No. 21-_____

In The
Supreme Court of the United States

JESUS GUERRERO,

Petitioner,

v.

DIOCESE OF LUBBOCK,

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Whether the First Amendment shields a religious organization from tort liability for defamatory statements made to a secular audience regarding the secular topic of child sexual abuse.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner, Jesus Guerrero, was the Plaintiff-appellee below. Respondent, the Diocese of Lubbock, was the Defendant-appellant below.

Petitioner is a seventy-eight (78) year old individual who resides in Lubbock, Texas.

RELATED PROCEEDINGS

There are no related proceedings.

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OPINIONS BELOW

The District Court of Lubbock County's opinion denying Respondent's Plea to the Jurisdiction is unpublished and reproduced at App. 102a. The Texas Court of Appeals for the Seventh District Court's opinion denying the Petition for Writ of Mandamus and Petition for Review is reported at 592 S.W.3d 196 and 591 S.W.3d 244 (Tex. App. – Amarillo 2019), and reproduced at App. 69a and 86a, respectively. The Texas Supreme Court vacated the judgment of the court of appeals and dismissed the case. The opinion is reported at 624 S.W.3d 563 (Tex. 2021) and reproduced at App. 1a.

JURISDICTION

The Texas Supreme Court entered its judgment on June 11, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof [.]" U.S. Const. Amend. I.

STATEMENT OF THE CASE

This is a civil defamation case in which the Diocese announced to the world that Jesus Guerrero ("Guerrero") sexually molested children. The Diocese of Lubbock ("Diocese") called Guerrero a child molester not from the pulpit, but from a world-wide

stage. The Diocese's false accusations of pedophilia were published in a "List" released on the Internet, as well as press releases and multiple on-camera interviews to secular media both before and after the publication of the List. The Diocese did not stop with only accusations of pedophilia, but went on to falsely tell the world that Guerrero had either **admitted** the allegations, had been **convicted** of this unspeakable crime in a court of law, or the Diocese possessed "testimony" from witnesses that actually observed the sexual abuse. (App. 118a). Although the statements are admittedly false, the Texas Supreme Court now immunizes religious organizations for its defamatory statements and has made child sexual abuse an ecclesiastical matter. It is the only court in the country to reach such a result, and it must be corrected. As stated by Justice Boyd in his dissenting opinion, "…the rule the [c]ourt announces today – which no other court has ever announced before – is as unwise as it is unsupported by the constitutional provisions on which the [c]ourt relies." (App. 35a).

I. Factual Background

A. Jesus Guerrero.

In 2003, Guerrero was a 60 year-old volunteer deacon and member of the Diocese. It was at this time that Guerrero received a letter informing him that a complaint had been made against him involving a 41 year-old woman. (App. 139a-144). Although he was not told any details at the time, two fellow parishioners allegedly observed Guerrero exiting a

room where the 41 year-old adult woman was also present. Neither parishioner claimed to have witnessed Guerrero make any physical contact, nor engage in sexual conduct with the adult woman. Guerrero denied then and now that anything inappropriate occurred between him and the adult woman.[1] Id. Ultimately, Guerrero was "permanently removed from the ministry" by 2008 and had all additional faculties removed. Guerrero did not challenge his removal then or now. Id.

Shockingly, on January 31, 2019, nearly eleven years later, Guerrero (then 75 years of age) was falsely accused of sexually abusing children when the Diocese identified him on a List published on its website, "Names of All Clergy with a 'Credible' Allegation of Sexually Abusing a Minor." (App. 103a-106). The List was published in conjunction with a series of press releases and media interviews in Hollywood-like fashion as part of a very public effort by the Diocese to restore "trust in the Diocese and Catholic Church" and "protect children from sexual abuse." (App. 107a-110). The Diocese's defamatory statements have destroyed Guerrero's reputation, legacy, and erased a lifetime of Guerrero's good works and accomplishments.

[1] According to the Diocese in their briefs throughout the appeal of this case, a second report was allegedly made prior to 2008.

B. The Two (2) Defamatory Statements.

As set forth in his state court Petition, Guerrero complains about two separate defamatory statements. (App. 145a-155).

Defamatory Statement No. 1: Diocese falsely accused Guerrero of sexually abusing children in the following series of seven publications:

- 1/31/19 **List published on the Internet titled:** "Names of All Clergy with a Credible Allegation of Sexual Abuse of a Minor." (App. 103a-106).

- 1/31/19 **Press Release drafted by Diocese and Sent to Secular Television News Media:** Diocese states the decision to release the names was made "in the context of their ongoing work to protect **children from sexual abuse**." (App. 107a-110).

- 1/31/19 **Interview**: Chancellor Martin gave multiple on-camera interviews to the secular media and in discussing the List, repeatedly refers to children: "**the Church is safe for children.**" (App. 166a-169). Martin also says, "You have to keep in mind, sometimes the authorities are involved but **because of the age of the victims, the parents** don't want anything released and the only way to ensure that is to not proceed with any legal court system or situation

because then something is going to leak out and they don't want the embarrassment for themselves or their **children**." (App. 111a-118).

- 10/10/18 **Diocese Interview Statement #1 to advertise upcoming release of List**: Bishop Coerver said in reference to the upcoming release of the List, "it is a step the church is willing to take to ensure the **children** are safe." (App. 132a-134). The Diocese also told the media/world, "[t]o report known or suspected neglect of abuse of a **minor (under age 18)**…." (App. 134a).

- 10/10/18 **Diocese Interview Statement #2**: Bishop Coerver said they "want to restore trust in the church and **protect children from crime**." (App. 135a; 160a-162).

- 10/10/18 **Press Release**, **sent to local news stations titled**, **"Diocese's Plan to Release Names"**: Lucas Flores, the Director of Communications for the Diocese said that the decision was made in the context of their ongoing work to protect **children**. The endeavor to compile a comprehensive list of clergy is part of an ongoing effort to "provide an even safer environment for **children**." (App. 128a-131).

