No. 19-0440

In the Supreme Court of Texas

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

Petitioners,

v.

IVAN VILLARREAL,

Respondent.

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

PETITIONERS' BRIEF ON THE MERITS

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Statement of the Case

Nature of the Case:	Ivan Villarreal brought constitutional and breach-of-contract claims against Texas Southern University and three faculty members (collectively, "TSU Defendants") challenging his dismissal from the Thurgood Marshall School of Law, which was predicated upon Villarreal's failure to maintain a 2.0 grade point average during his first year of law school. The TSU Defendants filed a plea to the jurisdiction invoking their sovereign immunity from suit. CR.300-32.
Trial Court:	164th Judicial District Court, Harris County The Honorable Alexandra Smoots-Thomas
Disposition in the Trial Court:	The trial court granted the TSU Defendants' plea to the jurisdiction and dismissed Villarreal's petition. CR.579. It later denied Villarreal's motion for a new trial. CR.602.
Parties in the Court of Appeals:	Villarreal was the appellant. The TSU Defendants were the appellees.
Disposition in the Court of Appeals:	The First Court of Appeals reversed the trial court's order dismissing the constitutional claims and remanded the case, holding that Villarreal alleged viable procedural- and substantive-due-course-of-law claims that established the trial court's jurisdiction over the case. *Villarreal v. Tex. S. Univ.*, 570 S.W.3d 916 (Tex. App.—Houston [1st Dist.] 2018, pet. filed) (per curiam). Justice Massengale filed a concurring opinion. *Id.* at 926-33.

Statement of Jurisdiction

Jurisdiction exists under Texas Government Code section 22.001(a) because this case presents questions of law that are important to the jurisprudence of the State concerning whether due-course-of-law rights under the Texas Constitution apply to a student's academic dismissal from public graduate school. *See* Tex. Const. art. I, § 19. In holding that Villarreal asserted viable due-course-of-law claims, the First Court of Appeals:

- Extended this Court's holding in *University of Texas Medical School at Houston v. Than,* 901 S.W.2d 926 (Tex. 1995), to apply due-course-of-law protections to a purely academic dismissal, as opposed to a disciplinary dismissal that harmed the plaintiff's reputation and career prospects;
- Misapplied the U.S. Supreme Court's holding in *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78 (1978), regarding the scope of any procedural due-process rights that attach to an academic dismissal; and
- Misapplied the U.S. Supreme Court's holding in *Horowitz*, 435 U.S. 78, regarding the scope of any substantive due-process rights that attach to an academic dismissal.

Issues Presented

Villarreal was dismissed from the Thurgood Marshall School of Law after he failed to maintain a 2.0 cumulative grade point average over the course of his 1L year. He received notice and an explanation regarding his GPA-based dismissal, along with multiple opportunities to challenge his grades. After failing to obtain immediate readmission, Villarreal brought constitutional claims contending that the TSU Defendants' purported mishandling of a class-wide first semester Criminal Law exam caused his GPA to dip below the school's minimum standard for academic performance. The First Court of Appeals held that Villarreal asserted viable due-course-of-law claims challenging his dismissal. The issues presented are:

1. Whether an academic dismissal from a public university infringes upon a liberty interest protected by the due-course-of-law clause;

2. Whether the First Court erred in holding that Villarreal may maintain procedural-due-course-of-law claims in the face of evidence showing that he received notice and an opportunity to challenge his GPA-based dismissal;

3. Whether the First Court erred in holding that Villarreal may maintain substantive-due-course-of-law claims in the face of evidence showing that the TSU Defendants exercised professional judgment in dismissing Villarreal from school, including their resolution of the alleged controversy concerning the first semester Criminal Law exam.

To the Honorable Supreme Court of Texas:

This case is an ideal vehicle to answer the question left open in *University of Texas Medical School at Houston v. Than,* 901 S.W.2d 926 (1995)—namely, whether due-course-of-law protections apply to a student who was dismissed from a public university for failing to satisfy the school's minimum academic standards. The Court should grant the petition and say no.

Villarreal was dismissed from Texas Southern University's Thurgood Marshall School of Law ("TMSL") after he failed to maintain a 2.0 cumulative GPA during his first year of law school. He was not disciplined and sustained no charge of misconduct in connection with his dismissal. Villarreal was offered a chance to restart at TMSL after waiting two years, and he remained free to pursue a law career through other means.

