No. 19-0440

In the Supreme Court of Texas

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

Petitioners,

v.

IVAN VILLARREAL,

Respondent.

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

PETITION FOR REVIEW

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General

EVAN S. GREENE
Assistant Solicitor General
State Bar No. 24068742
Evan.Greene@oag.texas.gov

Counsel for Petitioners

Identity of Parties and Counsel

Petitioners:
Texas Southern University; Dannye Holley, In His Individual & Official Capacities; Edward Maldonado, In His Individual & Official Capacities; Gabriel Aitsebaomo, In His Individual & Official Capacities

Appellate and Trial Counsel for Petitioners:
Ken Paxton
Jeffrey C. Mateer
Kyle D. Hawkins
Evan S. Greene (lead counsel)
Eric A. Hudson
Summer R. Lee
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
evan.greene@oag.texas.gov

Respondent:
Ivan Villarreal

Appellate and Trial Counsel for Respondent:
Jerad Wayne Najvar
Najvar Law Firm, PLLC
2180 North Loop West, Ste. 255
Houston, TX 77018
jerad@najvarlaw.com
Tel: (281) 404-4696
Fax: (281) 582-4138

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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, in part, 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) (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. Tex. Const. art. I, § 19. In holding that Ivan 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;
- 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 readmission, Villarreal brought constitutional claims contending that the TSU Defendants' purported mishandling of a 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 explanation regarding 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 presents 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 academically dismissed from a public university. The Court should grant the petition and hold 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 remains 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 are inapplicable to academic dismissals, which are subjective and not adaptive to the tools of judicial decisionmaking. 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 was correct in recognizing a liberty interest here, its holdings regarding Villarreal's procedural and substantive due-course-of-law claims are deeply flawed and independently deserving of this Court's review.

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 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 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

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

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 nonetheless advised students that TMSL had submitted the first-year class's performance on the allegedly compromised questions, along with the remaining questions, to TMSL's national expert, 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. Dr. Bolus ultimately concluded that no section received an unfair advantage on the 2014 exam that made any difference in performance on the compromised questions or otherwise. 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 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. Villarreal was advised, however, that he could wait two years and start anew as a 1L at TMSL. CR.13.

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 then 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 subjective and 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 satisfied 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's 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). 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. The Court Has Not Decided Whether Academic Dismissals Warrant Due-Course-of-Law Protections.

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 Andrade*, 345 S.W.3d at 11 ("[T]he [state official] retains immunity from suit unless the [claimants] have pleaded a viable [constitutional] claim.").

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-process protections. 901 S.W.2d at 930. That decision followed *Goss v. Lopez*, 419 U.S. 565 (1975), the leading federal case regarding due-process rights pertaining to public-school discipline.[2] 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 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 reputation-based analysis in concluding that the medical student's disciplinary dismissal implicated a liberty interest protected by the due-course-of-law clause. 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.").

Three years after *Goss*, the U.S. Supreme Court considered whether a student dismissed for failure to meet academic standards enjoyed similar due-process rights.

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[2] 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.

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. 13. 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)).[3]

Below, the First Court of Appeals failed to acknowledge the distinction between disciplinary and academic dismissals. The court purported to follow *Than* in holding 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 that application of *Than* was clearly erroneous because the Court explicitly limited its holding to disciplinary dismissals.

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[3] 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." (emphasis added)).

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

This case provides the Court with an ideal vehicle to answer the question left open in *Than*. It involves a purely academic dismissal based upon Villarreal's failure to maintain a 2.0 GPA. *Supra* pp. 2-5. Villarreal suffered no discipline and sustained no charge of misconduct in connection with his dismissal from TMSL.

On the question presented, the Court should hold that the due-course-of-law clause does not apply. The reputational and career-based interests underlying *Than* and *Goss* are not at stake 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 misconduct charge that might destroy Villarreal's ability to pursue his "chosen profession." *Than*, 901 S.W.2d at 930. 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. CR.13. And he remains free to pursue a law-school education or bar admission through other means.

Moreover, the bases for 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.

The First Court's holding also risks opening new floodgates for constitutional litigation. 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." *Id.*

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

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.

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 *Horowitz*. *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. *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*.

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' 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.

There is nothing remotely arbitrary or unusual 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* pp. 2-5. Indeed, Villarreal does not claim that the policy, or his dismissal thereunder, was arbitrary.

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*. As Justice Massengale noted:

> 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.

Id. at 930 n.14 (Massengale, J., concurring).

In short, there is no factual basis to conclude that the TSU Defendants acted arbitrarily, 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.

Ken Paxton
Attorney General of Texas

Jeffrey C. Mateer
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Kyle D. Hawkins
Solicitor General

Evan S. Greene
Assistant Solicitor General
State Bar No. 24068742
Evan.Greene@oag.texas.gov

/s/ Evan S. Greene
Evan S. Greene

Counsel for Petitioners

Certificate of Service

On July 10, 2019, this document was served electronically on Jerad Wayne Najvar, lead counsel for Respondent, via jerad@najvarlaw.com.

/s/ Evan S. Greene
Evan S. Greene

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/s/ Evan S. Greene
Evan S. Greene

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
No. 01-17-00867-CV

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ORDER GRANTING STATE DEFENDANTS' PLEA TO THE JURISDICTION (JULY 10, 2017)

CAUSE NO. 2016-64945

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v.	§	
TEXAS SOUTHERN UNIVERSITY; DANNYE HOLLEY, IN HIS INDIVIDUAL & OFFICIAL CAPACITIES; SPEARIT, IN HIS INDIVIDUAL & OFFICIAL CAPACITIES, GABRIEL AITSEBAOMO IN HIS INDIVIDUAL & OFFICIAL CAPACITIES, *Defendant.*	§	HARRIS COUNTY, TEXAS
	§	164th JUDICIAL DISTRICT

ORDER GRANTING STATE DEFENDANTS' PLEA TO THE JURISDICTION

On this day came on to be considered the State Defendants' Plea to the Jurisdiction. After due consideration of the motion, Plaintiff's response, the evidence presented, and the argument of counsel, the Court finds that Defendants' Plea to the Jurisdiction should be and is hereby GRANTED.

IT IS HEREBY ORDERED that Plaintiff's claims are DISMISSED in their entirety with prejudice, and the case should be administratively closed.

SIGNED this the _____ day of _____, 2017.

