Nos. 20-0005 & 20-0127

IN THE SUPREME COURT OF TEXAS

DIOCESE OF LUBBOCK,
***Petitioner*,**

v.

JESUS GUERRERO,
***Respondent*.**

On Appeal from the Seventh District Court of Appeals of Texas at Amarillo, Nos. 07-19-00307-CV & 07-19-00280-CV

IN RE DIOCESE OF LUBBOCK,
***Relator*.**

On Petition for Writ of Mandamus from the 237th Judicial District Court, Lubbock County Courthouse, the Honorable Les Hatch, Cause No. 2019-534, 677, and the Seventh District Court of Appeals at Amarillo, No. 07-19-00307-CV

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INTRODUCTION

As the Diocese explained in its opening brief, each of the two religious autonomy prohibitions in *Westbrook*—one a prohibition on "resolv[ing] a religious question" and the other on "imped[ing] the church's authority to manage its own affairs"—separately requires dismissing this case for lack of jurisdiction. Br.27-45; *Westbrook v. Penley*, 231 S.W.3d 389, 394, 397-98 (Tex. 2007). Indeed, the United States Supreme Court very recently reconfirmed *Westbrook*'s wisdom by emphasizing that the "First Amendment outlaws" any intrusion on "the general principle of church autonomy," that is, "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060-61 (2020).

That is enough to resolve this appeal. Failing to reverse the Court of Appeals and dismiss this case would unleash substantial church-state entanglement and endanger the independence of religious organizations. Br.55-64. *Westbrook* would be a dead letter, and religious autonomy would turn on how civil courts define a church's "confines." *Id.* at 29, 56. That would hardly reflect the "special solicitude" the First Amendment has for the "rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

In response to all this, Guerrero offers a grab bag of arguments, ranging from the merely misguided to the deeply troubling. Guerrero's lead

argument is that there is nothing "ecclesiastical" about a *church* authority imposing *church* discipline on a member of the *church's* clergy for not meeting the *church's* moral standards and telling the *church's* members about the discipline after the fact. It is hard to see what *isn't* ecclesiastical about that. Indeed, the United States Supreme Court held almost 150 years ago that matters "concern[ing] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" are "strictly and purely ecclesiastical." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872). Guerrero's attempt to make the "purely ecclesiastical" not ecclesiastical at all smacks of desperation, or at least chutzpah.

Guerrero fares no better with his argument that defamation law trumps constitutional protections for religious autonomy. Guerrero would import defamation law's "intended audience" criterion into the religious autonomy analysis. But the Supremacy Clause does not allow the scope of defamation law to limit the religious autonomy principle, any more than federal employment discrimination laws can limit the scope of the ministerial exception. *Our Lady*, 140 S. Ct. at 2060-62. The trumping works the other way around.

Similarly, Guerrero waves away *Westbrook*'s rule against "imped[ing] the church's authority to manage its own affairs," saying that "[s]ome amount of chilling or limited impediment is acceptable." *Westbrook*, 231

S.W.3d at 397; Resp.28. Aside from requiring that *Westbrook* be effectively overruled, such an approach simply does not comport with the Constitution and would also be deeply unwise. In this area there is no interest-balancing—the First Amendment has already "struck the balance" in favor of religious autonomy. *Hosanna-Tabor*, 565 U.S. at 196.

Lastly, Guerrero's argument regarding the "confines of the church" (as he defines them) confirms that the Court of Appeals' "confines" rule is unprecedented and would result in ongoing church-state entanglement. Under his rule, churches would have to vacate all but a few hidden gardens of cyberspace.

In short, Guerrero's brave new world of defamation claims brought against announcements of clergy status would upend church-state relations altogether: Civil courts would be free to ignore *Westbrook*, resolve religious questions, and impede church governance whenever they decide that a religious communication became "too" public. Both the Texas and federal constitutions, however, do not hang religious autonomy on such a contingent thread. Because the Diocese's communications about Guerrero with its members went to the core of the Diocese's faith and mission, it fell outside civil court jurisdiction. Accordingly, this case should be dismissed.

ARGUMENT

I. Under *Westbrook* and *Our Lady*, religious autonomy prohibits second-guessing the Diocese's application of Catholic canon law and church discipline to Guerrero.

