

No. 03-0753

**In the  
Supreme Court of Texas**

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THE UNIVERSITY OF TEXAS AT AUSTIN,  
PATRICIA OHLENDORF IN HER OFFICIAL CAPACITY  
AS VICE-PRESIDENT FOR INSTITUTIONAL RELATIONS AND  
LEGAL AFFAIRS AND IN HER INDIVIDUAL CAPACITY, AND  
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,  
*Petitioners,*

v.

JOSCELIN YEO,  
*Respondent.*

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On Petition for Review from the  
Third Court of Appeals, Austin, Texas

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**PETITION FOR REVIEW  
ON BEHALF OF THE UNIVERSITY OF TEXAS AT AUSTIN  
AND PATRICIA OHLENDORF**

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## TABLE OF CONTENTS

Identity of Parties and Counsel .....	i
Table of Contents .....	iii
Index of Authorities .....	v
Statement of the Case .....	vii
Statement of Jurisdiction .....	vii
Issues Presented .....	viii
Statement of Facts .....	2
Summary of Argument .....	3
Argument .....	4
I.    The Court of Appeals’s Decision Undermines the Bright-Line Rule That Students Do Not Have Due-Process Interests in Extracurricular Activities .....	4
II.   The Court of Appeals Mistakenly Held That Ms. Yeo Had a Constitutional Claim Because, Under a Proper Due-Process Analysis, Ms. Yeo Has Neither a “Property Interest” Nor a “Liberty Interest.” .....	8
A.   Ms. Yeo’s Reputation Claim Does Not Present a Constitutionally Protected Liberty Interest .....	8
B.   Ms. Yeo Has No Constitutionally Cognizable Property Interest In Her Possible Future Professional Career or Endorsement Opportunities .....	10
III.  The Court of Appeals Also Erred By Refusing To Define What Process Was Due, Instead Affirming a Remedy That Is Not Tailored to Any Alleged Due-Process Violation .....	11

A.	The Court of Appeals Erred By Confusing the University’s Role As Advocate For Its Students With the NCAA’s Role As Decision-Maker .....	11
B.	Due Process Is Aimed At Avoiding Erroneous Punishment, So Ms. Yeo’s Acknowledgment of the Facts Underlying Her Sanction Are Fatal to Any Due-Process Claim .....	13
C.	The Permanent Injunction Exceeds Any Possible Due-Process Relief Because It Predetermines the Result of Any Subsequent Hearing Rather Than Ordering a New One .....	14
	Prayer .....	15
	Certificate of Service .....	17

## INDEX OF AUTHORITIES

### Cases:

<i>Bishop v. Wood</i> , 426 U.S. 341 (1976) .....	9
<i>Blackburn v. City of Marshall</i> , 42 F.3d 925 (5th Cir. 1995) .....	9
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972) .....	6, 8, 10
<i>Brennan v. Board of Trustees</i> , 691 So.2d 324 (La. App. 1997) .....	7
<i>Codd v. Velger</i> , 429 U.S. 624 (1977) .....	13
<i>Colorado Seminary (University of Denver) v. NCAA</i> , 417 F. Supp. 885 (D. Colo. 1976) .....	5, 7, 9
<i>Dixon v. Love</i> , 431 U.S. 105 (1977) .....	14
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975) .....	14
<i>Hairston v. Pacific-10 Conference</i> , 893 F. Supp. 1485 (W.D. Wash. 1994) .....	7
<i>Hall v. NCAA</i> , 985 F. Supp. 782 (N.D. Ill. 1997) .....	7
<i>Hart v. NCAA</i> , 550 S.E.2d 79 (W.Va. 2001) .....	7
<i>Hawkins v. NCAA</i> , 652 F. Supp. 602 (C.D. Ill. 1987) .....	6, 7, 11, 14
<i>Hysaw v. Washburn Univ.</i> , 690 F. Supp. 940 (D. Kan. 1987) .....	7
<i>Justice v. NCAA</i> , 577 F. Supp. 356 (D. Ariz. 1983) .....	7, 11, 14
<i>Karmanos v. Baker</i> , 617 F. Supp. 809 (E.D. Mich. 1985) .....	7
<i>Lesser v. Neosho Cty. Community College</i> , 741 F. Supp. 854 (D. Kan. 1990) .....	7