Signed:
8/14/2017

HONORABLE ALEXANDRA SMOOTS-THOMAS

TAB B
OPINION OF FIRST COURT OF APPEALS (DECEMBER 31, 2018)

Opinion issued December 31, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00867-CV

IVAN VILLARREAL, Appellant

V.

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, Appellees

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On Appeal from the 164th District Court
Harris County, Texas
Trial Court Case No. 2016-64945

O P I N I O N

Former law student Ivan Villarreal appeals from a trial court order dismissing with prejudice his claims against Texas Southern University and three

members of its faculty. Villarreal argues that the trial court improperly granted a plea to the jurisdiction on his constitutional claims, his breach-of-contract claim, and his claims directed at the university employees in their official and personal capacities. We conclude that under governing precedents, Villarreal has alleged viable constitutional claims, and we reverse the trial court's judgment in part and remand for further proceedings.

Background

As required by the standard of review applicable to this appeal, we construe the pleadings liberally and accept factual allegations as true unless proved otherwise by undisputed evidence.[1]

Appellant Ivan Villarreal enrolled in the Thurgood Marshall School of Law at Texas Southern University as a first-year student in August 2014. The university divided all first-year students into four sections. Villarreal was in Section 4. All but one of the first-year classes were graded on a curve. For those classes subject to a curve, a student's final grade was made up of two parts. The first part was an exam score that was scaled against all other first-year student scores in all sections; the second was a score assigned by the professor that was scaled against other student scores in the same section. Each of those scores accounted for half of each

[1] *See Tex. Dep't. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004).

student's grade. The students' total scores in each class were once again curved to produce final grades. Using a typical system of grade-point averages, the university had a policy of dismissing any student who failed to maintain a GPA of 2.0 (a C average) after the completion of the first two semesters.

The university had another policy prohibiting professors from leading classroom teaching sessions during the reading period between the last day of classes and final exams. Professor Maldonado, the criminal-law professor for Section 2 who uses the "professional name" of "SpearIt," proposed review sessions during the reading period. But Assistant Dean Gabriel Aitsebaomo instructed Professor Maldonado not to conduct classroom-style teaching, on or off campus, during the reading period.

Professor Maldonado held review sessions anyway. The times and locations were disseminated by email. At the review sessions, Professor Maldonado showed students at least thirteen questions that were materially identical to questions that later appeared on the sixty-question uniform criminal-law exam that was used for all four sections of students. Some students left the review sessions with copies of the previewed questions.

Shortly after first-semester grades were posted, rumors circulated among the first-year class that "a handful of students," predominantly from Professor Maldonado's Section 2 criminal-law class, had received pre-exam access to a

number of exam questions during off-campus study sessions. By early February 2015, university administrators were aware of Professor Maldonado's unauthorized review sessions. Dean Dannye Holley identified thirteen exam questions that were accessed by an undetermined number of students before the exam and commissioned a statistical analyst to determine the effect of Professor Maldonado's review sessions. The statistician sought clarification that the university administrators were "quite sure" that the thirteen identified questions were the "only items that might have been compromised," as he planned to "use the non-compromised items as the 'control'" for his analysis. Dean Aitsebaomo responded: "There is a likelihood that the other items may potentially be compromised but the items you have are the ones we were provided evidential proof of." The statistician was instructed to assume that only thirteen questions were compromised and that Section 2 was the only section that received prior access to the questions.

In early March, Dean Holley informed the entire first-year class by email that the matter had been investigated and the exam results had been submitted to a "national expert," whose "key finding" was:

> Most importantly, the overall mean difference between the alleged compromised items(13)[C] and the Non-compromised items(4)[NC] 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.

Dean Holley thus stated:

> Hence our expert concluded no section received an advantage that made a difference in the performance between sections. The section which performed better on the thirteen items also performed better on the remaining 47, and the section which performed worst on the thirteen items also performed worst on the remaining 47. We must conclude therefore that even if the C items were previewed to a section, they did not impact the exam outcomes for those students, or the students in other sections[.]

The university advised students to file individual petitions with the Academic Standards Committee to review their individual exam scores by March 15, 2015, if they wished to preserve challenges to their grades. Villarreal relied on this email's conclusion that the review sessions had no effect on student scores in deciding not to challenge the C+ grade he received in criminal law.

Still concerned about the "optics" of the scenario, the university implemented a "class-wide remedy." The exam was re-scored without the thirteen compromised questions. The university then allowed students the option of accepting the new score if it was higher than the original score. The university claimed that this remedy did not result in any student's final letter grade being reduced, but in a later email to the entire first-year class, the class president stated that "at least one student's grade was lowered."

At the end of the second semester, the law school's registrar emailed Villarreal and informed him that he was being dismissed from the law school. His GPA was 1.98, below the minimum 2.0 GPA. Villarreal filed three petitions with the Academic Standards Committee, requesting review of his grades. He met with the committee, Dean Aitsebaomo, and Dean Holley. All stated that Villarreal missed the opportunity to challenge his criminal-law grade, with the committee noting that the university already "addressed administratively the issue of the alleged cheating in Criminal Law." Villarreal was then dismissed from the law school.

Villarreal sued the university, Dean Holley, Professor Maldonado, and Dean Aitsebaomo. He alleged that his substantive and procedural "due course of law" rights under the Texas Constitution were violated in multiple ways: by the unauthorized review sessions; by the university's failure to provide "suitable and appropriate remediation of the gross violation of his rights" with respect to the criminal-law exam and the determination of his cumulative GPA; by the university's actions misrepresenting the statistician's conclusions, withholding his full report, and "covering up the affair"; and by his dismissal from law school. He also alleged breach of contract. Villarreal's petition specifically stated it was "based solely on claims arising under Texas law" and that he "expressly disavows any federal claims."

While discovery was ongoing, the appellees filed a plea to the jurisdiction based on sovereign immunity and supported by evidence challenging some of Villareal's factual allegations. Villarreal filed a response, asking the trial court to deny the plea or, in the alternative, refrain from ruling until sufficient discovery could be conducted. After a hearing, the trial court granted the jurisdictional plea and dismissed Villarreal's claims with prejudice. Villarreal then filed a motion for a new trial that the trial court denied.

Villarreal appeals.

Analysis

Villarreal contends that the trial court erred by dismissing his case. In their jurisdictional plea, the appellees argued that they were immune from suit. Sovereign immunity protects the State and its employees from suit and will defeat a trial court's subject-matter jurisdiction unless the plaintiff establishes the State's consent to suit or pleads a viable constitutional claim.[2] Subject-matter jurisdiction implicates questions of law that this court reviews de novo.[3]

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[2] *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

[3] *Id*.