A. Adjudicating Guerrero's claims would require resolving an inherently religious question.

As the Diocese has explained, resolving Guerrero's claims would run headlong into *Westbrook*'s prohibition on adjudicating any "claim" that "require[s] the court to resolve a religious question." 231 S.W.3d at 396-97; *see also* Br.32-41. This includes defamation claims that "would . . . require[] the court to delve into" whether a given "religious question" is "true or false." *Westbrook*, 231 S.W.3d at 396.

Here, Guerrero's claims cannot be resolved without a civil court determining that the Diocese "falsely state[d] that Jesus Guerrero was and had been 'credibly accused' of sexual misconduct of a minor." CR:9 ¶ 24 (libel claim); CR:10 ¶ 31 (slander claim). Assessing whether the Diocese was wrong to say that Guerrero was credibly accused necessarily requires an evaluation of what it means to be credibly accused. And that evaluation rests in part on the Catholic canon law understanding of "minor"—which the Catholic Church's decades-long governance reforms on sexual abuse do *not* treat as coterminous with "child." Br.8-12, 33-34. Rather, as the U.S. Conference of Catholic Bishops' *Charter on the Protection of Young People* (the "*Charter*"), Catholic canon law, and exhortations from the Vatican confirm, clergy sexual abuse of a "minor" is a "delict against

the sixth commandment of the decalogue" with "a person who habitually has the imperfect use of reason." *Sacramentorum Sanctitatis Tutela*, *Part One: Substantive Norms*, Art. 6 § 1 https://perma.cc/KSN3-XZ43; A:52 (*Charter* explaining that *Sacramentorum Sanctitatis Tutela* will be used to define "the offense of sexual abuse of a minor" "[f]or purposes of this *Charter*."); 1983 Code of Canon Law cc.99 (similarly defining "minor").[1] *See also* Br.8-12.

As the Diocese and Bishop Coerver explained, these church legal materials and understandings are the basis for the Diocese's statements about Guerrero, who under canon law remains a member of the Catholic clergy. *See* CR:55-57 ¶¶ 8-11, 13, 15 (Bishop Coerver affidavit); Br.8-12, 16-20.[2] In particular, the *Charter* itself admonishes dioceses "to be open and transparent in communicating with the public about sexual abuse of minors by clergy." A:47 (Article 7 of *Charter*). The Diocese's decision to do

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[1] Guerrero complains about the Diocese's citation of church legal materials. Resp.61. But the *Charter*, canon law, and *Sacramentorum Sanctitatis Tutela* "are clearly the kind" of "church documents" for "which judicial notice by an appellate court is appropriate." *Bethel Conservative Mennonite Church v. Comm'r of Internal Revenue*, 746 F.2d 388, 392 (7th Cir. 1984); *see also* Br.6 n.3. These materials were discussed in Bishop Coerver's affidavit (CR:55-56 ¶¶ 8-10) and have always been part of this case.

[2] Guerrero has not been laicized, nor has he ever sought laicization. Thus, although he has had his faculties removed and is not allowed to exercise ministry, under canon law he is still a member of the clergy and subject to the canon law that applies to clergy. *See* Br.19-20.

so was one made in conjunction with all Texas Catholic bishops, and on the heels of both new sexual abuse revelations in the Catholic Church and a church report discussing "general complacency" in implementing the *Charter*. *See* Br.16 & n.10 (citing church report).

Accordingly, assessing the credibility of the accusation against Guerrero—as his defamation claims require—impermissibly turns on how the Diocese interpreted and applied these church policies, and their understanding of "minor," to Guerrero.[3] *Westbrook* bars that inquiry. *See id.* at 33-34. So does the one case from another jurisdiction where arguments substantially like Guerrero's were made (and rejected). *See Dermody v. Presbyterian Church*, 530 S.W.3d 467, 473-75 (Ky. Ct. App. 2017); *see also* Br.34, 36-37, 58.