<i>NCAA v. Gillard</i> , 352 So.2d 1072 (Miss. 1977) .....	7
<i>NCAA v. Jones</i> , 1 S.W.3d 83 (Tex. 1999) .....	15
<i>NCAA v. Miller</i> , 10 F.3d 633 (9th Cir. 1993) .....	5
<i>NCAA v. Tarkanian</i> , 488 U.S. 179 (1988) .....	11
<i>Parish v. NCAA</i> , 506 F.2d 1028 (5th Cir. 1975) .....	6
<i>Paul v. Davis</i> , 424 U.S. 693 (1976) .....	9, 10
<i>San Jacinto Sav. &amp; Loan v. Kacal</i> , 928 F.2d 697 (5th Cir. 1991) .....	9
<i>Spring Branch I.S.D. v. Stamos</i> , 695 S.W.2d 556 (Tex. 1985) .....	viii, 3, 4, 5
<i>University of Texas Med. School v. Than</i> , 901 S.W.2d 926 (Tex. 1995) .....	viii, 8, 13, 15

**Statutes, Rules, and Constitutional Provisions:**

TEX. GOV'T CODE §22.001(a)(6) .....	vii
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## STATEMENT OF THE CASE

*Nature of the Case:* This case involves a permanent injunction entered against the University of Texas that prohibits it from applying NCAA sanctions. The injunction is based on Ms. Yeo's claim that, as a student-athlete, she has a due-process interest under the Texas Constitution in her athletic reputation allowing her to compete in certain interscholastic athletic competitions.

*Trial Court:* The Honorable Paul R. Davis, Jr.  
200th District Court, Travis County

*Disposition:* On March 20, 2002, the District Court issued a TRO preventing the University from declaring Ms. Yeo ineligible. (Attached as App. E) After a number of agreed extensions of the TRO, the District Court held a one-day trial on October 14, 2002 on the propriety of a permanent injunction. On November 20, 2002, the District Court entered a final judgment containing a permanent injunction barring the University from, in part, sanctioning Ms. Yeo under NCAA rules for having competed while the NCAA considered her ineligible, regardless of whether a later hearing might confirm that she was, in fact, not eligible. (Attached as App. C)

The NCAA unsuccessfully attempted to intervene in the District Court and was not named on the District Court's final judgment.

*Court of Appeals:* Third Court of Appeals at Austin

*Disposition:* Affirmed. *NCAA v. Yeo*, 114 S.W.3d 584, 598 (Tex. App.—Austin 2003, pet. filed) (Kidd, J., joined by Patterson & Yeakel, JJ.) (Attached as App. A). In its opinion, the Third Court also affirmed the District Court's exclusion of the NCAA as a party.

## STATEMENT OF JURISDICTION

The Court has jurisdiction over this case under §22.001(a)(6) of the Texas Government Code.

## ISSUES PRESENTED

1. Did the court of appeals err to hold that Ms. Yeo had a constitutional due-process interest allowing her to swim in an intercollegiate meet?
  - a. In *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556 (Tex. 1985), this Court held that students have no constitutional due-process interest in their participation in extracurricular activities. Did the court of appeals err to ignore *Stamos*'s bright-line rule and instead employ its own fact-specific test?
  - b. Due process protects interests that fit the constitutional categories of "liberty interest" or "property interest." Here, the court of appeals did not find that Ms. Yeo's interest fit into either category. Did the court of appeals erroneously extend due-process protections to an interest that does not fit into a constitutionally protected category?
2. Did the court of appeals properly affirm the particular relief ordered by the district court, even though that relief is not aimed at securing a hearing for Ms. Yeo?
  - a. The goal of due-process protection is minimizing the potential for erroneous deprivations of property or liberty interests. Yet Ms. Yeo does not dispute the facts underlying her sanction. Did the court of appeals correctly hold that more process was necessary despite the uncontested nature of the facts?
  - b. In *University of Texas Med. School v. Than*, 901 S.W.2d 926 (Tex. 1995), this Court held that the proper remedy for a due-process violation is to give the claimant the process that was due. Instead of ordering any hearing, the courts below imposed the substantive remedy of a permanent injunction that predetermined the result of such a hearing. Did the courts below overreach by ordering relief that exceeded any process to which Ms. Yeo might have been entitled?
3. Did the court of appeals err to affirm Ms. Yeo's award of attorneys' fees? (Not briefed.)