A plea to the jurisdiction may be supported by evidence challenging the existence of jurisdictional facts necessary to support a claim.[4] A trial court reviews the relevant evidence and determines whether there is a dispute regarding a jurisdictional fact.[5] When such a fact question exists, a trial court should not grant the plea, and when none exists, a trial court may rule on the jurisdictional issue as a matter of law.[6] As with a traditional motion for summary judgment, a party asserting a plea to the jurisdiction must conclusively negate a jurisdictional fact before the burden shifts to the nonmovant to present evidence raising a question of fact.[7] If a jurisdictional deficiency can be cured by allowing the nonmovant to amend his pleadings, he should be afforded that opportunity.[8]

I. Due-course-of-law claims

Villarreal contends that the trial court improperly granted the university's plea to the jurisdiction because he stated viable due-course-of-law claims that defeated the appellees' claim to sovereign immunity. Section 19 of the Texas Bill of Rights provides: "No citizen of this State shall be deprived of life, liberty,

4 *See, e.g.*, *Miranda*, 133 S.W.3d at 227.

5 *Id.* at 227–28.

6 *Id.*

7 *Id.*; *Tex. S. Univ. v. Gilford*, 277 S.W.3d 65, 70 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

8 *Id.* at 226–27.

property, privileges or immunities, or in any manner disfranchised, except by the due course of law of the land."[9] The Supreme Court of Texas has looked to federal authorities applying the Fourteenth Amendment as persuasive authority when interpreting the analogous due-course-of-law clause in the Texas Constitution.[10] This court must analyze Villarreal's due-course-of-law claims and determine whether the trial court properly concluded that some element of the claims had been shown conclusively to be lacking.[11]

A. Procedural due-course-of-law claims

As a threshold issue for any procedural due-course-of-law claim, the claimant must allege that the state deprived him of a constitutionally protected interest.[12] Whether such a protected interest exists is a question of law this court reviews de novo.[13] The university contends that Villarreal has failed to satisfy this

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9 TEX. CONST. art. I, § 19.

10 *See, e.g.*, *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) ("in matters of procedural due process, we have traditionally followed contemporary federal due process interpretations of procedural due process issues"); *see also Alcorn v. Vaksman*, 877 S.W.2d 390, 396 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (en banc) ("[I]f a federal due process violation was proved, the evidence will prove a state violation, as well.").

11 *See Miranda*, 133 S.W.3d at 228.

12 *See Than*, 901 S.W.2d at 929.

13 *See id.* at 929–31.

element and the trial court therefore appropriately granted its plea to the jurisdiction. We disagree.

Villarreal alleged generally that the university deprived him of the liberty interest students have in "continuing graduate education." In *University of Texas Medical School at Houston v. Than*,[14] the Supreme Court of Texas has held that a graduate student dismissed for academic dishonesty held a "constitutionally protected liberty interest in his graduate education that must be afforded procedural due process."[15] And because Villarreal alleges that the appellees' handling of the exam controversy resulted in his criminal-law grade being depressed and ultimately caused his year-end GPA to dip just below the 2.0 cutoff to remain enrolled, and that he faces serious damage to his reputation and the loss of his chosen profession as a lawyer, his allegations sufficiently implicate the liberty interest in a graduate education as recognized in *Than* and precedents of this court.

The appellees contend that Villarreal's pleadings do not sufficiently allege that he was deprived of his liberty interest in continuing a graduate education without due course of law. A "flexible standard" that focuses on the "practical

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[14] 901 S.W.2d 926 (Tex. 1995).

[15] *Id.* at 930; *see also Alcorn*, 877 S.W.2d at 396.

requirements of the circumstances" applies to determine what process was due.[16] Considerations include the private interest affected by official action; the risk that the procedures used will result in an erroneous deprivation of that interest; "the probable value, if any, of additional or substitute procedural safeguards"; and "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[17]

Villarreal claims that he was denied due process when the university acted in bad faith by misleading students about the effect of Professor Maldonado's review sessions on criminal-law exam scores. After the university informed Villarreal of its decision to dismiss him, he attempted to challenge his criminal-law grade. The university told him he missed his opportunity to challenge the grade from the previous fall semester, noting that it already "addressed administratively the issue of the alleged cheating in Criminal Law." Villarreal alleges that he did not challenge his grade earlier because he relied on Dean Holley's email sent to the entire first-year class that stated "our expert concluded no section received an advantage that made a difference in the performance between sections." Villarreal contends that the email was misleading because it quoted a portion of the

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16 *Than*, 901 S.W.2d at 930.

17 *Id.*

statistician's report concluding that any "differences between sections are most likely random occurrences," but it left out other portions of the report that suggested otherwise, such as the conclusions that there was a "statistically significant difference" between section scores and that it was "unclear from the data available whether this difference was due to the [compromised] item set being inherently easier or the fact that student's received pre-testing information on them which would have enhanced their performance."

This court previously held that when a graduate student's dismissal results from a university's bad faith, that student's procedural due-course-of-law rights are violated. In *Alcorn v. Vaksman*, a doctoral candidate in history was dismissed for nominally academic reasons.[18] On appeal from a judgment in the student's favor after a bench trial, the university relied upon the U.S. Supreme Court's decision in *Board of Curators of University of Missouri v. Horowitz*[19] to argue that its academic judgments were due "great respect" from the court.[20] This court agreed with that principle[21] but noted that the rule "assumes, of course, that the academic

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18 877 S.W.2d at 393–95.

19 435 U.S. 78, 98 S. Ct. 948 (1978).

20 *Alcorn*, 877 S.W.2d at 397.

21 *See id*. (citing *Clements v. Cty. of Nassau*, 835 F.2d 1000, 1005 (2nd Cir. 1987)).

decision was made in good faith," because if it was made in bad faith, the university was "not entitled to the deferential standard of review used in cases of good faith academic dismissals."[22] After reviewing the trial court's findings, this court concluded that there was sufficient evidence that the student's dismissal was not due to academic deficiencies, but instead was a result of the university's "bad faith or ill will unrelated to performance."[23]

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.

The university, relying on declarations of its employees, contends that its decisions to investigate the allegations, to hire an expert to evaluate the exam, and to present its findings to the first-year class are undisputed evidence that

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22 *Id*. (citing *Ikpeazu v. Univ. of Neb.*, 775 F.2d 250, 253 (8th Cir. 1985)).