In response, Guerrero makes several arguments:

Religion's relevance to sexual abuse. First, Guerrero makes the absurd claim that the Diocese's religious beliefs, including its "internal Charter on sexual abuse," are completely irrelevant because in Guerrero's view "[t]here is no religious question, theological issue, or doctrine involved in this case. Sexual abuse is not a theological issue, and neither

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[3] In his Original Petition, Guerrero does not challenge the Diocese's statements that he engaged in sexual misconduct with an adult female. He only disputes that he has never been accused of, or found liable for, child abuse. *See* CR:69 ¶¶ 17-18. His affidavit generally denies that anything "inappropriate" happened (CR:238 ¶ 9), but only specifically denies physical sexual activity (CR:239 ¶ 13).

is protecting persons, whether it be an adult or child, from sexual abuse." Resp.32, 27; *see also id.* at 17, 33 (similar). Students of religion, or even just readers of the Bible, would disagree that religion in general or Catholicism in particular has nothing to say about sexual abuse or "the conformity of the members of the church to the standard of morals required of them" with respect to sexual abuse. *Watson*, 80 U.S. at 733; *see also* 1 *Thessalonians* 4:3-8.

Guerrero's position also gets the law wrong. As the Diocese previously explained, Br.40, Guerrero's position construes the law "too broadly." *In re Alief Vietnamese All. Church*, 576 S.W.3d 421, 436 (Tex. App.—Houston [1st Dist.] 2019, orig. proceeding). Texas law does not contain Guerrero's "blanket statement" that communications about sexual abuse fall completely outside the realm of religious discourse. *Id.*

Moreover, *none* of the cases Guerrero cites in support of this proposition are like his—they involve tort claims brought by *victims* of clergy sexual misconduct, not offending clergy. Resp.17-18. But as courts have recognized, defamation claims that necessarily require evaluating religious questions or impeding internal church governance are distinct from tort claims to redress misconduct.[4]

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[4] For example, in *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409, 431 (2d Cir.1999), which Guerrero cites (Resp.17), "[t]he Diocese point[ed] to no disputed religious issue." By contrast, *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 254 (S.D.N.Y. 2014), *aff'd*, 578 F. App'x 24 (2d Cir. 2014) distinguished *Martinelli*, because a defamation

The only defamation case Guerrero cites is a decades-old Louisiana appeal, *Hayden v. Schulte*. Resp.12, 17, 32, 43-44. There, the court allowed a priest's lawsuit against his archdiocese to proceed because the allegedly defamatory statements were "essentially secular," as shown by the fact that there was "no evidence of the Canon Law in the record." 701 So.2d 1354, 1357-59 (La. Ct. App. 1997). Even assuming *Hayden* were persuasive, here there is not only "evidence of the Canon Law in the record"—canon law was exactly what the Diocese was applying. Indeed, the lower court acknowledged that "a religious term imbedded in canon law" is central to this case. A:16. The record confirms as much. *See* CR:154 (Diocese explaining reliance on canon law to Guerrero); CR:145-146 (canon law cited in revised list); CR:55-56 (Bishop Coerver explaining reliance on canon law, consistent with the *Charter*, that explicitly relies on canon law definition of "minor"); *see also* A:51 (*Charter*'s canon law reliance); Br.8-12, 16-20. Thus, even on its own terms, *Hayden* is no bar to granting mandamus and dismissing this case.

Conflicts between religious autonomy law and defamation law. Guerrero's next argument is that whether the Diocese receives religious autonomy should be contingent on whether the Diocese's statements are true under defamation law. *See, e.g.*, Resp.29, 31, 47. In his view, the

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claim brought by a priest involving a church press release raised religious questions that a court could not answer. *See also* Br.40-41 (explaining why *Kavanagh* is on all fours with this case).

Diocese is free to "follow [its] directives, even if [its] directive includes" public communication—but "its statements simply must be accurate." *Id.* at 31. From this assertion, Guerrero argues that whether a defamation claim is barred by religious autonomy should not be determined by *Westbrook*, but by importing defamation law's analysis of "context." *See id.* at 27 ("Because resolution of this matter is governed by the tort law of defamation, i.e., what a reasonable person believes, it does not require inquiry into the religious doctrine and practices of the Catholic Church in defining the words the Petitioner published[.]").[5]

This argument fails for several reasons. First, it ignores the basic idea of constitutional law: constitutional supremacy. "At its core, the First Amendment recognizes two spheres of sovereignty when deciding matters of government and religion." *Westbrook*, 231 S.W.3d at 395. The Supremacy Clause prohibits state tort law from either displacing or defining that constitutional recognition.