Citing *Than*, the First Court of Appeals nonetheless held that Villarreal enjoys a constitutional liberty interest in his graduate education that is subject to due-course-of-law protections. But *Than* was predicated upon a *disciplinary* dismissal and the damage that a disciplined student sustains to his reputation and career prospects. Its reasoning does not extend to cases involving academic dismissals. The bases for affording due-course-of-law protections also are inapplicable to academic dismissals, which are based upon academic judgment. These judgment calls are not conducive to the tools of judicial decisionmaking or similar factfinding proceedings. The First Court's holding also risks opening new floodgates for constitutional litigation and enlarging the judicial presence in the academic community.

Even if the First Court were correct in recognizing a liberty interest here, its holdings regarding the scope of Villarreal's procedural- and substantive-due-course-of-law claims are deeply flawed and independently deserving of this Court's review. As for the procedure challenge, the decision below permits a student to obtain judicial review of an academic dismissal without even challenging the adequacy of procedural protections he received in connection with the dismissal. And as for the substantive challenge, the First Court improperly substituted its view for the reasoned professional judgment of the TSU Defendants. Reversal is warranted on those issues, too.

STATEMENT OF FACTS[1]

I. Villarreal Was Dismissed from TMSL for Failing to Maintain a 2.0 Grade Point Average.

Villarreal entered TMSL in the Fall of 2014. CR.9. TMSL utilizes a grading curve for each first-year course that is based upon (1) the student's score on a uniform exam that is utilized across all class sections for each course (50%), and (2) the student's intra-section grade for the course (50%). CR.9. During his tenure at TMSL, Villarreal earned grades ranging from "C+" to "D" in his courses, resulting in a 1.97 cumulative grade point average at the end of the school year. CR.350-51, 387-91. Villarreal's GPA failed to satisfy TMSL's non-waivable policy providing that "[a] first year student must achieve a cumulative law school grade point average of 2.0 or above" to remain in the program. CR.9, 343. Because Villarreal did not meet

[1] The court of appeals correctly stated the nature of the case. *Supra* p. iv.

TMSL's minimum academic requirements, he was dismissed from school on June 10, 2015. CR.345.

One week later, Villarreal submitted an admittedly untimely petition to TMSL's Academic Standards Committee challenging his first semester "C+" in Criminal Law based upon purported irregularities with the final examination in that course. CR.347-49. Villarreal asked the Committee and TMSL Dean Dannye Holley to change his grade to a "B-" or, alternatively, to readmit him to TMSL despite his unsatisfactory GPA. CR.349. Before receiving a response to that petition, Villarreal submitted a second petition to the Committee reasserting complaints about the first semester Criminal Law exam and challenging the computation of his GPA, which he asserted should have been rounded up to 1.98. CR.353-56.

The Committee "carefully review[ed]" and denied Villarreal's first petition for a grade change and readmission to TMSL in mid-July, noting that "the Office of the Dean had already addressed administratively the issue of the alleged cheating in Criminal Law[,]" CR.357, which arose independently from Villarreal's academic performance at TMSL.

Specifically, on March 2, 2015, Dean Holley had emailed the entire first-year class to report on TMSL's investigation into allegations that Professor SpearIt had conducted a pre-exam review in which certain students from his section were provided with access to a set of questions from the 2013 Criminal Law exam that later reappeared in similar form on the 2014 final exam. CR.364, 368. Professor SpearIt testified that, at the time he conducted the review session, he was not aware that the 2013 questions would be reused on the 2014 exam. CR.394. TMSL also

found "no evidence" that any student who attended that session was aware that the questions would be used on the 2014 exam. CR.365.

Dean Holley advised students that TMSL had nonetheless submitted the first-year class's performance on the allegedly compromised questions, along with the remaining questions, to Richard Bolus, Ph.D., who evaluated the exam for reliability. CR.364, 368. Upon comparing the different sections' performance on the 2014 exam with the prior year's sections' performance on the identical 2013 exam, Dr. Bolus found that "the overall mean difference between the alleged compromised items . . . and the Non-compromised items . . . sets in Fall 2013 students was . . . no different from the one observed in 2014." CR.365, 368, 376-82. He additionally found that, in 2014, the section that performed better on the compromised questions also performed better on the remaining non-compromised questions, and that the section that performed worse on the compromised questions also performed worse on the non-compromised questions. CR.365, 368, 376-82. Dr. Bolus ultimately concluded that no section received an unfair advantage on the 2014 exam that made any difference in performance. CR.365, 368, 376-82.