- **Internet Posting "Preventing the Sexual Abuse of Minors" on Diocese's website**: The Diocese promises to remain vigilant to provide an even safer environment for every **child** we serve and provide "victims of **childhood** sexual abuse by a minister" the opportunity to meet with a bishop. (App. 163a-165).

Defamatory Statement No. 2: The Diocese publicly claimed Guerrero had either admitted to committing sexual abuse, that he had been found guilty in a court of law, or that the Diocese possessed testimony from witnesses who actually observed the sexual abuse. Specifically:

- 1/31/19 **Interview**: In an on-camera interview, Chancellor Martin tells the media that for those named on the List, a **"credible allegation means" (1) either the person admits to doing it, (2) they are found guilty in a court of law, or (3) the abuse is witnessed by somebody and they testify against it**. (App. 113a-118; 120a-127).

C. <u>The Diocese's Omission.</u>

Of equal importance is the undisputed fact that the Diocese did not, in its January 31, 2019 List or in any press releases or media interviews, say that the word "minor" had an alternative meaning under

canon law that also included a class of an adult. (App. 103a-106). The Diocese never qualified its statements, nor explained to the general public, that its accusations were to be read or heard "within the meaning of Catholic canon law." Id. To the contrary, the Diocese told the world that a "minor" was a person "under age 18". (App. 134a). Similarly, the Diocese acknowledged that it was intentionally adhering to **civil laws** and societal norms, rather than canon law. Specifically, in an interview discussing the upcoming release of the List, Bishop Coerver said:

> - **We're giving a whole lot more credence to civil law and to civil society norms and expectations.**
>
> - **In the past, I'm afraid the church might have felt they're above those expectations and now we've discovered that we can't be and we shouldn't be.**

(App. 132a-134).

D. The Diocese Purposefully Published the Statements Outside the Confines of the Church.

The Diocese sought out the media and public attention. News coverage followed, and all of the defamatory statements were made to the media or on an Internet website accessible by the general public worldwide. The following additional statements were

publicly made by the Diocese as part of promoting itself with the public:

- **Pre-publication Interviews promoted the upcoming release of the List.** In October 2018, Bishop Coerver gave an **on-camera television news interview to a local news station** and admitted that the Diocese made a conscious decision to go outside the confines of the church: "**We are doing this [releasing List to the general public] out of a sense of transparency and accountability…."** (App. 132a-134).

- **Outside persons were involved in creating the List.** The Diocese admits that "outside people" were involved in the creation of the subject list. Specifically, Bishop Coerver stated, "[w]e're going to have **outside people** come in and go through our files just to make sure that we've got all the names and all of the circumstances so that when it comes time to **publish** we'll be as thorough as we possibly can be." (App. 160a-161).

- **List confirms that outsiders were brought in to review files.** On the List itself, the Diocese, "in an effort for transparency asked our diocesan

attorney to engage the services of a retired law enforcement professional and a private attorney to review all clergy files for any credible allegations of abuse of minors." (App. 103a-106).

- **Diocese tells Media that outsiders were brought in to show sincerity - 1/31/19 Martin Interview**: "It [the Diocese] claims the only way to ensure Bishops in Texas are truly sincere about rebuilding their sacred trust is to allow for independent properly trained experts in law enforcement to review all the files. (App. 166a-169).

E. The Diocese's Admission.

Initially, the Diocese refused to publish a retraction. (App. 150a). Once Guerrero filed this lawsuit, however, the Diocese published a Revised List wherein it admitted (i) it had no evidence that Guerrero had sexually abused a child, and (ii) it regretted the "misunderstanding" it had caused by the publication of the first List. (App. 136a-138). Eight (8) days later, the Diocese filed its Plea to the Jurisdiction and Motion to Dismiss on April 18, 2019. Those Motions, along with the subsequent appeals, have denied Guerrero the opportunity to conduct any discovery in this case.

REASONS FOR GRANTING THE PETITION

The question presented is of nationwide importance that can only be resolved by this Court. Although there is a division amongst the lower courts regarding the First Amendment protection of defamatory statements made internally within the church, there has never been a question regarding the protection of defamatory statements made externally to the general public – until now. State supreme courts are unanimous that defamatory statements made to the general public, as in Guerrero's case, are not protected by the First Amendment. Texas is the outlier, and churches in the State of Texas can now disseminate false statements to the general public with impunity on any topic, even the secular topic of child sexual abuse. As a result, defamed plaintiffs across the country are subject to completely different First Amendment standards. A citizen of Iowa, for example, who is falsely and publicly accused of being a child molester by a religious leader can seek justice through his state courts and not only recover damages, but also restore his reputation and good name. In Texas, he cannot. The Texas decision embraces the broadest construction of the ecclesiastical abstention doctrine yet. There are no longer any limits in Texas to the false information a church can publish to the general public and no civil consequences, no matter how heinous the falsehood. Churches are free to use the secular media platform of its choice, for example, to falsely attack even child victims if they so choose. A church can **knowingly and falsely** accuse any victim of being a convicted

perjurer, prostitute, drug addict, and even issue a press release falsely stating a teenage victim was actually an adult who voluntarily participated in sexual acts.

This case offers the Court the opportunity to not only address defamation claims brought against a religious organization for its statements made outside its confines of the church and into the general public – a case of first impression for this Court – but also defamation claims based on false accusations of the abhorrent secular crime of sexual abuse of a child. This issue is timely and relevant, particularly given the subject matter involved and today's use of communications via media, internet and social media.

I. The Decision from the Texas Supreme Court Protects a Religious Organization's Defamatory Statements on the Secular Issue of Child Sexual Abuse.

Before the First Amendment's right of free exercise of religion is implicated, the threshold inquiry is whether the conduct sought to be regulated was "rooted in religious belief." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). A court thus must determine whether the dispute "is an ecclesiastical one about 'discipline, faith, internal organization, or ecclesiastical rule, custom or law,' **or** whether it is a case in which [it] should hold religious organizations liable in civil courts for 'purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization.'" Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976). Child sex abuse is anathema to

society in general, even to an atheist. Sexual abuse is a crime under Texas law and in all other states. Tex. Penal Code. Ann. §21.11(a)(West 2019). Courts[2] across the country have held that torts arising from sexual misconduct within the church are not barred by the First Amendment. If sexual misconduct within the church is not a theological issue, then defaming a person of the same secular crimes should likewise not be a theological issue.