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TO THE HONORABLE SUPREME COURT OF TEXAS:

This case will determine whether student-athletes can use due process to force their participation in interscholastic athletics. Whether directly framed as the right to so compete—or, as here, indirectly framed as the right to compete so as to protect an athletic reputation that would be damaged by not competing—the bright-line answer under Texas law is that there is no such constitutional right. Respondent claims that the University was somehow negligent in its advocacy on her behalf with the NCAA. But whatever that claim

may be, it is surely not a due-process claim. Indeed, because Ms. Yeo admits the facts underlying her suspension, nothing would have been gained by another hearing. What Respondent sought was thus not more process, but rather a different substantive result. Petitioners The University of Texas at Austin and Patricia Ohlendorf therefore respectfully request that this Court grant the petition and reverse.

### **STATEMENT OF FACTS**

This case concerns the eligibility of Joscelin Yeo to compete in certain intercollegiate swim meets, including the 2002 NCAA Championship Meet. In the months leading up to that meet, questions about Ms. Yeo's eligibility were raised by the University of California at Berkeley, which has a rival swim program and was the school that Ms. Yeo attended immediately prior to transferring to the University of Texas. 2 RR 72, 77-79, 171-73. The initial eligibility questions concerned whether Ms. Yeo had sat out the required two semesters after her transfer to Texas. After a November 30, 2001 hearing, the NCAA imposed a four-contest suspension for Ms. Yeo's failure to sit out those full two semesters. 2 RR 213-14. Subsequently, as the 2002 NCAA Championship Meet approached, Cal-Berkeley objected to Ms. Yeo's eligibility, arguing that she still needed to sit out three more contests to satisfy the NCAA's four-contest suspension. 2 RR 216-18. After a hearing on March 7, 2002, the NCAA agreed with Cal-Berkeley and ruled that Ms. Yeo had not yet completed her suspension. 2 RR 230-33. Although Ms. Yeo contends that she did nothing morally culpable—and the University agrees that she did not—Ms. Yeo has not questioned the material facts relating to the rule violations involved in her suspension. *E.g.*, 2 RR 244.

On March 20, 2002—the eve of the NCAA Championship Meet—Ms. Yeo secured a Temporary Restraining Order preventing the University from declaring her ineligible to compete. *See* App. E. The NCAA attempted to intervene, but the District Court refused to allow the NCAA to join the litigation. On November 20, 2002, the District Court entered a Permanent Injunction barring the University from ever taking action against Ms. Yeo based on any future determination that Ms. Yeo had been ineligible for the swim contests in question. *See* App. C. The Third Court affirmed, *see* App. A-B, and this petition followed.

### SUMMARY OF ARGUMENT

This Court should reaffirm the bright-line rule that students do not have a constitutional due-process interest implicated by their temporary exclusion from extracurricular athletics. *See Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556 (Tex. 1985). By contrast, adherence to the court of appeals’ fact-specific standard would reopen the courthouse doors to litigation concerning even temporary suspensions from extracurricular activities—litigation that was foreclosed by *Stamos*.

Even if the Court moves past the bright-line rule that should exclude Ms Yeo’s claims, the court of appeals’s reasoning contradicts established due-process analysis. Ms. Yeo’s theory does not fit into the constitutionally protected categories of “property interest” or “liberty interest”—a prerequisite for a viable due-process claim. Any expectation Ms. Yeo may have of a future swimming or endorsement career is not yet a mature “property” interest under the Constitution, and she has no “liberty” interest at stake because she does not allege any reputation damage arising from a false communication by the University to third parties.