Second, as *Westbrook* explains, religious autonomy is a jurisdictional issue in Texas. *See* 231 S.W.3d at 394-95. This is for good reason. "It is not only the conclusions" a civil court may reach that may "impinge rights

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[5] Guerrero's improper emphasis on "context" is also improperly supported. Guerrero repeatedly cites evidence that the trial court explicitly excluded as unauthenticated and hearsay. *Compare* Resp.4, 8, & 15 (relying on CR:137) *with* Br.22 n.14 (discussing article at CR:136-38, which the trial court excluded from evidence (CR:236)). The Court should at the very least disregard these references, but it should also consider striking them. In any case, they do not change the jurisdictional analysis.

guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). Guerrero would condition the jurisdictional bar of religious autonomy on whether a civil court found that a church's statement was true or false under defamation law. This cannot be squared with *Westbrook*.

Third, the analysis of "context" for purposes of determining religious autonomy is not based on "the average reader" perspective, as it is in defamation. *See Dermody*, 530 S.W.3d at 473. As the Diocese explained, *Westbrook*, other Texas cases, the United States Supreme Court, and courts nationwide instead analyze religious autonomy by determining whether resolving the claim would "interfere[] in that sphere" of either "faith and doctrine" or "matters of church government." *Our Lady*, 140 S. Ct. at 2060; *see also Westbrook*, 231 S.W.3d at 400 ("breach of a secular duty by disclosing Penley's confidential information" "cannot be isolated from the church-disciplinary process in which it occurred"); Br.34-38 (discussing the application of this principle in Texas cases and others nationwide). Even a civil court's mere "influence" on "such matters would constitute one of the central attributes of an establishment of religion." *Our Lady*, 140 S. Ct. at 2060.

In addition, the First Amendment prohibits exposing religious organizations to the "significant burden" of having "to predict which of its activities a secular court will consider religious." *Corp. of Presiding Bishop*

of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987); *cf. Our Lady*, 140 S. Ct. at 2066 ("In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation . . . is important."). As the Diocese explained in its opening brief, Guerrero's (and the Court of Appeals') importation of the "context" analysis from defamation law into the *Westbrook* religious autonomy analysis would lead to a host of ill effects. Not least of those would be forcing civil judges to first imagine the "context" of a religious organization's activity and then decide what counts as "religious." This is exactly the kind of second-guessing the First Amendment forbids. *See Our Lady*, 140 S. Ct. at 2060-62, 2066; Br.34-38. It must be rejected here.

Neutral principles. Guerrero also argues that the neutral principles doctrine applies to his defamation claims, and *Westbrook*'s "narrow[] draw[ing]" of the doctrine to church-property disputes is "false." Resp.19 (citing, *inter alia*, *Westbrook*, 231 S.W.3d at 398). Guerrero is simply wrong.

Westbrook's observation that the neutral principles doctrine is "narrowly drawn" to the church property context is unremarkable—not least

because so many other courts have made it.[6] Indeed, it was not until 2013 that this Court formally adopted the "neutral principles" approach "to determine property interests when religious organizations are involved." *Masterson v. Diocese of Nw. Texas*, 422 S.W.3d 594, 607 (Tex. 2013). And just a few months ago, this Court reiterated that Texas courts are only required to apply the "neutral principles" doctrine to "issues such as land titles, trusts, and corporate formation, governance, and dissolution." *Episcopal Diocese of Fort Worth v. Episcopal Church*, 602 S.W.3d 417, 424 (Tex. 2020) (internal quotation marks omitted). Neither *Masterson* nor *Episcopal Diocese* questioned *Westbrook*'s observation that the doctrine has been "narrowly drawn" to the church-property context.

As the Diocese explained, the neutral principles doctrine should remain limited to the church-property context. Br.39. Leading church-state scholar Professor Michael McConnell put the point succinctly:

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[6] *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595, 599 (1979) ("there are neutral principles of law, developed for use in all property disputes") (internal quotation marks and citation omitted); *Gen. Conf. Corp. of Seventh-day Adventists v. McGill*, 617 F.3d 402, 409 (6th Cir. 2010) ("the neutral-principles approach governed in church property cases, but . . . that approach had never been applied to the realm of clergy employment and discipline"); *El-Farra v. Sayyed*, 226 S.W.3d 792, 795 (Ark. 2006) (United States Supreme Court treated the neutral principles doctrine as a "narrow exception to the prohibition of court involvement in ecclesiastical matters where the controversy involves a church's property rights"); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30, 32 (D.D.C. 1990) ("this approach applies only to church *property* disputes") (emphasis in original).