Nevertheless, one week after sending that email, Dean Holley and TMSL administrators met with the first-year class to address the appearance of impropriety relating to the Criminal Law exam and to review several options for a class-wide resolution. CR.365-66, 369-74. The Dean also advised students to file a written petition with the Academic Standards Committee by March 15, 2015 if they wished to preserve an individual challenge to their Criminal Law grade. CR.365-66, 369-74. Villarreal opted not to challenge his "C+" grade at that time. CR.13.

In April 2014, TMSL administrators again met with the first-year class to discuss a proposed class-wide remedy and to explain why, in the administrators' professional judgment, other options lacked merit. CR.366, 373-74. TMSL ultimately determined that withdrawing the set of allegedly compromised questions and giving students the higher of the two test scores—*i.e.*, the score with the compromised questions included or the score with those questions excluded—was the most appropriate under the circumstances. CR.366, 373-74. The remedy was designed to result only in raising students' grades, and no student's grade was lowered, including Villarreal's "C+." CR.366, 373-74, 385.

In August 2015, following his dismissal from TMSL, Villarreal was invited to meet with the Academic Standards Committee to discuss his second petition for readmission. CR.358. At that meeting, Villarreal relayed his continuing concerns about the Criminal Law exam and its effect on his other grades; the Committee, in turn, recommended that Dean Holley meet with Villarreal. CR.361. Dean Holley then met with Villarreal and rejected his second petition based upon his unsatisfactory grades, particularly Villarreal's failing grade in his six-hour Property course. CR.366-67.[2] Villarreal also was advised, however, that he could wait two years and start anew as a 1L at TMSL. CR.13.

[2] Earlier that summer, Villarreal had also met with Associate Dean Aitsebaomo to discuss his grades. CR.385. Villarreal was advised that he should consult with his Property professor to evaluate whether his grade could be increased. CR.385.

II. Villarreal Brought this Lawsuit Challenging His Dismissal.

Following his dismissal from TMSL, Villarreal filed this lawsuit challenging Professor SpearIt's improper exam review and the TSU Defendants' "refus[al] to afford Villarreal suitable and appropriate remediation of the gross violation of his rights with respect to the Criminal Law exam and . . . [his] final GPA." CR.15-16. Villarreal alleged that the TSU Defendants mishandled the investigation into the review session and provided Dr. Bolus with "incomplete information" regarding the identities of students who allegedly attended the review before the expert conducted his analysis of the exam results. CR.11-12. Villarreal claimed that the TSU Defendants' actions violated his substantive and procedural rights secured by the due-course-of-law clause of the Texas Constitution. CR.14-16. He also asserted a breach-of-contract claim against TSU. CR.17.

The TSU Defendants filed a plea to the jurisdiction asserting their sovereign immunity from suit. CR.300-32. Specifically, the TSU Defendants contended that Villarreal lacked any constitutionally-protected interest that could support viable ultra-vires claims under the due-course-of-law clause and that Villarreal's contract claim also was barred. CR.318-31. The district court granted the plea and dismissed Villarreal's petition in its entirety. CR.579. The court subsequently denied Villarreal's motion for a new trial. CR.602.

The First Court of Appeals reversed, holding that Villarreal alleged viable constitutional claims. *Villarreal*, 570 S.W.3d at 921-25. As a threshold matter, the court concluded that Villarreal has a constitutionally-protected liberty interest in his graduate education under this Court's holding in *Than,* 901 S.W.2d 926. *See*

Villarreal, 570 S.W.3d at 922. The court then held that Villareal adequately asserted procedural-due-course-of-law claims against the TSU Defendants "based on his allegation [regarding] the university's bad-faith mismanagement of an exam-grading controversy[.]" *Id.* at 924. The court further held that Villareal adequately asserted substantive-due-course-of-law claims by contending "that the 'class-wide remedy' for irregularities in the criminal-law exam was arbitrary [and] implemented in bad faith[.]" *Id.* at 925. The First Court affirmed the dismissal of Villarreal's breach-of-contract claim but remanded the constitutional claims to the district court for further proceedings. *Id.* at 925-26.