23 *Id*. at 400 (quoting *Ikpeazu*, 775 F.2d at 253).

conclusively demonstrates that it did not act in bad faith. We disagree. "Bad faith, like motive and other such ultimate facts constituting state of mind, must, of necessity, usually be established as an inference flowing from words, acts and conduct proved."[24] Although "the nature of the words, acts and conduct proved might be such as to authorize and justify a court in taking a case from the jury and in drawing the ultimate fact inference as a matter of law . . . that can rarely be so."[25] The retention of a statistician and communications with the first-year class are not conclusive proof that the university did not act in bad faith.[26]

Applying our court's precedents, we conclude that Villareal adequately alleged a procedural due-course-of-law claim based on his allegation of the university's bad-faith mismanagement of an exam-grading controversy, which allegedly caused him to miss the GPA cut-off by two one-hundredths of a grade point and thereby jeopardized his reputation and intended career path.[27]

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[24] *Kone v. Sec. Fin. Co.*, 313 S.W.2d 281, 284 (Tex. 1958); *see also Alcorn*, 877 S.W.2d at 400.

[25] *Kone*, 313 S.W.2d at 284; *see also Alcorn*, 877 S.W.2d at 400 (noting that where bad faith, a state of mind, is the critical issue and strong evidence exists to support the plaintiff's case, summary judgment is generally inappropriate).

[26] *See Kone*, 313 S.W.2d at 284.

[27] *See also Alanis v. Univ. of Tex. Health Sci. Ctr.*, 843 S.W.2d 779, 784 (Tex. App.—Houston [1st Dist.] 1992, writ denied) ("If the dismissal was based upon academic grounds, the school's decision is not to be disturbed unless it

B. Substantive due-course-of-law claims

Villarreal also argues that the trial court improperly granted the plea to the jurisdiction on his substantive due-course-of-law claim. A court reviewing a student's challenge to his dismissal from a publicly funded university may not override the faculty's professional judgment with respect to an academic dismissal unless that judgment reflects such "a substantial departure from accepted academic norms as to conclusively demonstrate that the person or committee responsible did not actually exercise professional judgment."[28]

Even if we assume, as suggested by the appellees, that Villarreal's dismissal was the result of a purely academic decision, to justify deference to the decision

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was motivated by bad faith or ill will unrelated to academic performance, or was based on arbitrary and capricious factors not reasonably related to academic criteria.").

[28] *Alanis*, 843 S.W.2d at 789 (quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225, 106 S. Ct. 507, 513 (1985)). Although *Ewing* made a point of characterizing the case as one involving an academic judgment, it said nothing about how and if the standard changes in disciplinary cases, *see* 474 U.S. at 225, 106 S. Ct. at 513, despite the clear difference the distinction has in procedural due-process cases. *Compare Goss v. Lopez*, 419 U.S. 565, 579, 95 S. Ct. 729, 738 (1975) (stating procedural due process requires students dismissed for disciplinary reasons be afforded "some kind of notice" and "some kind of hearing"), *with Horowitz*, 435 U.S. at 85–86, 98 S. Ct. at 953 (noting that procedural due-process requirements for an academic decision are "far less stringent," do not include a hearing, and may be satisfied by an informal process culminating in a "careful and deliberate" academic assessment).

the evidence submitted in support of the plea to the jurisdiction must conclusively demonstrate the exercise of professional judgment.[29]

Read liberally, Villarreal's pleadings allege that the "class-wide remedy" for irregularities in the criminal-law exam was arbitrary, implemented in bad faith, and negatively affected his grades. Aside from Dean Holley's declaration stating that the remedy "fit the facts," nothing in the record explains why the university imposed the remedy that it did.[30] Accordingly, we conclude that the appellees did not conclusively demonstrate that the decision to implement the "class-wide remedy" was an exercise of professional judgment entitled to judicial deference in the context of a constitutional challenge.[31] We therefore sustain Villarreal's issue challenging the dismissal of his substantive due-course-of-law claim.

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[29] *See Ewing*, 474 U.S. at 225, 106 S. Ct. at 513; *see also Miranda*, 133 S.W.3d at 228.

[30] Although the university contends that no student's grade was lowered, that claim has been factually disputed to the extent the record includes an email sent by the class president in which he "confirmed that at least one student's grade was lowered."

[31] *See Alanis*, 843 S.W.2d at 789 ("to have a cause of action for substantive due process violations," a dismissed graduate student must show that a university official's actions "were arbitrary and capricious; that is, that there was no rational basis for the University's decision, or that the decision to dismiss was motivated by bad faith or ill will unrelated to his academic performance" (citing *Ewing*, 474 U.S. at 220–26, 106 S. Ct. at 510–14)).

II. Breach-of-contract claim

Villarreal also challenges the dismissal of his breach-of-contract claim. He did not allege a contractual relationship with any party other than the university. By "entering into a contract, the State does not waive its immunity from suit."[32] It is "the Legislature's sole province to waive or abrogate the State's immunity from suit."[33] Therefore, even to the extent Villarreal had a contract with the university, his failure to identify any legislative authority that would overcome sovereign immunity from his breach-of-contract claim confirms that the trial court appropriately dismissed the claim. Accordingly, we overrule Villarreal's issue regarding his breach-of-contract claim.

III. Official- and personal-capacity claims

Finally, Villarreal argues that the trial court improperly dismissed his claims against Dean Holley, Dean Aitsebaomo, and Professor Maldonado in their official and personal capacities. Every cause of action Villarreal raised against the individual defendants alleged that they violated his rights under the due-course-of-law clause. In light of our conclusion that Villarreal alleged a viable constitutional claim, we sustain his issue challenging the erroneous dismissal of his official-

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32 *IT-Davy*, 74 S.W.3d at 856.

33 *Id.*

capacity claims.[34] Villareal's petition did not specifically allege any basis to hold the individuals liable in their personal capacities for constitutional violations, and his appellate brief sheds no additional light on the matter. We therefore overrule the challenge to the dismissal of constitutional claims against the individual defendants in their personal capacities.[35] Because Villarreal failed to state a viable personal-capacity claim against any of the named defendants, we conclude that the trial court appropriately dismissed his personal-capacity claims.

Conclusion

We reverse the judgment of the trial court to the extent it dismissed Villareal's constitutional claims against all appellees. We affirm the judgment to the extent it dismissed claims alleging the university's breach of contract or personal liability of the individual defendants for constitutional violations. We remand the case to the trial court for further proceedings.