And even if this Court were to conclude that Ms. Yeo had some constitutionally protected due-process interest—which she does not—the court of appeals’s decision would still warrant reversal because it imposes an excessive remedy. The relief ordered is not tailored to any determination by the court of appeals of what process was due Ms. Yeo in these circumstances. As Ms. Yeo admits the material facts underlying the NCAA rule violation, there was never any need for additional measures to satisfy due process. Moreover, the injunction not only fails to order a new hearing, but instead permanently forecloses any future hearing from concluding that Ms. Yeo was in fact ineligible for these particular swim contests. The injunction thus goes too far by prejudging the results of any such process.

The court of appeals’s opinion not only reaches the wrong result in this case, but its reasoning threatens to inject significant confusion into Texas’s due-process jurisprudence. This Court should reverse and render judgment for Petitioners.

## **ARGUMENT**

### **I. THE COURT OF APPEALS’S DECISION UNDERMINES THE BRIGHT-LINE RULE THAT STUDENTS DO NOT HAVE DUE-PROCESS INTERESTS IN EXTRACURRICULAR ACTIVITIES.**

A student’s participation in athletics does not, by its nature, rise to a level warranting constitutional due-process protection. This Court has recognized such a bright-line rule, applying it to the parallel situation of high school athletics. In *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556 (Tex. 1985), students challenged the State’s “no pass, no play” law applicable to state-supported secondary schools, arguing in part that it infringed on their

constitutional due-process rights. *Id.* at 560-61. Noting that “[t]he federal courts have made it clear that the federal constitution’s due process guarantees do not protect a student’s interest in participating in extracurricular activities,” *id.* at 561 (citing cases from the Fifth, Sixth, and Tenth Circuits), the Court went on to also reject such a claim under Texas law:

Nothing in either our state constitution or statutes entitles students to an absolute right to participation in extracurricular activities. We are in agreement, therefore, with the overwhelming majority of jurisdictions that students do not possess a constitutionally protected interest in their participation in extracurricular activities.

*Id.* (citing cases from New York, Ohio, Oregon, Pennsylvania, and West Virginia).

Although the *Stamos* Court was not confronted with claims brought by a university student, its decision should be read to establish a bright-line rule against such claims by students at any level. The Court’s language was broad and certainly did not distinguish secondary-school students from other types of students. *Stamos*, 695 S.W.2d at 560-61 (discussing “students” and “extracurricular activities” generally). And the logic of the rule suggests that its reach should also extend to the university level because, ultimately, the student-athletes at both levels are still bound by rules of amateurism.<sup>1</sup> *Accord Colorado Seminary (University of Denver) v. NCAA*, 417 F. Supp. 885, 895 (D. Colo. 1976) (“We perceive no constitutional distinction between the loss of a forum for obtaining a contract for a college scholarship and a similar loss of a forum for obtaining a professional contract.”).

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1. Having a consistent rule for both high-school and college athletes also avoids other constitutional problems that might arise from having a special rule for intercollegiate athletics. Given the inherently interstate role of the NCAA, state law that imposes its own regulatory scheme directed to intercollegiate athletics could violate the Commerce Clause. *See NCAA v. Miller*, 10 F.3d 633, 638-39 (9th Cir. 1993) (holding unconstitutional a California statute that imposed certain due-process requirements on the NCAA).

The Fifth Circuit has considered, and rejected, due-process claims brought by college athletes in the context of NCAA sanctions in what has nationally become the leading case on the question. In *Parish v. NCAA*, 506 F.2d 1028 (5th Cir. 1975), the court held that no due-process interest had been deprived where the university’s students were prohibited from participating in NCAA-sponsored tournaments or televised games. *Id.* at 1034. The court rejected claims predicated on the student-athletes’ future professional careers (brought by, among others, future Hall-of-Fame NBA player Robert Parish) because “[b]oth the injury and the career are far too speculative to establish a property interest as defined in *Roth*.” *Id.* at 1034 n.17. The *Roth* test requires actual legal *entitlement*, not mere expectancy, no matter how statistically likely that expectancy may be. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). So long as student-athletes remain amateurs—as they must to remain eligible—their future interests remain mere expectancies. *See Hawkins v. NCAA*, 652 F. Supp. 602, 611 (C.D. Ill. 1987) (holding that such claims inherently fail the *Roth* test because “professional careers in athletics are just too speculative to rise to the level of a constitutionally protected interest” due to “the endless intervening variables which may arise, and impact on those ‘hoped-for’ opportunities. Health, team record, academic achievement, to name a few, will all impact on Plaintiffs’ alleged ‘claim of right.’”) Thus, student-athletes cannot simply offer more evidence going to the likelihood of their career success because, as amateurs, they cannot turn those “unilateral expectancies” into true claims of legitimate entitlement. *See Roth*, 408 U.S. at 577.