Concluding that the court was bound "as an intermediate appellate court[]" by prior Texas courts' "uncritical[] adopt[ion] [of] the federal courts' ever-morphing methods of applying the Fourteenth Amendment of the U.S. Constitution[,]" Justice Massengale concurred but urged "[t]he Texas bench and bar [to] undertake the effort of litigating and implementing the proper interpretation of our unique Texas Constitution." *Id.* at 926 (Massengale, J., concurring).

SUMMARY OF THE ARGUMENT

The First Court purported to follow *Than* in holding that Villarreal is entitled to due-course-of-law protections in connection with his academic dismissal from TMSL. But *Than* explicitly refused to answer that very question. The Court should grant review and hold that academic dismissals do not implicate constitutional liberty interests and that the due-course-of-law clause therefore does not apply.

Unlike the disciplinary dismissal at issue in *Than*, an academic dismissal does not deprive a student of his reputation or his ability to pursue a chosen career—*i.e.*,

the underlying liberty interests supporting due-process protections. Moreover, the bases for providing those protections are inapplicable to an academic dismissal—which is based upon academic judgment and is not readily adaptive to judicial or similar factfinding proceedings. The First Court's holding also risks opening the floodgates for every failing public-school student to challenge his dismissal.

But even if due-course-of-law protections apply, the First Court erred in its procedural analysis. For academic dismissals, the U.S. Supreme Court requires only notice and a reasoned explanation for the dismissal—not a hearing. Several Texas courts of appeals have applied that precedent. Here, Villarreal received all the process he was due and more, including multiple opportunities to challenge his grades. The First Court's substantive analysis was equally flawed and deserving of review. So long as the record shows that school officials exercised professional judgment, their academic decisions cannot be disturbed by courts. The TSU Defendants easily cleared that hurdle by showing that Villarreal was dismissed for failing to satisfy the school's minimum GPA requirement.

Standard of Review

Sovereign immunity deprives a court of subject-matter jurisdiction over claims brought against state agencies and officials. *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007). Under the ultra-vires exception, the plaintiff may maintain a claim for injunctive relief against a state official who is violating the law, including the Texas Constitution. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). But if the plaintiff fails to allege a viable claim, or if the record evidence undisputedly refutes the claim, the court must grant the state officials' plea to the jurisdiction. *Andrade v.*

NAACP of Austin, 345 S.W.3d 1, 11 (Tex. 2011); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227-28 (Tex. 2004).[3]

This Court reviews the jurisdictional issues de novo. *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 929 (Tex. 2010).

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO HOLD THAT ACADEMIC DISMISSALS FROM PUBLIC GRADUATE SCHOOLS DO NOT IMPLICATE THE DUE-COURSE-OF-LAW CLAUSE.

A. Whether Academic Dismissals Warrant Due-Course-of-Law Protections Is an Open and Important Question of Texas Law.

The due-course-of-law clause of the Texas Constitution, *see* Tex. Const. art. I, § 19, is not implicated unless a protected liberty or property interest is at stake, *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015). Accordingly, failure to plead the infringement of a constitutionally protected liberty or property interest warrants dismissal of a due-course-of-law claim brought against a state defendant. *See id.* at 13 ("While it is true that sovereign immunity does not bar a suit to vindicate constitutional rights, . . . immunity from suit is not waived if the constitutional claims are facially invalid[.]" (citation omitted)); *accord Andrade*, 345 S.W.3d at 11 ("[T]he [state official] retains immunity from suit unless the [claimants] have pleaded a viable [constitutional] claim.").

[3] The First Court of Appeals did not separately address defendant Texas Southern University's immunity from suit. Villarreal cannot maintain due-course-of-law claims against the University under the ultra vires doctrine. *Heinrich*, 284 S.W.3d at 372-73 (State agencies "remain immune" from ultra-vires claims). Because Villarreal has not pointed to any alternative basis to maintain his constitutional claims against the University, those claims should have been dismissed.

In *Than*, this Court held that a medical student charged with misconduct and dismissed from a state university had a constitutionally protected liberty interest in his graduate education that warranted due-course-of-law protections. 901 S.W.2d at 930. That decision followed *Goss v. Lopez*, 419 U.S. 565 (1975), the leading case regarding federal due-process rights pertaining to public-school discipline.[4] There, the U.S. Supreme Court observed that, "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the [Due Process] Clause must be satisfied." *Goss*, 419 U.S. at 574 (internal quotation marks omitted). *Goss* was grounded on the fact that the misconduct charges sustained by the plaintiff-students "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Id.* at 575 (footnote omitted).