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[34] *See, e.g.*, *Hall v. McRaven*, 508 S.W.3d 232, 238–39 (Tex. 2017); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex. 2009).

[35] *See, e.g.*, *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 147–49 (Tex. 1995) (no implied cause of action for damages against government employees for violations of the Texas Constitution).

PER CURIAM

Panel consists of Justices Jennings, Higley, and Massengale.

Justice Jennings, concurring in the judgment only.

Justice Massengale, concurring in the judgment.

Opinion concurring in the judgment issued December 31, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00867-CV

IVAN VILLARREAL, Appellant

V.

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, Appellees

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On Appeal from the 164th District Court
Harris County, Texas
Trial Court Case No. 2016-64945

CONCURRING OPINION

The Texas Bill of Rights provides that no "citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner

disfranchised, except by the due course of the law of the land."[1] As this 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. Even if it were, in the circumstances of this case the dismissal was not inconsistent with "the due course of the law of the land."

I concur in the judgment as an intermediate appellate court's application of controlling precedent. But I also respectfully suggest that in their past development of Texas constitutional law, Texas courts often have too uncritically adopted the federal courts' ever-morphing methods of applying the Fourteenth Amendment of the U.S. Constitution. The Texas bench and bar should undertake the effort of litigating and implementing the proper interpretation of our unique Texas Constitution. Not for the sake of being different, but because our state constitution serves an important function as a distinct source of legal protections for individual rights, because reasonable jurists can and do disagree about how the legal concept of due process can and should be implemented by courts, and because independent reasoning by Texas judges could positively influence the development of the law in other states and in the federal courts as well.

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[1] TEX. CONST., art. I, § 19.

I

Ivan Villareal's fundamental complaint is that he was dismissed from a public law school. The justification was that his GPA fell below 2.0, which mandated his dismissal under school policies. Villareal does not challenge the constitutionality of the policy of requiring a 2.0 GPA to continue his studies.

There is no allegation that the law school failed to provide fundamental procedural protections to Villareal in the implementation of this 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.

But there's more to this case, which confounds the typically observed distinction of dismissals based on academic performance from those based on

student misconduct.[2] Villareal's 1.98 GPA was so close to the 2.0 cutoff that the smallest incremental increase of any one of his grades would have allowed him to stay in school. And there were unusual circumstances surrounding one of his classes, his fall course in criminal law. The first irregularity arose from a law professor previewing actual questions from a criminal-law exam given to the entire first-year class and graded on a curve. Villareal alleges that an unfair advantage to some students depressed the grades of other students and caused his own GPA to dip to 1.98.

The exam irregularity allegedly was compounded by the school administration's handling of the matter. Villareal criticizes the investigation for jumping to unwarranted conclusions by failing to fully inquire about the scope of the problem, such as how many questions were previewed and how many students were disadvantaged as a result. The school then reported to students selected excerpts of the resulting statistical analysis as an apparent assurance that grades were unaffected. Villareal contends that he relied on this information when he decided not to challenge his criminal-law grade, a decision he regretted the next semester when an incremental grade adjustment could have made the difference that allowed him to continue his studies. The subject of the constitutional challenge

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[2] *See, e.g.*, *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 931 (Tex. 1995) (citing *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86–87, 98 S. Ct. 948, 953–54 (1978)).

therefore is not simply his dismissal for low grades, but the cumulative effect of conduct by school employees that impacted one component of one grade just enough to subject Villareal to an otherwise unimpeachable academic dismissal.

Villareal sued, seeking a declaration of his rights and injunctive relief in the form of re-admittance to the law school as a second-year student in good standing. He alleged that a contract with the law school was breached, but his claims are primarily based on the Texas Constitution's due-course-of-law protections. For reasons that are not disclosed in the appellate record, Villareal has deliberately confined his constitutional claims to the Texas Constitution, and he has expressly disavowed reliance on comparable federal protections.[3]

II

To reach the conclusion that Villareal's complaint presents a valid type of constitutional claim, courts have identified reputation associated with the pursuit of

[3] The procedural posture of this appeal and the presentation of state constitutional issues are therefore quite different from the circumstances of *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992), in which only federal constitutional arguments were made until the Supreme Court of Texas invited supplemental briefing on the effect of the state constitution. *See also* Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 8–9 (2018) (observing that although American dual federalism results in dual constitutional opportunities to challenge actions by state governments, most lawyers focus their arguments on federal claims and neglect to present meaningful distinct arguments based on state constitutions).

graduate education as a constitutionally protected liberty interest.[4] But it has been persuasively argued that the "liberty" referenced in federal and state constitutional due-process protections, which are similarly traceable to Magna Carta,[5] refers to

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[4] *E.g.*, *Than*, 901 S.W.2d at 930 (medical student expelled for academic dishonesty had "a constitutionally protected liberty interest in his graduate education that must be afforded procedural due process," citing *Goss v. Lopez*, 419 U.S. 565, 574–75, 95 S. Ct. 729, 736–37 (1975), *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 572, 92 S. Ct. 2701, 2706–07 (1972), and *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961)).

[5] Magna Carta, ch. 39 (1215) ("No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."); Magna Carta (1225) ("No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land."); *see also Kerry v. Din*, 135 S. Ct. 2128, 2132 (2015) (Scalia, J., plurality op.) ("The Due Process Clause has its origin in Magna Carta."); *Den v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855); *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 82–84 (Tex. 2015) (discussing history of adoption of due-course-of-law clause, including alterations made at the 1875 constitutional convention); *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983) (acknowledging that article I, section 19 of the Texas Bill of Rights has its origin in Magna Carta); 1 George D. Braden et al., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 68 (1977) ("Whether the phrase be 'due course of law' or 'due process of law' they both have a common origin in the 'law of the land' expression of the Magna Carta and a common history."); John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1127–30 & n. 245 (1995) (noting that due course of law was incorporated in the 1845 Texas Constitution "without debate" and later reproduced in the 1876 Texas Constitution); J.E. Ericson, *Origins of the Texas Bill of Rights*, 62 S.W. HIST. Q. 457, 463–64 (1959) (noting that the "due course of law" provision was first introduced in a Texas constitution upon statehood in 1845).

freedom from physical restraint: "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."[6] This conception of liberty also was understood as a freedom from governmental interference, not a right to governmental entitlements.[7]

Even to the extent courts have stretched the concept of liberty for these purposes beyond the original public understanding at the time the Texas Constitution was adopted, the case for treating a citizen's pursuit of graduate education—and whatever embarrassment may accompany an expulsion from school—as sufficiently fundamental to invoke constitutional protection under the rubric of due process is far from self-evident. Contemporary precedents have identified a student's reputational concern for not being arbitrarily dismissed on grounds of alleged misconduct as the justification for recognizing a liberty interest

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[6] 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 130 (1769); *see also* Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 441–45 (1926) (discussing the founding-era interpretation and application of "liberty" as used in state constitutions).