A bright-line rule rejecting due-process claims for intercollegiate athletics also keeps Texas in line with the approach taken by the vast majority of other states and federal courts that have considered the question. *E.g.*, *Hart v. NCAA*, 550 S.E.2d 79, 85-86 (W.Va. 2001) (per curiam); *Hall v. NCAA*, 985 F. Supp. 782, 799-800 (N.D. Ill. 1997) (college basketball); *Brennan v. Board of Trustees*, 691 So.2d 324, 330 (La. App. 1997); *Hairston v. Pacific-10 Conference*, 893 F. Supp. 1485, 1495 (W.D. Wash. 1994) (football bowl game); *Lesser v. Neosho Cty. Community College*, 741 F. Supp. 854, 861-62 (D. Kan. 1990) (college baseball); *Hysaw v. Washburn Univ.*, 690 F. Supp. 940, 944-45 (D. Kan. 1987) (college football); *Hawkins*, 652 F. Supp. at 609-11 (college basketball); *Karmanos v. Baker*, 617 F. Supp. 809, 815 (E.D. Mich. 1985) (college hockey); *Justice v. NCAA*, 577 F. Supp. 356, 365-68 (D. Ariz. 1983) (college football); *NCAA v. Gillard*, 352 So.2d 1072, 1081-82 (Miss. 1977) (college football); *Colorado Seminary*, 417 F. Supp. at 895-96.

Yet the court of appeals swept aside this Court's bright-line rule and replaced it with an entirely case-by-case approach. It stated: "The determination of whether a student-athlete has a protected interest is necessarily fact-specific, depending on that athlete's specific situation and reputation. Each such case must be decided on its own merits, in light of the financial realities of contemporary athletic competition." 114 S.W.3d at 598.

That is not a workable rule so much as an invitation to future litigation. The Court should grant this petition to reaffirm the bright-line rule prohibiting such claims—a rule that had provided certainty to universities, secondary schools, and, ultimately, to students.

**II. THE COURT OF APPEALS MISTAKENLY HELD THAT MS. YEO HAD A CONSTITUTIONAL CLAIM BECAUSE, UNDER A PROPER DUE-PROCESS ANALYSIS, MS. YEO HAS NEITHER A “PROPERTY INTEREST” NOR A “LIBERTY INTEREST.”**

Whether a particular interest is protected by the Constitution’s guarantee of due process is a matter of categorization, not of degree.<sup>2</sup> As the Supreme Court has explained, “to determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the nature of the interest at stake.” *Roth*, 408 U.S. at 570-71. To be constitutionally protected, the interest must be either a “property interest” or a “liberty interest.” *Id.* But although the court of appeals recognized this prerequisite, it did not decide this threshold question. 114 S.W.3d at 596 n.10. Ms. Yeo’s interest cannot be classified as either “property” or “liberty” and thus cannot support a constitutional claim.

**A. Ms. Yeo’s Reputation Claim Does Not Present a Constitutionally Protected Liberty Interest.**

The court of appeals identified Yeo’s interest as “her athletic reputation and the accompanying potential income,” noting that at both the TRO hearing and the permanent-injunction hearing, “Yeo represented that it was this continuing interest in her athletic and professional reputation that UT-Austin had damaged by its actions.” 114 S.W.3d at 597. But that reputation interest does not fit the constitutional category of a “liberty interest.”

