, cannot be fantasy,

and that the State Board's chosen means must rationally relate to the state interest it articulates").

## V. At a Minimum, Villarreal is Entitled to a Continuance of the Decision on the Plea to Permit Necessary Discovery.

Defendants' plea should be denied outright. In the alternative, and at a minimum, he is entitled to conduct necessary discovery before a decision is rendered on the plea. For example, he is entitled the opportunity to discover what Professor Walker told Dean Holley that might have indicated the compromise extended beyond the 13 questions identified in the series of disjointed photographs that came to light, what information Dean Holley was privy to that led him to tell Dr. Bolus that there was a "likelihood" that further questions were compromised, and the full range of materials either distributed or discussed by SpearIt at these review sessions. These are obvious facts which any student at this state-supported institution should have a right to know, and certainly one whose test was scored against other 1Ls who were privy to an unknown number of compromised questions. Only with these and other such facts can any court make a reasoned judgment as to whether the Defendants exercised professional academic judgment, or met a higher standard applicable in disciplinary contexts, based on the information that they either knew or should have known.

## PRAYER

Only Texas universities that spend tax dollars aiding and abetting, and then covering up, cheating scandals affecting uniform exams, which then contributes to a student's mandatorily-curved score and contributes to his dismissal for failure to meet a mandatory GPA, need worry about being sued. Respondent respectfully submits that the petition for review should be denied. Should the petition be granted, the appellate decision should be affirmed.

*/s/ Jerad Wayne Najvar*
**Jerad Wayne Najvar**
Texas Bar No. 24068079
jerad@najvarlaw.com
**Austin M.B. Whatley**
Texas Bar No. 24104681
austin@najvarlaw.com
NAJVAR LAW FIRM, PLLC
2180 North Loop West, Ste. 255
Houston, Texas 77018
Telephone: (281) 404-4696
Facsimile: (281) 582-4138
*Counsel for Respondent*

## Certificate of Compliance

This brief contains 13,165 words, excluding the parts permitted to be excluded by the Texas Rules of Appellate Procedure.

*/s/ Jerad Wayne Najvar*
Jerad Wayne Najvar

## Certificate of Service

I hereby certify that a true and correct copy of the foregoing document, along with any accompanying exhibits, has been served by eService on the following counsel of record on May 18, 2020.

Evan S. Greene
Assistant Solicitor General
Evan.Greene@oag.texas.gov

*Counsel for Petitioners*

*/s/ Jerad Wayne Najvar*
Jerad Wayne Najvar

# Automated Certificate of eService

This automated certificate of service was created by the efiling system.
The filer served this document via email generated by the efiling system
on the date and to the persons listed below:

Jerad Najvar on behalf of Jerad Najvar
Bar No. 24068079
jerad@najvarlaw.com
Envelope ID: 43067886
Status as of 05/19/2020 07:13:11 AM -05:00

Case Contacts

| Name | BarNumber | Email | TimestampSubmitted | Status |
|---|---|---|---|---|
| Jerad Najvar | 24068079 | jerad@najvarlaw.com | 5/18/2020 11:57:40 PM | SENT |
| Evan Greene | | evan.greene@oag.texas.gov | 5/18/2020 11:57:40 PM | SENT |
| Anne LSchievelbein | | anne.schievelbein@oag.texas.gov | 5/18/2020 11:57:40 PM | SENT |