> Church property cases do not present a conflict between the civil law and an internal church decision; they present a conflict between two church entities over what the church's decision was in the first place. The laws of trust and property are not being used to thwart that decision but to discern what it was and give legal effect to it.

Michael McConnell & Luke Goodrich, *On Resolving Church Property Disputes*, 58 Ariz. L. Rev. 307, 336 (2016).[7] Extending the neutral principles doctrine into the tort context, however, will present the very conflict that church-property conflicts do *not* present—that is, "a conflict between the civil law and an internal church decision." *Id.* Forcing courts to parse this conflict in every case can undermine the prohibition on interfering in matters of internal church governance—as *Westbrook* recognized when it declined "to expand the neutral-principles approach beyond the property ownership context." 231 S.W.3d at 399; *id.* at 400.

The United States Supreme Court's latest religious autonomy decisions confirm *Westbrook*'s wisdom. Like *Westbrook*—and unlike the church-property context—both *Hosanna-Tabor* and *Our Lady* involved the potential conflict of secular duties (including anti-discrimination and contract law) and religious autonomy. Unsurprisingly then, neither case even mentions the neutral principles doctrine. Rather, as *Hosanna-Tabor* concludes, "strictly ecclesiastical" matters are "the church's alone." 565

[7] Indeed, even within the church-property context, "the law governing these disputes is in disarray." McConnell & Goodrich, 58 Ariz. L. Rev. at 307. Importing that disarray into a new area of law would be unwise.

U.S. at 195; *see also Our Lady*, 140 S. Ct. at 2060. By contrast, Guerrero's defamation claims threaten to upend the "balance" that the First Amendment has "struck." *Hosanna-Tabor*, 565 U.S. at 196.

Demonstrating the problem, neither Guerrero nor the Court of Appeals can explain why *Westbrook* declined to extend the neutral principles doctrine to the tort claim it considered: "the *application* of those principles" will "impinge" a church's "ability to manage its internal affairs" or "hinder adherence to the church disciplinary process." 231 S.W.3d at 400 (emphasis in original). Rather, Guerrero freely admits that adjudicating his claims will chill adherence to the *Charter* and the Catholic Church's reformed teachings regarding the identity and disclosure of clergy sexual abuse. Resp.28 ("Some amount of chilling or limited impediment is acceptable").

If Guerrero's approach were accepted, a Texas court would take a "forbid[den]" path: "substitut[ing] its interpretation" of the *Charter*'s directives on the transparent discussion of clergy sexual abuse and canon law "for that of the" Diocese, "in which church law vests authority to make that interpretation." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 721 (1976); *id.* at 717 ("questions of church discipline and composition of the church hierarchy are at the core of ecclesiastical concern"). *See also Mouton v. Christian Faith Missionary Baptist Church*, 498 S.W.3d 143, 150 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (neutral principles doctrine "did not alter the long-recognized principle that

civil courts must not interfere with the free exercise of religion by adjudicating claims that are intertwined with inherently ecclesiastical issues"). The Court of Appeals' unstudied embrace of the neutral principles doctrine here is unprecedented in Texas and should be rejected. *See* Law Professors' Br.24-27.[8]

B. Adjudicating Guerrero's claims would unconstitutionally impede internal church governance.

As the Diocese explained, *Westbrook* prohibits civil courts from adjudicating claims that "encroach[] on the church's ability to manage its internal affairs," *regardless* of whether a religious question is at issue. *Westbrook*, 231 S.W.3d at 395; *see also id.* at 397 ("resolv[ing] a religious question" "goes to only one area of constitutional concern"); Br.41-45. Just last month, the United States Supreme Court similarly confirmed that "[t]he independence of religious institutions in matters of 'faith and doctrine' is closely linked to independence in what we have termed 'matters of church government.' " *Our Lady*, 140 S. Ct. at 2060. This independence

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[8] The tentative and fact-bound decision in *McRaney v. N. Am. Mission Bd. of the So. Baptist Convention, Inc.* is not to the contrary. 2020 WL 4013074 (5th Cir. Jul. 16, 2020), *extension of time to file en banc petition granted* (Jul. 23, 2020). *McRaney* merely found, on a limited motion to dismiss record, that "[a]t this time," it was "not certain" that resolving the claims at issue required forbidden interference with internal church affairs. *Id.* at *3. Contrary to Guerrero, Resp.20, *McRaney* did not apply "neutral principles" nor find that they could rightly be applied.