[7] *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 918–19 (1993) (arguing that Americans in the founding era understood natural liberty as "the freedom an individual could enjoy as a human in the absence of government").

worthy of constitutional protection.[8] Without diminishing the significance of the concern for students facing that circumstance, it bears observation that the cases have not attempted to justify extending constitutional protections on the grounds

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[8] *See Goss*, 419 U.S. at 574–75, 95 S. Ct. at 736 (high-school students were suspended for up to 10 days on charges of misconduct that, "[i]f sustained and recorded . . . 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"); *Than*, 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. . . . The stigma is likely to follow the student and preclude him from completing his education at other institutions.").

The liberty rationale in *Goss* was arguably dicta, as it was secondary reasoning provided after the Court first referenced Ohio state law to determine that public high-school students in that state had "legitimate claims of entitlement to a public education." 419 U.S. at 573, 95 S. Ct. at 735 (citing OHIO REV. CODE §§ 3313.48 and 3313.64 (1972 & Supp. 1973)). The Court held that a 10-day suspension was a sufficiently significant intrusion on the students' state-law property right to attend school, *id*. at 576, 95 S. Ct. at 737, and that the Due Process Clause required that a student receive "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id*. at 581, 95 S. Ct. at 740. Later U.S. Supreme Court cases reviewing student dismissals have focused on the adequacy of process without confronting questions of whether a protected liberty or property interest had been implicated. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 222–23, 106 S. Ct. 507, 511–12 (1985); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. at 84–85, 98 S. Ct. at 952.

that this interest is of a nature "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[9]

III

Even accepting precedents such as *Goss v. Lopez*[10] and *University of Texas Medical School at Houston v. Than*[11] at face value, their application to the unique

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[9] *Snyder v. Mass.*, 291 U.S. 97, 105, 54 S. Ct. 330, 332 (1934) (Cardozo, J.); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 122–23, 109 S. Ct. 2333, 2341–42 (1989) (Scalia, J., plurality op.). *Than* cited *Goss*, which quoted Justice Douglas's opinion in *Wis. v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507 (1971), for the proposition that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 400 U.S. at 437, 91 S. Ct. at 510; *see Goss*, 419 U.S. at 574, 95 S. Ct. at 736; *Than*, 901 S.W.2d at 930. This language in the *Constantineau* opinion was not directly supported by legal authority, and the opinion included no analysis grounding the announced standard in legal history or tradition.

Notably, in *Constantineau* the plaintiff complained that, without notice or a hearing, a police chief caused a notice to be posted in all liquor stores in his town, stating that sales or gifts of liquors were forbidden to him for a year. 400 U.S. at 435, 91 S. Ct. at 509. This action was authorized by a state statute described by the court as providing "that designated persons may in writing forbid the sale or gift of intoxicating liquors to one who 'by excessive drinking' produces described conditions or exhibits specified traits, such as exposing himself or family 'to want' or becoming 'dangerous to the peace' of the community." *Id*. at 434, 91 S. Ct. at 508. Thus the nature of the reputational concern deemed to invoke constitutional protection as a liberty interest started with publication of a notice that branded a person as an excessive drinker and prevented him from buying liquor (*Constantineau*), then expanded to include a high-school student expelled for 10 days for misconduct (*Goss*) and a medical student dismissed for academy dishonesty (*Than*). Villareal would have us expand this concept to a law student dismissed for poor academic performance without any suggestion of wrongdoing by the student.

facts of this case should not compel a conclusion that a constitutional claim is viable. It's one thing for courts to have held that a state university or its employee can be sued when bad faith tainted a decision to expel a graduate student despite a pretense of procedural protections such as notice and a hearing.[12] But it is hard to see how that circumstance is implicated in this case, when the essential allegation is not a denial of procedural fairness in enforcing the rule imposing a minimum standard of academic performance.

Instead, Villareal presents a different kind of complaint that boils down to allegations of incompetence or self-serving malfeasance in the exercise of academic discretion, with an attenuated theory of causation that the marginal impact on the exam curve affecting 50% of his criminal-law grade had the consequential effect of pulling his GPA below the school's minimum standard for academic performance. But the suggestions that some conduct by Professor Maldonado,[13] or by Dean Holley and Dean Aitsebaomo,[14] could be proved to have

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[10] 419 U.S. 565, 95 S. Ct. 729 (1975).

[11] 901 S.W.2d 926, 931 (Tex. 1995).

[12] *See, e.g.*, *Alcorn v. Vaksman*, 877 S.W.2d 390, 397 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (en banc) (citing *Ikpeazu v. Univ. of Neb.*, 775 F.2d 250, 253 (8th Cir. 1985)).

[13] Villareal's real complaint that Professor Maldonado gave an unfair advantage to some students is not based so much on the timing of the sessions as the preview of exam questions. Villareal did not allege that he

proximately caused Villareal's academic dismissal,[15] thereby depriving him of the opportunity to pursue a legal career, strain credulity.

IV

Assuming that Villareal has a cognizable claim under the Texas Constitution, by what standard should a court evaluate it? In the past our court has applied an ultradeferential review standard found nowhere in the federal or state constitutions. If "reasonable academic judgment" was used to justify dismissal,

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was not given substantively similar opportunities to attend other review sessions where he could receive supplemental instruction conducted by Professor Maldonado or others. Nor did Villareal identify statutes, regulations, or even informal policies governing the extent to which instructors were precluded from "teaching to the test" in review sessions or otherwise (classroom instruction, office hours, etc.).

[14] 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. There 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. Maybe they wanted to shield Maldonado, themselves, and the institution from criticism. Maybe they just didn't know what to do and handled it poorly. In any case, Villarreal alleges no violation of a statute, regulation, or even informal policy in the handling of the matter.