A secular topic does not transform into a religious issue simply because it is addressed by a church. For example, a church's internal rule

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[2] Numerous federal and state courts have allowed various sexual misconduct tort claims to proceed forward against religious organizations, including negligence and fiduciary duty claims involving sexual abuse against churches/clergy. See Turner v. Roman Catholic Diocese of Burlington, Vt., 987 A.2d 960 (Vt. 2009)(holding negligence claim does not violate First Amendment because standard of care is measured by secular legal standards, not canon law); Roman Catholic Diocese of Jackson v. Morrison, 905 So.2d 1213 (Miss.2005) (sexual abuse tort claims against church); Fortin v. Roman Catholic Bishop of Portland, 871 A.2d 1208 (Me. 2005)(fiduciary duty claim not barred against priest for child sexual abuse); Malicki v. Doe, 814 So.2d 347 (Fla. 2002) (negligence claims for sexual abuse not barred against church); F.G. v. MacDonnell, 696 A.2d 697 (N.J.1997), (sexually inappropriate conduct during pastoral counseling); Moses v. Diocese of Colorado, 863 P.2d 310 (Colo.1993)(breach of fiduciary claim against church); Erickson v. Christenson, 781 P.2d 383 (Or.App.1989) (claims for breach of fiduciary duty and intentional infliction of emotional distress); Martinelli v. Bridgeport Roman Diocesan Corp., 196 F.3d 409, 431-32 (2nd Cir. 1999) (breach of fiduciary duty claim for sexual abuse by priest); Nutt v. Norwich Roman Catholic Diocese, 921 F.Supp.66 (D.Conn.1995) (negligent supervision against church for sexual misconduct of priest).

requiring its members to wear masks in order to attend in-person services during a pandemic, does not transform the mask mandate into a religious issue. As better said by a Louisiana appellate court, a "church cannot appropriate a matter with secular criminal implications by making it simultaneously a matter of internal church policy and discipline." Hayden v. Schulte, 701 So.2d 1354, 1356 (La.App. 4th Cir. 1997). The Texas Supreme Court, because of the Diocese's unique definition of "minor" and a policy of investigating sexual abuse, makes the secular act of child sexual abuse, and the false accusations thereof, a religious issue. However, it can hardly be said that the conduct sought to be regulated here – the Diocese's dissemination to the general public of false, defamatory statements about a secular crime – is "rooted in religion" particularly given the Diocese's admissions that its statements were made to rebuild its image in society at large:

1. Bishop Coerver says the church "is not" and "should not be" above **societal norms** and **civil laws** (App. 132a);
2. they purposefully **chose the secular media** to reach the general public to restore "trust" in the church and "protect children" (App. 135a); and
3. they hired **outside law enforcement personnel** and a **private attorney** to review their files to appear sincere to the public. (App. 103a-106).

These undisputed facts are telling. If the conduct sought to be regulated was really rooted in religious

belief, then the Diocese would have been seeking to comply with church norms and canon law, had their files reviewed by canonical experts, and used the church bulletin or pulpit to publish the statements. Clearly, the Diocese's defamatory conduct was directed at rebuilding the image in the public eye and addressing a problem that exists in society at large. The Texas Court of Appeals for the Seventh Circuit succinctly articulated this point as follows:

> It is the injection into the discussion of more than simply the misconduct of those related to the church. The church's statements that 1) "our dioceses are serious about ending the cycle of abuse in the Church and **in society at large**, which has been allowed to exist for decades" and 2) "[i]t's time we need to be honest about these kinds of matter **and society hasn't always been open and honest** about those." (Emphasis added). They [the Church] reveal 1) an acknowledgement that the issue necessitating attention (i.e., sexual abuse) is more than a church matter but rather one of society at-large, 2) an intent to induce society at-large to address the issue, and 3) an intent to join society at-large in the effort. So, **admonishing**, **inducing**, and **joining society at-large** is telling. Those indicia provide further basis dispelling any nexus between the Diocese's

> conduct and any theological, dogmatic, or doctrinal reason for engaging in it. The same is true regarding any nexus between the decision to go public and the internal management of the church.

(App. 82a-83)(Emphasis added). Clearly, the conduct sought to be regulated here, i.e. compliance with Texas defamation law, has a secular purpose and concerns a secular subject matter.

II. The Texas Supreme Court's Holding Conflicts with Six (6) Other State Supreme Courts Applying Neutral Principles to Defamation Claims.

A. Supreme Court Jurisprudence.

This Court has long recognized that a church's freedom to act is not absolute, and not every civil court decision jeopardizes values protected by the First Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940)(the freedom to believe is absolute, the freedom to act is not). Churches exist and function within a civic community, and it is acknowledged that they are as amenable as other societal entities to rules governing property rights, torts, and criminal conduct. Watson v. Jones, 80 U.S. 679, 732-733 (1871).

This Court expressly approved use of the neutral principles of law approach to resolve disputes

in which a church is a party. Jones v. Wolf, 443 U.S. 595 (1979). Under this method, secular courts may decide civil disputes between a religious body and its members if those disputes involve purely secular issues and can be resolved without entanglement into matters of faith, discipline, or doctrine. Jones, 443 U.S. at 602. The Free Exercise Clause does not shield religious entities from complying with a "valid and neutral law of general applicability." Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879-880(1990). To do so would place the "professed doctrines" of the church "superior to the law of the land," making the church a "law unto [it]self," something that Smith specifically held the First Amendment was never intended to do. Smith, 494 U.S. at 879-880. If neutral principles of law can be applied to resolve the dispute without infringing upon religious doctrine, then the protections of the First Amendment do not apply. Jones; Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Only "when the underlying dispute turns on "doctrine or polity" should a court refuse to enforce secular rights. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976).