Than echoed that analysis in concluding that the plaintiff-medical student's disciplinary dismissal implicated a liberty interest protected by the due-course-of-law clause because the dismissal threatened his reputation and career prospects. 901 S.W.2d at 930 ("A medical student charged with academic dishonesty faces not only serious damage to his reputation but also the loss of his chosen profession as a physician.").

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[4] In *Than*, the Court noted that although it was "not bound by federal due process jurisprudence[,]" it had "traditionally followed contemporary federal due process interpretations" when charged with interpreting the Texas Constitution's "nearly identical" due-course-of-law clause. 901 S.W.2d at 929.

Three years after *Goss*, the U.S. Supreme Court considered whether a student dismissed for failure to meet academic standards enjoyed similar federal due-process rights. *See Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978). The Court ultimately declined to answer that question, assumed *arguendo* the existence of a constitutionally-protected interest, and resolved the case on narrower grounds. *Id.* at 84-85 ("Assuming the existence of a liberty or property interest, respondent has been awarded at least as much due process as the Fourteenth Amendment requires."); *see also infra* p. 17. The Supreme Court again declined to answer that question in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 223 (1985).

Similarly, in *Than*, this Court left open the question of whether the due-course-of-law clause is implicated when a student is dismissed for academic reasons, as opposed to misconduct. 901 S.W.2d at 931 ("Because we conclude that Than's dismissal involved a disciplinary matter, we need not decide and express no opinion on what, *if any*, procedural due process must be afforded when academic dismissals are involved." (emphasis added)).[5] This Court has never had cause to revisit it. Nevertheless, what (if any) rights a student has under those circumstances is a recurring question for the lower courts. *See infra* p. 17.

Below, the First Court of Appeals failed to acknowledge the distinction between disciplinary and academic dismissals. The court purported to follow *Than* in holding

[5] The Fifth Circuit subsequently suggested that students dismissed purely for academic failure have no constitutionally protected interest in their graduate education. *See Shaboon v. Duncan*, 252 F.3d 722, 731 (5th Cir. 2001) ("Shaboon can prevail . . . *only* if she was dismissed *solely for behavioral misconduct* and if the Health Science Center . . . failed to accord her the minimum procedural protections owed in cases of student dismissal." (emphases added)).

that Villarreal has a constitutionally-protected interest in continuing his law-school education after missing the 2.0 GPA cutoff. *Villarreal*, 570 S.W.3d at 922. But the First Court erred when it expanded *Than* without regard to the fact that this Court explicitly limited its holding to disciplinary dismissals.

Villarreal suggests that the TSU Defendants have not "[c]onclusively [e]stablish[ed]" that his dismissal was academic, as opposed to disciplinary. *See* Pet. Resp. at 14. But he alleges no facts that would even suggest that his dismissal was disciplinary. Villarreal was dismissed from TMSL on account of his grades and nothing more. His 1.97 cumulative grade point average fell below the school's 2.0 minimum requirement for first-year law students. *Supra* p. 2. Villarreal was not disciplined or charged with any type of misconduct in connection with his dismissal. He even was invited to recommence his law-school education at TMSL after waiting two years. *Supra* p. 5.

Moreover, Villarreal did *not* participate in the allegedly improper review sessions that form the basis for his lawsuit. His entire point is that *other* TMSL students enjoyed an unfair advantage over him in Criminal Law. *Cf.* Pet. Resp. 15-17. Neither Villareal nor any other student was punished in connection with that exam.

On these facts, there is no question that Villarreal was academically dismissed. *See Than*, 901 S.W.2d at 931 ("Academic dismissals arise from a failure to attain a standard of excellence in studies whereas disciplinary dismissals arise from acts of misconduct."); *accord Horowitz*, 435 U.S. at 89-90 ("[An academic dismissal] rest[s] on the academic judgment of school officials that [the student] did not have the

necessary . . . ability to perform adequately as a [professional.]"). Indeed, Villarreal's dismissal for "bad grades" is *the* quintessential "academic dismissal[]." *Tex. Tech Univ. Health Scis. Ctr. v. Enoh*, 545 S.W.3d 607, 622 (Tex. App.—El Paso 2016, no pet.).

Accordingly, there is no fact question that precludes the Court from reviewing the important and recurring question of whether academic dismissals implicate the due-course-of-law clause.