The Supreme Court has made clear that the Fourteenth Amendment does not constitutionalize tort law by providing a remedy for anyone whose reputation has been

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2. Ms. Yeo brought her claims under Article I, §19 of the Texas Constitution, which this Court has held to be “without meaningful distinction” from the federal Due Process Clause. *Than*, 901 S.W.2d at 929. “As a result, in matters of procedural due process, [this Court has] traditionally followed contemporary federal due process interpretations of procedural due process issues.” *Id.*

wronged by the State. *Paul v. Davis*, 424 U.S. 693, 698-99 (1976). Instead, to have a “liberty interest,” the claimant must—in addition to some defamatory statement—also show that government infringement of some other, preexisting right. *Id.* at 702. The Fifth Circuit has referred to this as a “stigma plus infringement” requirement. *San Jacinto Sav. & Loan v. Kacal*, 928 F.2d 697, 701-02 (5th Cir. 1991) (per curiam).

Ms. Yeo’s reputation claim does not even satisfy the “stigma” part of the “stigma-plus” requirement. Ms. Yeo argues that being excluded from the NCAA Championships would harm her reputation because third-parties might assume the worst. But because Ms. Yeo does not contest the facts underlying her suspension, she cannot have a constitutional due-process reputation claim. *Blackburn v. City of Marshall*, 42 F.3d 925, 936 (5th Cir. 1995) (falsity is “a prerequisite for a liberty interest-stigma claim”). Nor does due process protect against inferences that might be drawn by third-parties from the fact of the suspension itself, rather than from some defamatory government communication. *Id.* at 935; accord *Bishop v. Wood*, 426 U.S. 341, 349 (1976) (requiring that the reasons underlying the decision, not just the fact of the decision, have been communicated). Thus, Ms. Yeo’s contention that others would assume the worst about her—which is the core of her reputational-harm argument—is insufficient under the Constitution. So, too, Ms. Yeo’s claim that third-parties might not fully understand the sanction cannot be the basis of a reputational liberty interest because it follows from the sanction imposed, not from any defamatory communication by the University. See *Colorado Seminary*, 417 F. Supp. at 896.

Nor does Ms. Yeo’s theory satisfy the “plus” part of the “stigma-plus” test. In order

to have a constitutional claim, as distinguished from a mere tort claim, the reputational damage must be linked to the State seeking to remove or significantly alter a preexisting life, liberty, or property interest protected by state law or a constitutional provision. *Paul*, 424 U.S. at 710-11 & n.5. Ms. Yeo’s allegations, however, flow from damage to her reputation alone, not from some deprivation of another right.

**B. Ms. Yeo Has No Constitutionally Cognizable Property Interest In Her Possible Future Professional Career or Endorsement Opportunities.**

To have a constitutional “property interest,” Ms. Yeo must prove that she “has more than a unilateral expectation” of a benefit. *Roth*, 408 U.S. at 577. She “must have a legitimate claim of entitlement to it” and that entitlement must “stem from an independent source such as state law.” *Id.* Ms. Yeo points to no “entitlement” that she can legitimately enforce against some third party, such as a corporate sponsor, from whom she claims to expect to receive future benefits. She therefore presents only “unilateral expectations.”

Indeed, she could not have had “entitlements” based on her athletic career because Ms. Yeo—like all NCAA student-athletes—was an amateur. Testimony indicated, for example, that her status as an NCAA athlete precluded her from accepting immediate financial opportunities. *E.g.*, 2 RR 50, 136. For the same reasons discussed above in the context of the bright-line rule, Ms. Yeo’s amateur status prevents her from translating her own subjective expectations about her future swimming or endorsement opportunities into the kind of legally enforceable “entitlements” that become “property” for due process. *See* Part I, *supra*. The inherent risks in athletic careers—injuries being just one example—mean

that, until the student-athlete can actually solidify her expectations into real legal entitlements, they do not rise to a constitutional level. *Hawkins*, 652 F.2d at 610-11.

Moreover, whatever “legitimate . . . entitlement” Ms. Yeo might hold is necessarily limited by the understanding that she would need to comply with NCAA Rules to continue competing. Were that not the case, student-athletes could essentially argue that they are simply too talented or have too lucrative a future career path to be held to the rules. On this record—where Ms. Yeo does not contest the facts underlying her violation of NCAA rules—this implicit limit on any “legitimate claim of entitlement” is entirely fatal to her claim because she cannot reasonably hold an “entitlement” to compete when ineligible. *Justice*, 577 F. Supp. at 365 n.6 (any understanding “must have implicitly been subject to the reasonable rule-making and regulatory authority of the sport’s governing body, the NCAA”).