According to the Court's recent pronouncement in Hosanna-Tabor, determining whether the ecclesiastical abstention doctrine applies, or whether neutral principles and secular law can be used, turns on whether adjudication would result in "government interference with an internal church decision that affects the faith and mission of the church itself." Hosanna-Tabor v. Evangelical Lutheran Church School v. EEOC, 565 U.S. 171, 190 (2012). Even in the employment context, the Court left open the

possibility of a church's liability for tortious conduct. Hosanna-Tabor. 565 U.S. at 196. Later, in Our Lady of Guadalupe School v. Morrissey – Berru, 140 S.Ct. 2049, 2060 (2020), this Court emphasized that a church's ability to decide matters of governance, faith, and doctrine "does not mean that religious institutions enjoy a general immunity from secular laws."

B. Application of neutral principles to defamation claims by federal and state Courts.

At least six (6) state supreme courts have concluded that defamation claims are not barred by the ecclesiastical abstention doctrine and do not entangle with church polity or doctrine. For example, the Iowa Supreme Court held that the religious autonomy doctrine did not bar a defamation claim based on a letter the church sent to its members and non-members that the plaintiff had the "spirit of Satan". Kliebenstein v. Iowa Conf. of the United Methodist Church, 663 N.W.2d 404, 407 (Iowa 2003). The court concluded that the phrase had secular and sectarian meaning, and gave weight to the church's dissemination of the letter to more than just church members.

Likewise, the D.C. Court of Appeals, in Lipscombe v. Crudup, 888 A.2d 1171 (D.C. App. 2005), held the First Amendment did not bar a member's defamation claims, applying neutral principles of law. The Lipscombe plaintiff was a church member who sued a pastor for defamatory statements made at a church picnic that the member

had been sued for sexual harassment. The court relied on its prior decision of Heard v. Johnson three years earlier, wherein the D.C. Court of Appeals observed:

> It is also conceivable that torts such as defamation, infliction of emotional distress, and invasion of privacy might be so unusual or egregious as to fall within the Sherbert exception. For example, a **potentially defamatory charge of child molestation might be actionable under the Sherbert exception.**

Heard v. Johnson, 810 A.2d 871, 885 (D.C. App. 2002)[referring to Sherbert v. Verner, 374 U.S. 398, 403 (1963) recognizing the state's ability to restrict religious activity when the activity "pose[s] some substantial threat to public safety, peace or order"].

The Alaska Supreme Court, in Marshall v. Munro, 845 P.2d 424 (Alaska 1993), applied neutral principles and held that the minster's defamation claim was based on secular elements not barred by the First Amendment. One year later, the Alaska Supreme Court again held that a parishioner's defamation claim against a priest involved a secular issue. McAdoo v. Diaz, 884 P.2d 1385 (Alaska 1994). The South Carolina, Virginia, and Pennsylvania Supreme Courts are in accord. See Banks v. St. Matthew Baptist Church, 750 S.E.2d 605 (S.C. 2013); Bowie v. Murphy, 624 S.E.2d 74 (Va. 2006); Connor v. Archdiocese of Philadelphia, 975 A.2d 1084 (Pa. 2009).

See also McRaney v. North American Mission Board of the Southern Baptist Convention, Inc., 966 F.3d 346 (5th Cir. 2020)(dismissal of defamation claim brought by former employee premature where allegations in complaint did not appear ecclesiastical in nature); Drevlow v. Lutheran Church, 991 F.2d 468, 471-72 (8th Cir. 1993)(claim based on false information in pastor's personnel file regarding his spouse did not entangle in religious controversy where his fitness as a minister was not in dispute); Conley v. Roman Catholic Church of San Francisco, 102 Cal. Rptr.2d 679 (Cal. App. 2000)(witch hunt letter published in a newspaper); Hayden, *supra* (publication of child sexual abuse innuendos).

Other jurisdictions have held that the First Amendment did bar defamation claims because the statements were either made during an internal church proceedings or required interpretations of statements referring to religious laws or doctrine. Cha v. Korean Presbyterian Church, 553 S.E.2d 511 (Va. 2001)(comments made during church meeting); El-Farra v. Sayyed, 226 S.W.3d 792 (Ark. 2006)(Imam's conduct contradicted "Islamic law"); Schoenhals v. Mains, 504 N.W.2d 233 (Minn. App. 1993)(dissemination to church members); Klagsbrun v. Va'ad Harabonim, 53 F.Supp.2d 732 (D.N.J. 1999)(publication that plaintiff had not been given a "Jewish divorce"); Kavanagh v. Zwilling, 997 F.Supp.2d 241 (S.D.N.Y. 2014)(publication that plaintiff was guilty of sexual abuse of a minor "under **church law**"); Dermody v. Presbyterian Church, 530 S.W.3d 467 (Ky.Ct.App. 2017)(statement that plaintiff committed ethics violations contrary to church's ethical policy).

1. Internal v. external publication.

A recurring, pivotal factor considered in the state courts' analysis is the intended audience and whether the publication left the confines of the church. Most courts have refused jurisdiction where the defamatory statements were only communicated exclusively within the church. In Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession of Worthington, 877 N.W.2d 528 (Minn. 2016), the Minnesota Supreme Court held the ecclesiastical abstention doctrine applied to statements made by the pastor during church discipline proceedings, which "***were communicated only to other members of church and participants in formal church discipline process***." Pfeil, 877 N.W.2d at 540-41. However, the court observed, "[w]e would of course be troubled by any case…if the statements were disseminated to individuals outside of the religious organization". Id.

See also Hiles v. Episcopal Diocese of Massachusetts, 773 N.E.2d 929, 937 n.12 (Mass.2002)("absolute First Amendment protection for statements made by church member in an internal church disciplinary proceeding would *not* apply to statements made or repeated outside that context); Cha, *supra* (abstention applied because pastor's claim for defamation was based on remarks made to church officials during church meeting); Schoenhals, *supra* (the fact the statements were only disseminated within the church strengthens its First Amendment protection); Klagsbrun, *supra* (publication did not leave confines of the church).