[15] *Cf. Parratt v. Taylor*, 451 U.S. 527, 543, 101 S. Ct. 1908, 1917 (1981) (observing that although prisoner had been deprived of property under color of state law, "the deprivation did not occur as a result of some established state procedure").

then under our precedents the student's challenge can't succeed.[16] But once the courts have decided to recognize a constitutionally protected liberty interest in these circumstances, why would they then hold state-employed academics to such a toothless extraconstitutional standard determined by academia itself?

Courts applying due-process principles need not, and have no authority to, inject themselves into "every field of human activity where irrationality and oppression may theoretically occur."[17] 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, especially if the rule they invent is only going to impose extreme deference to "reasonable academic judgment."

In the absence of legislative and regulatory guidance, the better tools for analyzing this dispute are the traditional common-law causes of action[18]—the same

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16 *See, e.g.*, *Alcorn*, 877 S.W.2d at 397; *Alanis v. Univ. of Tex. Health Sci. Ctr.*, 843 S.W.2d 779, 784–85 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *Eiland v. Wolf*, 764 S.W.2d 827, 833 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

17 *Cruzan v. Dir., Mo. Dep't. of Health*, 497 U.S. 261, 300–01, 110 S. Ct. 2841, 2863 (1990) (Scalia, J., concurring).

18 *Cf. Daniels v. Williams*, 474 U.S. 327, 332, 106 S. Ct. 662, 665 (1986) ("Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."); *Parratt*, 451 U.S. at 544, 101 S. Ct. at 1917

legal claims Villareal presumably would consider if a public school were not involved in this case. He already has alleged breach of contract. Based on the allegations that the first-year class was misled about the nature of the school's investigation and the conclusions to be drawn about whether the curve had been impacted, a tort claim such as fraudulent misrepresentation might provide a remedy,[19] subject to the application of defensive doctrines such as governmental and official immunities.[20]

To the extent the remedies supplied by the common law might be considered inadequate—because they are limited to money damages or could be barred by

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(observing that the Fourteenth Amendment was not intended to function as "a font of tort law to be superimposed upon whatever systems may already be administered by the States," quoting *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160 (1976)).

[19] *See, e.g., Ho v. Univ. of Tex. at Arlington*, 984 S.W.2d 672, 691 (Tex. App.—Amarillo 1998, pet. denied) (discussing fraudulent misrepresentation in context of dismissal of graduate student).

[20] *See, e.g., id*. at 683, 687–88 (discussing governmental and official immunity defenses to tort claims alleged in context of dismissal of graduate student). Notably, official immunity is conditioned on the individual defendant's "good faith" performance of discretionary duties within the scope of his authority. *See, e.g., City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). The objective standard for good faith inquires "whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *McCartney v. May*, 50 S.W.3d 599, 605 (Tex. App.—Amarillo 2001, no pet.) (quoting *Chambers*, 883 S.W.2d at 653).

immunity—the Legislature is better equipped to supply remedies to protect citizens' access to and fair treatment in the course of publicly funded graduate education. The Legislature can determine whether special statutes or regulations are necessary to supply legal rules to police and ensure fairness in academic exams. The Legislature can determine whether and to what extent the existing scope of immunity should be narrowed to allow students to access courts to vindicate their legal rights. And if the Legislature saw fit to take such actions, courts then would have justiciable standards by which the actions of professors and university administrators could be evaluated. Courts then would also have a basis grounded in law to determine whether a student was deprived of some right established by state law, and if so whether it was caused by some official action that conflicted with the due course of the law of the land.

V

Confronted with a novel case like this, Texas judges should resist the easy path of merely stating that we follow the federal courts in their implementation of constitutional due-process protections. To the extent early Texas authorities reasonably observed a conceptual unity behind federal constitutional "due process" and state constitutional "due course of law,"[21] the ensuing 150 years of judicial

[21] *E.g.*, *Mellinger v. City of Houston*, 3 S.W. 249, 252–53 (Tex. 1887); *see also Patel*, 469 S.W.3d at 84.

experience have shown, at a minimum, that these important constitutional protections for individual rights have not always been susceptible to judicial implementation by objectively discerned standards. Citizens and jurists have disagreed in good faith about how these provisions can and should be enforced in the courts, and the solutions applied by the federal courts therefore are not necessarily the infallibly correct solutions.[22] These questions, including the means of safeguarding those unalienable rights of men that have not been reduced to writing in a constitutional text, ultimately depend on the application of reason and judgment, which federal and state courts are equally capable of performing, even when they reach different conclusions.

State courts interpreting their own state constitutions have an important role to play in ongoing national developments about the interpretation and application of American constitutional principles,[23] including the relative roles of the branches of government. Important perspectives will be lost and the quality of

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22 *Cf.* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

23 *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596–97 (2015) (discussing the role played by state courts, including decisions interpreting state constitutions, in helping to "explain and formulate the underlying principles" informing the U.S. Supreme Court's recognition of a constitutional right to same-sex marriage). Justice Kennedy's *Obergefell* opinion included two appendices listing state court decisions addressing or legalizing same-sex marriage. *See id*. at 2610–11.

decisionmaking will be poorer if we do not fully engage, and instead uncritically defer to federal precedents.

Texas courts do not have to meekly follow federal authorities when interpreting the Texas Constitution. We should adopt reasoning used in federal cases when it is relevant and persuasive. When federal authorities are relevant yet unpersuasive, we should engage in an independent judicial decisionmaking process and aim to reach better decisions and provide better guidance to the legal community and to the public generally, explaining the reasoning that we think better resolves the cases before us. In my view, our judicial oaths to preserve the Texas Constitution require nothing less.

* * *

The briefing in this appeal and the novel issues presented to us assume the continuing validity of prior Texas decisions which have not analyzed the issues in the way I am suggesting. The briefs do not advocate any distinctive constitutional interpretations based on unique text or history associated with the Texas Constitution.[24] As such, in the current procedural posture the court is not equipped to draw any firm conclusions about what the Texas Constitution might require in a

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[24] *Cf.* Sutton, *supra* note 3, at 177 ("There will never be a healthy 'discourse' between state and federal judges about the core guarantees in our American constitutions if the state judges merely take sides on the federal debates and federal authorities, as opposed to marshaling the distinct state texts and histories and drawing their own conclusions from them.").

case such as this. For present purposes at this early stage of litigation, I am satisfied with the court's conclusion that based on the current state of the law as stated by the Supreme Court of Texas and precedents of this court, it was error for the trial court to conclude that Villareal failed to plead viable constitutional claims. As such I concur in the court's judgment remanding the case for further proceedings in the trial court.