### **III. THE COURT OF APPEALS ALSO ERRED BY REFUSING TO DEFINE WHAT PROCESS WAS DUE, INSTEAD AFFIRMING A REMEDY THAT IS NOT TAILORED TO ANY ALLEGED DUE-PROCESS VIOLATION.**

#### **A. The Court of Appeals Erred By Confusing the University’s Role As Advocate For Its Students With the NCAA’s Role As Decision-Maker.**

Even assuming that Ms. Yeo had some constitutionally protected interest, the court of appeals erred by holding that the University could violate due process by doing an imperfect job of advocacy in hearings in which the NCAA was the actual decision-maker. *See NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988) (NCAA is not a state actor for due-process purposes); *see also* 114 S.W.3d at 599 (“Procedural due process only ensures that *government decisions* will be made with sufficient procedural safeguards.”) (emphasis added). It is the NCAA who is in the role of decision-maker regarding the meaning of its

own rules and what facts would constitute a violation of those rules. Within that NCAA decision-making process, the University acts merely as an advocate.

Ms. Yeo's theory thus improperly attacks the University's role as an advocate, not as a decision-maker. In her petition to the trial court, Ms. Yeo focuses on two hearings in regard to which she claims to have been denied process—a November 30, 2001 NCAA hearing and a March 7, 2002 NCAA hearing. CR 81-83, ¶¶ 13, 16-17 (listing alleged deficiencies in those two hearings). Yet, both of these hearings were conducted by the NCAA, not by the University.<sup>3</sup>

So, too, the court of appeals's criticism of the University focuses on its role as an advocate, not on any "government decision" that might be reached by due process. While the court of appeals used the word "decision" to describe some of the University's conduct, it is plain that they mean *advocacy* decisions—i.e., "strategic decision[s]," 114 S.W.3d at 599—as distinguished from any role as the arbiter of Ms. Yeo's claims at the challenged hearings, which the University was not. Indeed, the court of appeals criticizes the University for such things as "fail[ing] to suggest that Yeo retain counsel" for the NCAA proceedings,

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3. The court of appeals's decision focuses attention on the University's first step on November 26, 2001 of formally declaring Ms. Yeo ineligible so that it could then seek her reinstatement through available NCAA processes. 114 S.W.3d at 599–600. Yet Ms. Yeo did not advance or prove any deficiencies in that University action below; instead, she focused on alleged deficiencies at the November 30, 2001 NCAA hearing and the March 7, 2002 NCAA hearing. The court of appeals's observation that "[t]here is no record of how the [November 26] decision was made," 114 S.W.3d at 599, is thus quite unsurprising and only demonstrates that the trial record does not support the court of appeals's decision on that basis. Nor is there any suggestion in the record that, had the University refused to take that initial step back in November 26, 2001, that Ms. Yeo would have either avoided punishment or received a lesser sanction such that she would have again been eligible by the time of the 2002 NCAA Championship. Indeed, the record shows that Cal-Berkeley had already reported Ms. Yeo's rule violation to the Big XII. *See* 2 RR 77-79, 171-73.

114 S.W.3d at 599, and for not “suggest[ing] to [Yeo] that she could avoid the entire controversy by obtaining a waiver from Cal-Berkeley,” 114 S.W.3d at 599. Thus, the court of appeals’s conclusion that Yeo “was not allowed *to participate in* crucial decisions,” 114 S.W.3d at 600, is a misdirected criticism of the University’s role as advocate for Ms. Yeo in hearings that were occurring before other decision-makers such as the NCAA and Cal-Berkeley, not its role in any “government decision” covered by due process.