Federal courts have likewise considered the legal effect of defamatory publications made internally versus to third parties. See Yaggie v. Ind-Ky. Synod, Evangical Lutheran Church in Am., 64 F.3d 664 (6th Cir. 1995) (unpublished) (noting that "the alleged defamatory statements were made in connection with the mediation process and strictly within the confines of the church"); Hubbard v. J. Message Grp. Corp., 325 F.Supp.3d 1198, 1219 (D.N.M. 2018) (allegations in complaint suggest the defamatory statements were published exclusively to the church membership).

Even where communication of the defamatory statements were made within the church, at least four (4) state supreme courts have held that religious autonomy did not apply because the claims could be resolved without impermissible inquiry into religious beliefs or doctrine. In 2013, the South Carolina Supreme Court held that the pastor's defamatory statements at a congregational meeting about its Trustees regarding mismanagement of assets were independent of religious doctrine or governance. Banks, 750 S.E.2d at 607-608. In applying the neutral principles methodology, the court concluded that the truth or falsity of the statements "can easily be ascertained by a court without any consideration of religious issues or doctrines." Id. at 607. The fact that the statements were made at a church meeting was of no import to the court and did "not dictate" jurisdiction. Id. at 608.

In 2009, the Pennsylvania Supreme Court held that the First Amendment did not bar a defamation

claim because no religious authority would be relevant to proving whether the statements that the child brought a "weapon" to a parochial school were false. Connor, 975 A.2d at 1107 (2009). In 2006, the Virginia Supreme Court applied neutral principles in holding that the court could adjudicate the plaintiff's defamation claims regarding a purported assault without the "need [to] become involved with the underlying dispute among the congregation" of the church. Bowie, 624 S.E.2d at 80. The Alaska Supreme Court, in 1994, allowed a member and volunteer lay minister's defamation claims to proceed where statements were made in a pastor's letter to members of the pastoral council. McAdoo, 884 P.2d at 1390-91. The McAdoo Court held that a religious question would not be presented in determining whether the statements of "abusiveness and vindictiveness" were true. Id.

However, in cases where the defamatory statements were made **externally** and "outside the confines of the church", the courts, with the exception of Texas, are unanimous that the autonomy doctrine does not bar the application of neutral principles of defamation law. According to the Iowa Supreme Court, the "ecclesiastical shield" is weakened by a publication made outside of the confines of the congregation. Kliebenstein, 663 N.W.2d at 407 (statements made to members and **other persons in the community)**. However, the California appellate court in Conley found paramount that the defendant caused the "witch hunt" letter to be published in a San Francisco newspaper, reasoning that "[t]he commission of a common law tort in the name of or

under the auspices of a church does not lessen its culpability." Conley, 102 Cal. Rptr.2d at 683-684.

In Hayden v. Schulte, a case strikingly similar to the case at bar, the court held that the autonomy doctrine did not apply. The plaintiff/priest claimed damage to his reputation arising out of the defendants' false allegations of child sexual abuse made to a local newspaper. Hayden at 1356. The Hayden court noted that the accusations had been "**intentionally disseminated outside the church to news organizations**." Id. In its analysis, the court recognized sexual abuse as secular topic and considered where the statements were made as a relevant factor:

> "[i]t is one thing to say that churches must be free of governmental interference to conduct matters of internal discipline and organization, even when those matters touch upon the reputations of those affected…it is quite another to say that churches have the unfettered right to make ***unsubstantiated statements of an essentially secular nature to the media destructive of a priest's character***…"

Id. at 1356-1357. See also Ausley v. Shaw, 193 S.W.3d 892, 896 (Tenn.Ct.App. 2005)(defamatory statements were made after pastor was terminated and outside the confines of the church members, to law enforcement and the surrounding community); Tubra v. Cooke, 225 P.3d 862, 872 (Or.App. 2010)("we fail to

understand how a defamatory statement accusing a pastor of theft is any more (or less) a matter of church 'discipline, faith, internal organization, or ecclesiastical rule, custom or law', [citation omitted] than is a defamatory statement accusing a pastor of child molestation"); Stepek v. Doe, 910 N.E.2d 655 (Ill.App. – 2009)(noting the distinction in Hayden where the defamatory statements were disseminated outside the church).

Justice Jeffrey S. Boyd of the Texas Supreme Court, in his dissenting opinion, recognized the altering, legal significance of publication to the media and general public:

> Exercising jurisdiction over Guerrero's claim would not second-guess or threaten the church's (or any other religious organization's) decision to investigate its clergy, finding of misconduct by a clergy member, or imposition of internal disciplinary measures against a member within the church's religious activities. What it would threaten is a religious organization's ability to make false and defamatory statements about its clergy or members to the general public, outside of the organization's internal operations….By extending its internal disciplinary procedures and beliefs into the public arena, the Diocese subjected itself to the public laws that govern that realm.

(App. 51a-52). The Seventh Circuit for the Texas Court of Appeals, in a unanimous decision, similarly held:

> A religious body exposing matters historically deemed ecclesiastical **to the public eye has consequences. The action leaves the area of deference generally afforded those bodies and enters into the civil realm**. That is not to say that publication alone is always enough, but it is a pivotal nuance. Indeed, arguing that a dispute remains an internal ecclesiastical or church polity issue after that body chooses to expose it publicly rings hollow. And, that is the situation here.

(App. 79a). Numerous appellate courts in Texas have likewise recognized the distinction between the protections afforded when the defamatory statements are made solely within the church versus to the general public. Patton v. Jones, 212 S.W.3d 541, 554 (Tex. App.-Austin 2006)(publication was confined within the church); Torralva v. Peloquin, 399 S.W.3d 690 (Tex.App.-Corpus Christi 2013); In re: Alief Vietnamese All. Church, 576 S.W.3d 421, 435 (Tex.App.-Houston 2019); Jennison v. Prasifka, 391 S.W.3d 660, 667-68 (Tex.App.—Dallas 2013) (defamatory statements were made within the church's disciplinary process); Kelly v. St. Luke Comm. United Methodist Church, 2018 WL 654907 (Tex.App. – Dallas 2018)(unpublished)(First Amendment did not protect publications of statements made outside the church); Turner v.