Michael Massengale
Justice

Panel consists of Justices Jennings, Higley, and Massengale.

Justice Massengale, concurring in the judgment.

TAB C

JUDGMENT OF FIRST COURT OF APPEALS (DECEMBER 31, 2018)

JUDGMENT

Court of Appeals

First District of Texas

NO. 01-17-00867-CV

IVAN VILLARREAL, Appellant

V.

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, Appellees

Appeal from the 164th District Court of Harris County. (Tr. Ct. No. 2016-64945).

This case is an appeal from the final judgment signed by the trial court on October 14, 2017. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that there was reversible error in the portion of the trial court's judgment that dismissed appellant's constitutional and official-capacity claims for lack of jurisdiction. Accordingly, the Court **reverses** this portion of the trial court's judgment.

The Court further holds that there was no reversible error in the remaining portions of the trial court's judgment. Therefore, the Court **affirms** the remaining portions of the trial court's judgment.

The Court further **remands** the case to the trial court for further proceedings.

The Court orders that the appellant, Ivan Villarreal, pay one-half of the appellate costs, and that the appellees, Texas Southern Univ.; Dannye Holley, in his official capacity; Edward Maldonado (A/K/A SpearIt), in his official capacity; and Gabriel Aitsebaomo, in his official capacity, jointly and severally, pay one-half of the appellate costs.

The Court **orders** that this decision be certified below for observance.

Judgment rendered December 31, 2018.

Panel consists of Justices Jennings, Higley, and Massengale.

Tab D

TEXAS CONSTITUTION
ARTICLE 1, SECTION 19

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

Vernon's Ann.Texas Const. Art. 1, § 19

§ 19. Deprivation of life, liberty, etc.; due course of law

Currentness

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Sections 1 to 8 appear in this Volume

Editors' Notes

INTERPRETIVE COMMENTARY

2007 Main Volume

Section 19 of the Texas Bill of Rights is a due process of law provision and has been included in all of the Texas Constitutions. The words "due process of law" or "due course of the law of the land" are the equivalent of the phrase "law of the land" in Magna Carta.

This provision has been construed by the courts as affording several types of protection. It has been said that "when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament. . . .. It was not in their minds, therefore, to protect themselves against enactment of laws by the Parliament of England." Davidson v. New Orleans, 96 U.S. 97, 24 L.Ed. 616 (1878).

Therefore, originally the due process clause was construed as applying to the method of making a judicial or administrative decision. It applied directly to the machinery or procedure by which people were tried for crime, by which property rights were adjudicated, by which the powers of eminent domain and taxation were exercised. In short, legal proceedings were and are required to be conducted by the rules and forms established for the protection of private rights. Otherwise, life, liberty or property would be taken without due process of law so as to be violative of the fundamental principles. See Steddum v. Kirby Lumber Co., 110 T. 513, 221 S.W. 920 (1920).

As applied to procedure, due process requires a fair and impartial trial before a competent tribunal. Vogt v. Bexar County, 5 Tex.App. 272, 23 S.W. 1044 (1893). Included within this requisite is an opportunity to be heard, and reasonable opportunity to prepare for the hearing, which, of course, encompasses reasonable notice of the claim or charge against an individual so as to advise him of the nature thereof, and of the relief sought. State ex rel. Merriman v. Ball, 116 T. 527, 296 S.W. 1085 (1927), Steddum v. Kirby Lumber Co. *supra*.

The right to a hearing requires a judicial examination of every issue that, according to established procedure, may affect the attainment of a legal trial, and in such a trial determine the cause according to law. Freeman v. Ortiz, 106 T. 1, 153 S.W. 304 (1913). There should be opportunity given to cross examine witnesses and to produce witnesses and to be heard on questions of law. Steddum v. Kirby Lumber Co., *supra*.

Due process of law not only includes procedural protection, but also substantive protection. It is a direct constitutional restraint upon the substance of legislation and means that a legislative curtailment of personal or property rights must be justified by a resultant benefit to the public welfare. Thus the due process guaranty does not restrain the state in the exercise of its legitimate police powers. See City of New Braunfels v. Waldschmit, 109 T. 302, 207 S.W. 303 (1918). Houston & Tex. Cent. Ry. Co. v. Dallas, 98 T. 396, 84 S.W. 648 (1905). Both liberty and property are subject to the exercise of these powers.

Nevertheless, the exercise of the police powers is not unrestricted, but is limited to enactments having reference to the public health, comfort, safety and welfare. It must not be arbitrary, unreasonable, or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the object sought to be attained. See Spann v. City of Dallas, 111 T. 350, 235 S.W. 513 (1921), Houston & T.C. Ry. Co. v. City of Dallas, *supra*; American Federation of Labor v. Mann, Civ.App., 188 S.W.2d 276 (1945).

In substantive due process cases, the courts balance the gain to the public welfare resulting from the legislation against the severity of its effect on personal and property rights. Every exercise of the police power involves a restraint upon individual freedom of action or the free use of property based upon some social need which presumably justifies the restraint. Hence, a law is unconstitutional as violating due process when it is arbitrary or unreasonable, and the later occurs when the social necessity the law is to serve is not a sufficient justification of the restriction of liberty involved.

For example, the police power may be constitutionally exercised to destroy property where the social necessity or interest involved is the prevention of the spread of disease or conflagration. Chambers v. Gilbert, 17 Tex.App. 106, 42 S.W. 630, error refused (1897); Keller v. City of Corpus Christi, 50 T. 614 (1879). Again the liberty of contract between employers and employees may be regulated under the police power by limiting the hours of labor in order to promote the public health. See Bunting v. State of Oregon, 37 S.Ct. 435, 243 U.S. 426, 61 L.Ed. 830 (1916).

The Federal Constitution, in the fifth and fourteenth amendments, also provides against deprivation of life, liberty or property without due process of law, the fourteenth amendment by its language being applicable to prevent the states from carrying out such a deprivation. It has been held by Texas courts that the clause of the Texas Constitution, to the extent that it is identical with the fourteenth amendment, has placed upon the powers of the state legislature the same restrictions as those which have been held to be imposed by the language of that amendment of the Federal Constitution. Mellinger v. City of Houston, 68 T. 37, 3 S.W. 249 (1887).

Notes of Decisions (3368)

Vernon's Ann. Texas Const. Art. 1, § 19, TX CONST Art. 1, § 19
Current to legislation effective May 29, 2019, of the 2019 Regular Session of the 86th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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