B. Academic Dismissals Do Not Impair "Liberty" Interests Warranting Due-Course-of-Law Protections.

On the principal question presented, the Court should hold that the due-course-of-law clause does not apply because an academic dismissal does not infringe upon a protected liberty interest.

To begin with, when the state constitution was adopted, the due-course-of-law clause was not understood to protect a law student from dismissal for failing to meet minimum academic standards. *See Villarreal*, 570 S.W.3d at 926 (Massengale, J., concurring) ("As th[e] [due-course-of-law] provision was understood when our Texan predecessors adopted the 1876 state constitution, a law student's dismissal from school for poor academic performance properly should not be considered a deprivation of liberty."). A constitutionally protected "liberty" interest instead referred to freedom from physical restraint. *Id.* at 927-28 (Massengale, J., concurring) (citing 1 William Blackstone, *Commentaries on the Laws of England* 130 (1769)); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 Harv. L. Rev. 431, 441-45 (1926)). The initial conception of "liberty" also included

freedom from unwarranted governmental interference—but not a right to governmental benefits like a public graduate-level education. *Id*. at 928 (Massengale, J., concurring) (citing Phillip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. 907, 918-19 (1993)).

Although the concept of "liberty" undoubtedly has evolved beyond its original understanding, there is no basis to extend it to an academic dismissal from a public law school. As this Court recognized, the due-course-of-law clause protects "the right of the individual to . . . engage in any of the common occupations of life" alongwith a person's "good name, reputation, honor, or integrity." *Than*, 901 S.W.2d at 929-30 (citations omitted). But the reputational and career-based interests underlying *Than* are not at stake in this case because the TSU Defendants did nothing to deprive Villarreal of his good name or his future as a lawyer.

Villarreal instead was dismissed due to his own failure to meet TMSL's basic academic standards. This is not akin to a school-initiated misconduct charge that might destroy Villarreal's ability to pursue his "chosen profession" in the future. *Cf. id.* at 930; *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 (1972) ("It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another.").

As Justice Massengale observed, Villarreal's "suggestions that [the TSU Defendants' handling of the Criminal Law exam] could be proved to have proximately caused Villareal's academic dismissal, thereby depriving him of the opportunity to pursue a legal career, *strain credulity*." *Villarreal*, 570 S.W.3d at 930 (Massengale, J., concurring) (emphasis added) (footnotes omitted). Indeed,

Villarreal concedes that he was offered an opportunity to continue his education at TMSL after waiting two years. *Supra* p. 5. And he remained free to pursue a law-school education or bar admission through other means.

Moreover, the underlying bases for affording due-course-of-law protections are inapplicable to an academic dismissal like Villarreal's. As *Horowitz* observed, academic evaluations "bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement." 435 U.S. at 89. Fact questions underlying a disciplinary dismissal ordinarily warrant a hearing "where the student [can] present his side of the factual issue [to] provide a meaningful hedge against erroneous action." *Id.* (internal quotation marks omitted). An academic dismissal, in contrast, rests upon "subjective" and "evaluative" analyses that are "not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 90. Indeed, "[c]ourts are particularly ill-equipped to evaluate academic performance[.]" *Id.* at 92; *accord Southwell v. Univ. of Incarnate Word*, 974 S.W.2d 351, 358 (Tex. App.—San Antonio 1998, pet. denied) ("Courts are not equipped to meddle in academic decision-making[.]").

The First Court's holding to the contrary also risks opening new floodgates for constitutional litigation. In this instance, Villareal asserts that his grade was incorrect due to a cheating scandal in which he was not involved. But there is no principle under the due-course-of-law clause to limit the First Court's ruling from applying to disputes about whether a particular grade is fair or not. As a result, every failing undergraduate and graduate public-school student could maintain due-course-of-law

claims challenging his dismissal, "further enlarg[ing] the judicial presence in the academic community and thereby risk[ing] deterioration of many beneficial aspects of the faculty-student relationship." *Horowitz*, 435 U.S. at 90; *see also Villarreal*, 570 S.W.3d at 931 (Massengale, J., concurring) ("It is unnecessary to constitutionalize disputes of this kind that can be better resolved in other ways that do not require courts to conjure rules to govern academic administration[.]").