Church of Jesus Christ of Latter-Day Saints, 18 S.W.3d 877, 896 (Tex.App.-Dallas 2000) (minister's employment-related claims were deemed "ecclesiastical matters" protected from review, **except for his defamation claim of statements made to third parties by the church).**

Despite this overwhelming jurisprudence to the contrary, the Texas Supreme Court gave minimal to no consideration to the "outside the confines" factor. Instead, the court considered the "real pivotal nuance" as the reason his name was on the List, in an attempt to make Guerrero's claims "inextricably intertwined" for adherence to its policy to investigate. However, the reason for its policy to investigate or publish is irrelevant in the defamation analysis. The inquiry is not **why** the Diocese published the defamatory statements but **whether** the Diocese published them. Connor, 975 A.2d at1105.Clearly, the legal effect of broadcasting defamatory statements beyond the pulpit and for public disclosure has widely been recognized and accepted by courts across the country as a distinguishing factor. Under the circumstances of Guerrero's case, it is even more relevant particularly given the multitude of overt acts of the Diocese to seek out the media's attention and engage the public-at-large, in its 2 press releases (App. 107a-110; 128a-131) and at least 5 media interviews. (App. 111a-119; 120a-127; 132a-134; 135, 160a-162; 166-169).

2. Unusual and egregious circumstances

Another factor typically given consideration by the lower courts is whether unusual or egregious circumstances exist. False allegations of child molestation has been expressly recognized as one of those examples. See, e.g., Heard v. Johnson, *supra* (using child molestation as an example of such circumstances); Hayden, at 1356 ("[w]here child molestation is at issue, it cannot be considered just an internal matter of church discipline or administration."); Pfeil, 877 N.W.2d at 544 (using a false vicious accusation that the minister regularly sexually assaulted kids in class in retaliation response)(dissenting opinion); In re: Godwin, 293 S.W.3d 742 (Tex.App.- San Antonio 2009)(even pulpit statements about sexual abuse would likely not have protection of First Amendment).

Given the abhorrent nature of the accusation of child sexual abuse, Guerrero submits that the defamatory statements used by the Diocese are so vicious and even more egregious than an intentional physical assault upon his person. Indeed, wounds to his body would likely heal, but the harm to his good name can never recover from such wounds of this magnitude.

III. **Application of Neutral Principles to Guerrero's Defamation Claim do not Entangle with Church Polity, Doctrine, Governance, or Discipline.**

The relevant inquiry in the First Amendment analysis is whether the elements of common law defamation[3] can be applied without adjudicating theological controversies, church discipline, church government, or conformity of members to the standard of morals required of them. In Texas, whether a publication is false and defamatory hinges on a reasonable person's perception of the entirety of a publication and not merely on individual statements. In re: Lipsky, 460 S.W.3d 579, 593 (Tex. 2015); Scripps NP Operating v. Carter, 573 S.W.3d 781 (Tex. 2019). The context in which the defamatory statements are made matter. Scripps, 573 S.W.3d at 790; D Magazine Partner, LP v. Rosenthal, 529 S.W.3d 429, 439 (Tex. 2017). Courts must examine the entire communication or series of communications published as a whole to determine the "gist" and how the average person perceives the statements and the context in which they are spoken, including all instances of publication. Id. It is the words actually spoken, not what the speaker might have intended to say, that is relevant to the analysis. Connor, at 1105. The Diocese's publications, interviews, Internet release, and press releases lead a reasonable person to believe that Guerrero was a pedophile. The series

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[3] The elements of defamation in Texas are: (1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases. In re: Lipsky, 460 S.W.3d at 593.

of communications released in advance of and contemporaneously with the List, repeatedly reference "children" and accuse Guerrero of sexually abusing children. (App. 107a-110; 111a-119; 120a-127; 128a-131; 132a-134; 135; 160a-162; 166a-169).

A. Guerrero's claims do not require a theological interpretation of the meaning of the purported "Church Term" – Minor.

In arriving at its decision, the Texas Supreme Court improperly relied upon what the Diocese claims it intended to say, rather than what was actually said. The court opined that, "a court would have to evaluate whether the Diocese had credible allegations against Guerrero under the canonical meaning of a 'minor'" that would "necessarily entail a secular investigation into the Diocese's understanding of the term 'minor'…." (App. 16a). This reasoning is flawed because the "Diocese's understanding of the term minor" is not at issue. Instead, the issue is whether a reasonable person of the general public, not the Diocese, would believe Guerrero to be a pedophile by the use of the Diocese's repeated references to children along with "minor" in its accusations against Guerrero. Incredibly, the Diocese initially told the world that a minor was "a person under eighteen (18) years of age" in an interview to promote the upcoming release of the List. (App. 132a-134). It was not until after Guerrero had been labeled a pedophile and **after** Guerrero filed suit, did the Diocese tell the public that minor meant something different under canon law. (App. 136a-138).

The Texas Supreme Court's decision also overlooks the claims as raised in Guerrero's Petition.[4] (App. 145a-155). The Diocese did not only accuse Guerrero of sexual abuse of a minor; rather, given the context of the publications in intermixing the terms "minor" and "children" to the public, Guerrero was falsely accused of sexual abuse of children. Id. By using the word "minor" at the same time its leaders were telling the media/public that **(1)** the church was safe for **children,** and **(2)** its press releases the List released to protect **children** from sexual abuse, the Diocese was accusing Guerrero of being a child molester. The Diocese does not, and cannot, contend that "child" or "children" have alternate meanings under canon law. Indeed, canon law is not in play. "What is in play is how a person of ordinary intelligence would perceive the accusation that Guerrero sexually abused a "minor" when the church accompanied the word reference to abuse involving "children" and the "safety of children." (App. 84a).