"protect[s] [religious] autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id.* And here, as the Diocese explained, the Court of Appeals transgressed *Westbrook* (and now, *Our Lady* too) by evaluating "only one area of constitutional concern," *i.e.*, whether it had to evaluate canon law. Br.42. This failure is reason alone to reverse the Court of Appeals and dismiss this case. *Id.*

As the Diocese explained, taking jurisdiction over Guerrero's claims would permit a civil court to determine that the Diocese ought not follow the *Charter*'s directives on evaluating and communicating clergy sexual abuse, while at the same time exposing the Diocese to crippling financial liability. *Id.* at 41, 43-45. This is unconstitutional. As the Diocese explained (*id.* at 43-44), religious autonomy encompasses "informing members of the Catholic Church of the status of its clergy." *Tran v. Fiorenza*, 934 S.W.2d 740, 744 (Tex. App.—Houston [1st Dist.] 1996, no writ). It also includes "the manner in which the Diocese formally executes and adopts a policy." *In re Vida*, No. 04-14-00636-CV, 2015 WL 82717, at *3 (Tex. App.—San Antonio Jan. 7, 2015, orig. proceeding). These are exactly the Diocese's actions here. Br.8-18.

In response, Guerrero does not dispute that the Court of Appeals failed to analyze this separate religious autonomy protection. Nor does he dispute that adjudicating his case will chill the Diocese's religious exercise and financially devastate it. Instead, he incredibly contends that "[s]ome

amount of chilling or limited impediment is acceptable and has been upheld by the U.S. Supreme Court." Resp.28. He could not be more wrong. All the cases Guerrero cites for that astonishing proposition pertain to "government regulation of only outward physical acts," which do not control religious autonomy cases "concern[ing] government interference with an internal church decision that affects the faith and mission of the church itself." *See Hosanna-Tabor*, 565 U.S. at 190. And *Westbrook* itself rejects Guerrero's bald claim that there is "no authority" saying tort damages can chill religious exercise. Resp.34; *see also Westbrook*, 231 S.W.3d at 400 ("imposing tort liability for [a church following its teachings] would in the long run have the same effect as prohibiting the practice and would compel the Church to abandon part of its religious teachings") (internal quotation marks and citation omitted).

Guerrero's failure to defend the Court of Appeals' ruling, combined with his own free admission that he seeks to chill and impede the Diocese's church governance, is reason alone to disregard his arguments, reverse the Court of Appeals, and dismiss this case.[9]

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[9] Guerrero's claim that he is being "bait[ed]" into challenging internal church processes (his disciplinary process, the process to evaluate his inclusion on the list, and the process to restore reputational injury from an allegation of sexual abuse) is unserious. Resp.29-31, 32-33. Several of his prior filings, and his Response here, overtly second-guess internal church processes, including whether the Diocese correctly applied canon law. *See, e.g.*, CR:106; CR:238-39 ¶¶ 9-10, 14; Resp.5-6 (disputing notice and

II. Guerrero lacks the clear and unambiguous evidence required to establish a prima facie case of defamation under the TCPA.

In its opening brief, the Diocese explained that, while granting mandamus on religious autonomy grounds is the proper disposition of this case, Guerrero also could not meet his burden under the TCPA. Br.45-46.

In particular, the Diocese explained that Guerrero could not meet his burden to show clear and unambiguous evidence of a false statement made by the Diocese, as to him, with negligence. *See id.* at 49-53. And the Diocese argued that, upon dismissing this case for lack of subject-matter jurisdiction, the Diocese should be allowed to put on evidence of its costs, expenses, and fees. *Id.* at 54.