**B. Due Process Is Aimed At Avoiding Erroneous Punishment, So Ms. Yeo’s Acknowledgment of the Facts Underlying Her Sanction Are Fatal to Any Due-Process Claim.**

The court of appeals also erred by affirming due-process relief for Ms. Yeo even though she does not dispute the facts underlying her suspension. Because due process is aimed at preventing undue error, there is no further claim for due process when a person admits to the charges against them. Indeed, the Supreme Court has squarely held that “[i]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee’s reputation.” *Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam). Where a due-process claimant does not contend that the facts underlying the charges are false, “the absence of any such allegation or finding is fatal to [his] claim under the Due Process Clause that he should have been given a hearing.” *Id.* This Court, too, has repeated the Supreme Court’s guidance that further hearings are necessary only “if [the claimant] denies the charges.” *Than*, 901 S.W.2d at 930 (requiring that the “student be given 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”) (emphasis added) (citing *Goss v. Lopez*, 419 U.S. 565, 581 (1975)).

Here, Ms. Yeo was told the nature of the charges against her and admitted the underlying facts. Indeed, “[Ms.] Yeo never challenges the NCAA eligibility rules involved in her case, nor does she challenge the determinations made by any of the NCAA personnel and committees based on those rules.” Appellee’s Br. in Response to NCAA, at 1. Thus, as she admitted the facts underlying the sanction, no further process was constitutionally due.

By the same token, Ms. Yeo has no constitutional due-process right to another hearing simply to plead for leniency in punishment. The Supreme Court has held that where the factual basis for a disciplinary decision is undisputed and an individual wishes only to request leniency, an additional hearing is not required. *Dixon v. Love*, 431 U.S. 105, 113-14 (1977). Thus, a student who does not contest the facts underlying an NCAA sanction has no constitutional right to ask for leniency in their application. *E.g.*, *Hawkins*, 652 F. Supp. at 611-12 (refusing to order a new hearing because, in part, “a plea for leniency is likely the only contribution Plaintiffs could have made at such a hearing”); *Justice*, 577 F. Supp. at 368-69 (same). What Ms. Yeo seeks is not “due process” but instead a different substantive result than warranted by NCAA rules. That the Constitution does not provide.

**C. The Permanent Injunction Exceeds Any Possible Due-Process Relief Because It Predetermines the Result of Any Subsequent Hearing Rather Than Ordering a New One.**

The court of appeals also erred to leave unmodified the permanent injunction in this case, which in effect precludes any meaningful hearing about Ms. Yeo’s eligibility. The

Permanent Injunction provides, in relevant part, that no action can ever be taken with regard to meets including all of those in which Ms. Yeo competed without eligibility:

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants . . . be, and hereby are, commanded to desist and refrain from declaring Plaintiff Joscelin Yeo ineligible for competition or imposing any punishment on plaintiff Joscelin Yeo including, but not limited to, withholding Ms. Yeo from competition, for having competed in any competition including, but not limited to, the 2002 NCAA Women’s Swimming and Diving Championship Meet, under any of the Temporary Restraining Orders issued in this cause.

App. C, at 6.<sup>4</sup> As the Temporary Restraining Order also prohibited the University from taking any action irrespective of whether another hearing was held, *see* App. E, no hearing on Ms. Yeo’s eligibility could have, consistent with the trial court’s orders, been effective. The effect of the Permanent Injunction is thus to permanently deny the process Yeo sought. The correct remedy—if a remedy was due—should have been more process, not less. *See Than*, 901 S.W.2d at 933-34. Any argument by Ms. Yeo to the contrary is an admission that her claim does not properly sound in due process at all.

### PRAYER

For the foregoing reasons, Petitioners The University of Texas at Austin and Patricia Ohlendorf respectfully request that this Court grant the petition for review, reverse the decision of the court of appeals, and render judgment in their favor.

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4. Although Ms. Yeo has exhausted her NCAA eligibility, such a determination is still meaningful because, as this Court has acknowledged, after-the-fact remedies such as the NCAA’s Restitution Rule can still affect the parties. *See NCAA v. Jones*, 1 S.W.3d 83, 87-88 (Tex. 1999) (holding that appeal of a permanent injunction was not moot even after student-athlete’s eligibility expired because of the Restitution Rule).

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## CERTIFICATE OF SERVICE

I certify that I caused to be served a true and correct copy of this Petition for Review by certified mail, return receipt requested, on January 28, 2004, on:

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