Further, the truth or falsity of whether Guerrero sexually abused children is "subject to objective verification" (App. 96a) and does not turn upon the interpretation and application of religious doctrine. Such objective verification requires no study of canon law or doctrine and neither advance nor inhibit religion. Moreover, after Guerrero filed suit, the **Diocese admitted that it had no evidence**

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[4] At this juncture, particularly where no discovery has been conducted, the inquiry is limited to the complaint and whether the allegations raised on the face of the complaint involves a civil rather than a religious dispute. McRaney, 966 F.3d at 350-351.

that he had sexually abused a child ("minor under the age of eighteen (18)"). (App. 136a-138).

Still, the Texas Supreme Court concluded that "minor" is a "church term" because of its unique definition under canon law. Guerrero is not asking a judge or jury to determine whether the Diocese's unique definition of "minor" is right or wrong. And, it is not relevant whether the church is correct to believe that a vulnerable adult should be included within the definition of the word "minor." Rather, Guerrero's concern is that the public is going to believe what was actually said – that Guerrero sexually abused a child because the Diocese told the public that "minor" meant "child" by its accompanying statements and rhetoric. The judge or jury need not interpret any church doctrine in order to determine how the reasonable person would perceive these words. To the lay audience, the words "sexual abuse", "children", and "minor" have secular meaning and no religious connotation. A "church cannot appropriate a matter with secular criminal implications by making it simultaneously a matter of internal church policy and discipline." Hayden at 1356. Here, the Texas Supreme Court did just that and made the secular act of child sexual abuse, or false accusations thereof, a religious issue.

Moreover, the Diocee never really attempted to publicly define minor. In its post-litigation publication of the Revised List, the Diocese publicly uses the phrase "minor or vulnerable adult" to identify two separate classes of victims of sexual abuse that it views as equals in the context of the List. (App. 136a-138). Importantly, the Revised List also

states "a person who habitually lacks the use of reason is considered **equivalent** to a minor." Id. It does not say that a vulnerable adult **is** defined as a minor, or conversely, a minor is defined as a vulnerable person. Id. The point being, even in the Revised List, the Diocese still does not define "minor" and instead leaves it to the reader, i.e. the general public, to define for themselves what the term "minor" means. As pointed out by the three judges on the appellate panel, to the lay audience, the word "minor" has secular meaning:

> …our common parlance tends to assign a definition to "minor" based upon age, much like the common understanding of the words "child" and "children". In reference to human beings, "minors" are commonly understood to be under-age people or those below the age of majority or legal responsibility….[citations omitted]. That common perception of the term generally does not include adults older than 17 or 21 depending upon the law involved. As for the words, "child" or "children," they not only have a meaning similar to "minor" in our everyday parlance but often are interpreted as describing those of very young age, such as infants, toddlers, and pre-teens."

(App. 93a-94). Quite simply, the term "minor" does not turn on religious interpretation and has no theological connotation, unlike actual church terms

such as "sin," "biblical impropriety," "adultery," "bigamy according to Jewish faith," or "conduct contrary to Islamic law". See, e.g. Klagsbrun v. Va'ad Harabonim, 53 F.Supp.2d 732, 735 (D.N.J. 1999); El-Farra v. Sayyed, 226 S.W.3d 796 (Ark. 2006). The Texas Supreme Court overstepped in categorizing "minor" as a church term.

B. Guerrero's claims do not impede on the church's ability to investigate its clergy, internal governance, or discipline.

Assuming arguendo that the topic of sexual abuse is a theological issue or the use of the common word "minor" is a "church term" as held by Texas Supreme Court, that should only be the beginning of the inquiry. Theological beliefs only become relevant to the First Amendment analysis if the Diocese demonstrates that its ability to practice specific beliefs will be interfered with in some real and substantial way. See Lukumi, *supra* (places substantial burden on the observation of a central religious or practice.) In Cantwell, this Court, after recognizing the freedom to believe is absolute, stated:

> Conduct remains subject to regulation for the protection of society.
>
> ***
>
> Nothing we have said is intended even remotely to imply that under the cloak of religion, persons may, with impunity, commit frauds upon the

> public.... Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury.

Cantwell, 310 U.S. at 304, 306.

This Court's First Amendment jurisprudence provides several examples of the types of interference that is "real and substantial." For example, a law prohibiting the use of animal sacrifice by the Santeria religion. Lukumi, 508 U.S. at 523-24. The prohibition of the use of the drug peyote in religious ritual of Native American Church. Smith, 494 U.S. at 874. A civil court's interpretation of specific religious doctrine to resolve a church's internal dispute as to the rightful owner of real property. Jones, 443 U.S. at 602. A court's allocation of hierarchical authority by interpreting the church's governing documents. Milivojevich, 426 U.S. 696. A state truancy law conflicting with Amish religious belief about education beyond the eight grade. Yoder, 406 U.S. at 210. The imposition of monetary penalties on a closely held corporation for its failure to provide the type of health insurance that pays for contraception that violates the shareholders religious beliefs. Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682 (2014). The Free Exercise Clause is violated only when laws actually conflict with a religion's specific doctrine and therefore imposes a penalty either for engaging in religiously motivated conduct or for refusing to engage in religiously prohibited conduct. *Michael W. McConnell, The Origins and Historical*

Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1412 (1990).

No such similar infringement or even inconvenience, exists in the case at bar. The Diocese has never argued that the common law tort of defamation is something other than a neutral law of general applicability. Neither has the Diocese ever identified any religious doctrine that requires it to falsely accuse its members of molesting children. Nor does the Diocese point to any doctrine or dogma that prohibited it from disclosing in its publication that Guerrero had not been accused of molesting a child or, similarly disclosing that its definition of the word "minor" was broader and unique as compared to the common meaning of the word to the general public. Indeed, the Diocese was quite able to accomplish both without infringement after Guerrero filed suit. (App. 136a-138).