In response, Guerrero offers three arguments.[10] The first is a blatant misrepresentation: He erroneously and repeatedly claims that the Diocese "admitted" it defamed Guerrero by publishing the revised list. *See* Resp.24, 54, 59, 62. The Diocese *never* admitted that—either in the record citation Guerrero gives (CR:145-46), or anywhere else. Rather, Guerrero's citation—the revised list—confirms that the Diocese relied upon canon law's understanding of "minor" throughout the entire time period

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veracity of allegations). Moreover, attempts to evade internal church processes have been rejected by both *Westbrook* and *Hosanna-Tabor*. Br.44-45. The Court must consider the effect of adjudicating Guerrero's claims on those processes.

[10] Guerrero does not contest—and thereby concedes—that, upon dismissing this case for lack of subject-matter jurisdiction on religious autonomy grounds, the Diocese should be allowed to put on evidence of its costs, fees, and expenses. Br.53-54.

at issue and is not making any statement regarding civil or criminal liability. CR:146.[11]

Guerrero's second argument is that the "context" shows the Diocese accused him of "child" abuse, not "minor" abuse. Resp.52-55. His argument is based on several errors. First, as discussed above, he erroneously claims the Diocese "admitted" to doing this. It did not. Second, he claims that the Diocese's statements insufficiently referred to canon law and church policies. Resp.52-53. In other words, Guerrero wants a civil court to second-guess the Diocese's internal management decisions. Indeed, the Diocese already explained the list's placement in the full public context of the Catholic Church's reckoning with clergy sexual abuse, as well as the Diocese's accompanying statements connecting the list to that broader context. *See* Br.6-21; *see also* n.11 above. The list itself refers to Bishop Coerver's releasing it in his role as the Diocese's "chief shepherd," and identified the role of the Diocesan Review Board—which, as Guerrero's star case (*Hayden*) explains, is an explicit apparatus of "internal church discipline and governance." 701 So.2d at 1358; *see also* CR:140

[11] Guerrero's misrepresentation also reveals why religious autonomy requires dismissal. On one hand, he claims that the Diocese could say what it said about him, if it was "accurate." *See, e.g.*, Resp.31. And he claims that the "crux" of the dispute here is that the Diocese did not specify its reliance on canon law. *Id.* at 52. But the revised list undoubtedly did this. *See* CR:146. Yet Guerrero says the revised list still is not specific enough (Resp.18), and says it "assault[s]" him (Resp. to Pet. for Rev. 4). Guerrero cannot have it both ways.

(initial list).[12] Moreover, it is hardly a secret that the Catholic Church has a centuries-old body of canon law. No one can act surprised that the Catholic Church would regulate its behavior in accordance with that law. *Cf.* The Portable Medieval Reader 249-50 (James Bruce Ross & Mary Martin McLaughlin eds., Viking Press 1949) (Archbishop of Canterbury, Thomas Becket, opposing King Henry II's attempt to give himself power to interpret canon law within England). And third, as the Diocese explained, it never used the words "child" or "children" in the accusations represented by the list (in fact, the list itself makes no use of those words at all). *See* Br.21-23.[13]

Unable to rebut the church governance context in which the list was released, for the first time on appeal Guerrero invokes another allegedly defamatory statement: Diocesan Chancellor Marty Martin's description of credible accusations. *See* Resp.7, 54-55. While Guerrero's Original Petition denies the substance of what Martin said, it only alleges that the list's statements are defamatory. *See* CR:8 ¶ 19 (identifying list as how he was defamed); CR:9 ¶ 24 (libel per se claim based on "falsely stat[ing]"

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[12] Because the list's reference to the Diocesan Review Board is a clear reference to internal church discipline and governance, Guerrero's attempt to distinguish *Kavanagh* falls flat. *See* Resp.26-27 (claiming the press release in *Kavanagh* is distinct because it referred to a "Church Court").

[13] Guerrero does not respond to—and thereby concedes—the impropriety of the Court of Appeals' attributing media statements about "children" to the Diocese. Br.38.

what was said in the list); CR:10 ¶ 31 (slander claim making identical allegation). Nor did the Court of Appeals address whether Chancellor Martin's statement was defamatory. The Court should disregard Guerrero's attempt to amend his pleading in this Court.

In any event, Chancellor Martin's statement is not defamatory. As Guerrero knows, the Diocese *does* possess eyewitness statements attesting to his alleged conduct, and they were analyzed by the Diocesan Review Board. Br.18-19, 24; CR:153-154. That Guerrero now disputes this only confirms that he is asking a civil court to second-guess internal church determinations. Guerrero's last-ditch request thus runs directly counter to longstanding First Amendment principles holding that "church discipline" and "the conformity of the members of the church to the standard of morals required of them" are "strictly and purely ecclesiastical." *Watson*, 80 U.S. at 733.