The Court should grant review and hold that academic dismissals do not implicate liberty interests subject to due-course-of-law protections.[6]

II. EVEN ASSUMING THE DUE-COURSE-OF-LAW CLAUSE APPLIES, THE COURT SHOULD GRANT REVIEW TO RECTIFY THE FIRST COURT'S IMPROPER PROCEDURAL ANALYSIS.

Even if the due-course-of-law clause applies to an academic dismissal, this case still warrants review because the First Court failed to conduct a proper analysis of Villarreal's procedural-due-course-of-law claim. Left standing, the decision below permits a student to obtain judicial review of an academic dismissal without even challenging the procedural protections he received in connection with the dismissal. That holding conflicts with U.S. Supreme Court precedent as well as caselaw from Texas appellate courts.

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[6] The First Court of Appeals did not address Villarreal's alternative contention that he maintains a constitutionally protected "property" interest in his law-school education, *see* CR.14, and Villarreal has not pressed that argument as an independent basis to affirm the First Court's judgment, *cf.* Tex. R. App. P. 53.3(c)(2). And for good reason. There is no state law or rule that establishes an entitlement to a graduate-level education in Texas. *See Roth*, 408 U.S. at 577 ("[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

In *Goss*, the U.S. Supreme Court held that a disciplinary dismissal ordinarily requires "an informal give-and-take between [the] student and disciplinarian, preferably prior to the suspension[.]" 419 U.S. at 584. That is *not* a right to a formal hearing with counsel and confrontation rights, but rather an "opportunity [for the student] to characterize his conduct and put it in what he deems the proper context." *Id.* at 583-84. In *Than*, this Court followed *Goss* and held that a medical student was denied procedural due course of law when he was not provided with an opportunity to respond to certain evidence showing that he had cheated on an exam. 901 S.W.2d at 932-33.

After assuming that an academic dismissal gave rise to due-process rights, *Horowitz* held that even minimal *Goss*-type process is not required. 435 U.S. at 86. The Court specifically rejected *any* hearing requirement. *Id.* at 90. Instead, the dismissing school need only show that the student was provided with notice explaining the school's "careful and deliberate" decision to dismiss the student. *Id.* at 85.

As noted above, this Court has not decided "what, if any" procedural due process is required when an academic dismissal is involved. *Than*, 901 S.W.2d at 931. But several Texas courts of appeals have followed the *Horowitz* standard—*i.e.*, a student must receive meaningful notice explaining his dismissal. *See Tex. Tech Univ. Health Scis. Ctr. v. Enoh*, 545 S.W.3d 607, 621-24 (Tex. App.—El Paso 2016, no pet.); *Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 684 (Tex. App.—Amarillo 1998, pet. denied); *Brown v. Univ. of Tex. Health Ctr. at Tyler*, 957 S.W.2d 911, 915-

16 (Tex. App.—Tyler 1997, no pet); *Tobias v. Univ. of Tex. at Arlington*, 824 S.W.2d 201, 209-10 (Tex. App.—Fort Worth 1991, writ denied).

Here, the First Court engaged in no procedural analysis whatsoever. The court failed to grapple with 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. *Supra* pp. 2-5. Villarreal simply failed to make the cutoff. The process he received in connection with his dismissal was, however, plainly adequate to satisfy any constitutional requirements under *Horowitz*. *See*, *e.g.*, *Enoh*, 545 S.W.3d at 623 (medical resident not denied due course of law where he received notice of the university competency committee's determination that he was failing the school's training requirements, along with an opportunity to challenge that determination); *accord Shaboon*, 252 F.3d at 731; *Davis v. Mann*, 882 F.2d 967, 975 (5th Cir. 1989).

The First Court wrongly focused upon the TSU Defendants' purported "bad-faith mismanagement" of the Criminal Law exam in concluding that Villarreal pleaded a viable claim. *Villarreal*, 570 S.W.3d at 924. The handling of that exam—which affected the entire TMSL 1L class—had nothing to do with the process Villarreal received concerning his academic dismissal. As Justice Massengale noted:

> There is no allegation that the law school failed to provide fundamental procedural protections to Villareal in the implementation of [the school's GPA] policy. The school provided Villareal notice of his dismissal and the reason for it. He had opportunities to give reasons why the policy should not be applied to him, and he actually was heard in various ways by the Academic Standards Committee and in personal meetings with two deans. To the extent Villareal attributes his substandard GPA to one particular

> grade, he also had an opportunity to challenge that grade after the fall semester, though he failed to do so. Thus from a procedural perspective concerning the individual grades that cumulatively determined his GPA and resulted in his academic dismissal, Villareal has no constitutional grievance whatsoever.