1. No Internal Process or Discipline.

The decision to investigate, the actual investigation, and the results thereof are not in issue or dispute in this case. What is in issue is the Diocese's act of publishing a falsity in connection with its public relations campaign to rebuild its image after decades of sexual abuse scandals and coverups. According to the Diocese, the express purpose of publishing the List was to restore "trust" in the church and "protect children from sexual abuse." (App. 107a-110). It was not to evaluate internal decisions on choosing its leaders or removing clergy.

Clearly, the investigation and results of investigating clergy years before is separate and apart from the church's distinct act of initiating an advertising campaign ten (10) years later to restore "trust" in the Catholic Church. Guerrero is not challenging the determination the Diocese made from that investigation. Independent conduct by the Diocese forms the basis of the 2019 defamation claim versus the acts taken to remove him as a deacon in 2008. The conduct giving rise to defamation did not occur until 2019, and the acts of the Diocese making the defamatory statements to the general public did not arise from any alleged, internal process. Without question, churches have the unfettered right under the First Amendment to select and remove those who carry out its faith and mission. Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church N. Am., 344 U.S. 94, 119; Hosanna-Tabor at 194-196; Our Lady Guadalupe School v. Morrisey-Berru, *supra*. However, the First Amendment has never given the church the same unfettered right to commit secular acts/crimes with immunity nor publish false, unsubstantiated statements to the general public about a secular act destructive of a person's character. Hayden, at 1356-57.

Further, Guerrero was removed as a voluntary deacon over ten (10) years prior, and Guerrero's Petition asserts no claims pertaining to his removal. [5] Moreover, most of the other accused on the List are

[5] This point is conceded by the Diocese. "Guerrero was not an employee, and Guerrero brings no claims that the church wrongfully removed him from his position as a deacon of the church." (App. 156a-159; 145a-155).

deceased, and the Diocese has never claimed it was intending to discipline him or the departed. Guerrero has played no part in leading, preaching, or teaching the faith on behalf of the Diocese as a deacon since 2008. He has performed no duties on behalf of Diocese, not even *de minimus*. **The record is devoid of any evidence**, (including the Charter or Bishop Coerver's Affidavit), that suggests the 2019 Statements were published to punish Guerrero. There is no evidence that the statements were made as part of an evaluation of Guerrero's fitness for ministry or to initiate disciplinary proceedings against him.

Nor does the resolution of Guerrero's claims hinder or interfere with the church's decisions and processes of investigating its clergy or members. Again, the investigation is not in dispute, and Guerrero is not asking the Court to overturn the decision to remove him as a deacon, i.e. not internal governance or church discipline. Guerrero is not asking the Court to resolve a doctrinal dispute or interpret church terms. Instead, it is the church's subsequent acts of publishing the false statements to the world and how the ordinary person perceives those statements when the words "minor", "child", children" are used interchangeably not once, but multiple times, that form the basis of his claims.

IV. The Texas Supreme Court Created a New Type of Immunity for Religious Organizations.

The court created blanket immunity under the religious autonomy doctrine for a church's defamatory statements. Such immunity is neither authorized by the United States or Texas Constitutions nor supported by the Court's jurisprudence. While both Constitutions afford broad protections under the free exercise of religion, neither necessarily bar all claims which may touch on religious conduct. The Free Exercise Clause "**never has immunized clergy or churches from all causes of action alleging tortious conduct"**. Tilton v. Marshall, 925 S.W.2d 672, 677 (Tex. 1996) (quoting Cantwell at 303-304). Churches are not "above the law" and "may be held liable for their torts." Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 657 (10th Circ. 2002)(quoting Rayburn v. Gen'l Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985). "There are indeed limits to what can be said by church officials from the pulpit." In re: Godwin, 293 S.W.3d at 742. If the church can disseminate false, defamatory statements to the general public with impunity, it in effect transforms the shield of autonomy into a sword of immunity. The consequence of this holding will insulate religious organizations in Texas from liability not only for defamation claims, but also for claims brought by victims of sexual abuse for other tortious acts of the church such as negligent hiring/supervision, false imprisonment, and battery. Further, granting such blanket immunity for defamatory statements involving a secular crime, would, in avoiding the free exercise problems, create

far more serious problems under the Establishment Clause. And, as Justice Scalia cautioned, makes the church's statements "superior to the law of the land" and the statements "law unto itself." Smith, 494 U.S. at 879-880. Moreover, false statements made to the general public in connection with efforts to sway public opinion and rebuild its image are quite different than internal decisions as to who will lead the flock, teach the faith and carry out the mission, and not deserving of the Hosanna-Tabor immunity.

This Court has recognized that claims for redress arising from defamatory statements is a valued and important societal interest. In Milkovich v. Lorain Journal Co. 497 U.S. 1 (1990), this Court emphasized, "[t]he numerous decisions… [of the Court] establishing First Amendment protections for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues." Milkovich, 497 U.S. at 22. "But there is also another side to the equation; we have regularly acknowledged the 'important social values which underlie the law of defamation,' and recognized that '[society] has a pervasive and strong interest in preventing and redressing attacks upon reputation."" Id. (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). Quoting Justice Stewart, Milkovich confirmed this Court's historic determination and commitment to striking a proper balance between protecting First Amendment rights and providing meaningful redress for defamatory attacks upon reputation:

> The right of a man to the protection of his own reputation from unjustified

> invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.
> .....
> The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Id. at 22-23 (quoting Rosenblatt, 383 U.S. at 92-93).

Courts cannot avoid adjudicating rights arising out of civil law. The First Amendment requires a civil court to enter a church dispute if resolution rests on neutral principles of law. Whether the Diocese's statements constitute a defamation of Guerrero can be decided in a civil court of law without violation of the First Amendment. Adjudicating his claim based on false accusations regarding child sexual abuse purposefully disclosed to the public does not affect the faith, mission, or governance of the church. Without correction by this Court, the Texas Supreme Court's decision promises to leave religious organizations with blanket defamation immunity in Texas.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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