Id. at 926-27 (Massengale, J., concurring).

The First Court's improper procedural analysis warrants review and reversal.

III. Even Assuming the Due-Course-of-Law Clause Applies, the Court Should Grant Review to Rectify the First Court's Improper Substantive Analysis.

The First Court's improper substantive-due-course-of-law analysis also warrants review. Villarreal's ipse-dixit allegations of "bad faith" cannot proceed to trial in the face of the TSU Defendants' unrebutted evidence demonstrating that Villarreal's dismissal was the product of professional judgment.

Upon presuming that courts could entertain a substantive-due-process challenge to an academic dismissal, *Horowitz* suggested that a dismissal could be enjoined only "if shown to be clearly arbitrary or capricious." 435 U.S. at 91 (internal quotation marks omitted). *Ewing* then reiterated that an academic dismissal could be overturned only if it reflected "such a substantial departure from accepted academic norms as to demonstrate that the [school officials] responsible did not actually exercise professional judgment." 474 U.S. at 225. That is an exceptionally deferential form of review. Under these precedents, so long as the record contains "minimum professional judgment evidence[,]" that is "sufficient to justify judgment against the student as a matter of law." *Brown*, 957 S.W.2d at 916; *see also Tobias*, 824 S.W.2d at 210-11 ("[A] court must review the record for some evidence

that professional judgment was exercised. If any evidence exists that there was some rational academic basis for the complained of decision, the substantive due process inquiry ceases.").

There is nothing remotely arbitrary or improper coloring Villarreal's dismissal from TMSL. It was predicated upon Villarreal's failure to satisfy TMSL's non-waivable policy requiring first-year law students to maintain a 2.0 GPA. *Supra* p. 2. Indeed, Villarreal does not claim that the policy, or his dismissal thereunder, was arbitrary. On those undisputed facts, Villarreal's substantive-due-course-of-law claim should have been dismissed.

His focus upon the TSU Defendants' alleged mishandling of the Criminal Law exam is misplaced. Even assuming the circumstances surrounding that exam had a "marginal impact" on Villarreal's cumulative GPA and dismissal, *Villarreal*, 570 S.W.3d at 930 (Massengale, J., concurring), the evidence shows that the TSU Defendants demonstrated professional judgment in resolving the situation. They investigated allegations regarding Professor SpearIt's review session, submitted the first-year class's performance on the allegedly compromised questions to an expert who assessed and confirmed the reliability of the exam, met with students multiple times to discuss potential remedies, and ultimately withdrew the set of comprised questions from the exam and gave students the higher of their two scores. *Supra* pp. 2-5.

The TSU Defendants were not obligated to "conclusively demonstrate" that this was the best conceivable resolution, as the First Court suggested. *Cf. Villarreal*, 570 S.W.3d at 925. That is precisely the sort of second guessing that is restricted

under *Horowitz*. *See Ewing*, 474 U.S. at 227-28 (affirming university's decision to restrict plaintiff from retaking an exam even though the university had permitted other students to do so).

Instead, Villarreal was required to demonstrate that the TSU Defendants substantially departed from academic norms in dismissing him from school. In other words, Villarreal needed to show that his dismissal was based upon malice, discrimination, or some other improper motivation unrelated to academic performance. *See Horowitz*, 435 U.S. at 91-92 & n.7. But there is no such allegation, let alone evidence, in this case. As Justice Massengale observed:

> Read in the light most favorable to Villarreal, the petition suggests that administrators deployed junk science in an effort to assuage student concerns about the effect on the grade curve. [But] [t]here is no allegation of malice toward or discrimination against Villarreal or any identifiable group of students. The administrators could have consciously decided not to invest any greater effort into more rigorously evaluating the potential marginal effect Professor Maldando's review sessions had on an exam grade that was just one component of just one of many grades received by the first-year students.

Villarreal, 570 S.W.3d at 930 n.14 (Massengale, J., concurring).

In short, there is no factual basis to conclude that the TSU Defendants acted arbitrarily in dismissing Villarreal pursuant to TMSL's minimum academic requirements, and accordingly, no basis to permit Villarreal to maintain substantive-due-course-of-law claims.

Prayer

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

Respectfully submitted.

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