Guerrero also argues that the Diocese spoke about him negligently because of how widely it "distribute[d]" the list. Resp.61. But as the Diocese explained, it did not "distribute" the list. It put the list on the Diocese's own website and directed inquiring minds (including the media) there. Br.20-22. When Chancellor Martin spoke to the media, he gave only one interview, in response to a request. *See id.* And as the Diocese also explained, his references to "children" dealt with the "safe environment" program that the *Charter* directs dioceses to implement, *not* with the list. *See id.* at 22-23, 36.

Moreover, Guerrero's negligent-distribution argument turns on the fact that the Diocese's website is not "members only." Resp.61 & n.4. As a factual matter, this argument is based on a false premise, because it is indisputable that the letter and release accompanying the list demonstrated that the list was directed toward Catholics. Br.21. As a legal matter, conditioning a church's freedom to speak on how it constructs its website, and how it refers to its religious terms and understandings when speaking on its own website, only underscores why religious autonomy requires dismissing Guerrero's lawsuit.[14]

III. Avoiding endless church-state conflicts requires protecting all religious communications closely linked to a religion's faith and mission.

A. Guerrero's purported limiting principle solves none of the entanglement problems.

As the Diocese explained and Guerrero does not dispute, the Court of Appeals acknowledged that the Diocese's alleged defamation implicates "internal church discipline," concerns activity "historically deemed ecclesiastical," and possesses "a religious term imbedded in canon law." A:14; A:12; A:16; *see also* Br.55; *Watson*, 80 U.S. at 733 ("church discipline"). Nevertheless, the Court of Appeals held that civil courts could take jurisdiction over claims turning on those religious subject matters, because

[14] Guerrero's announcement that he will amend his pleading to add a bodily injury claim is nothing but a back-door attempt to revive his dismissed intentional infliction of emotional dismiss claim. Resp.63 n.5.

what is "pivotal" is that the alleged defamation "left" what a civil court decided was a church's "confines." A:12; A:17. The Diocese explained at length that this holding was unprecedented, unwise, and creates unbounded church-state entanglement. Br.55-61.

In response, Guerrero makes three arguments, all belied by both the law and the record.

First, he argues that the Court of Appeals did not make scope-of-publication "pivotal." Resp.35-36. To Guerrero, all the Court of Appeals said was that "leaving the confines of the church is one of several factors, 'pivotal nuances,' that should be considered in determining whether the disputed issue is an internal ecclesiastical matter." *Id.* at 36. This is false. The Court of Appeals identified exactly *one* "pivotal nuance": that "matters historically deemed ecclesiastical" were "expos[ed] . . . to the public eye." A:12. That is the point on which the lower court's decision turned. *See id* ("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."). Only Guerrero pluralized "pivotal nuances"—the Court of Appeals did not.[15]

Second, Guerrero attempts to find precedential support for the "pivotal nuance" approach. Resp.37, 39-44. But the precedents he cites do not support the Court of Appeals' ruling. For example, *Bryce* does not hold that

[15] Later in his brief, even Guerrero uses the singular, calling scope of publication "this pivotal factor." Resp.46.

religious autonomy in speaking to "non-members" only applies when "non-members" "voluntarily attend and voluntarily participate in discussions of internal doctrine." Resp.37-38. To the contrary, *Bryce* said that "[t]he applicability of the doctrine does *not* focus upon the relationship between the church and Rev. Smith [the non-member]. It focuses instead on the right of the church to engage freely in ecclesiastical discussions with members and non-members." *Bryce v. Episcopal Church*, 289 F.3d 648, 658 (10th Cir. 2002) (emphasis added).[16] *Bryce* held that because the subject of the discussion with the non-member was rooted in an "ecclesiastical" matter, the church could hold the discussion. *Id.* That is not the Court of Appeals' "pivotal nuance" approach.

Nor do any of Guerrero's other cited cases help him. The Diocese explained why *Kliebenstein*, *Kelly*, and *Turner* (Resp.40-42) do not apply here: none of those cases strip religious autonomy from church statements because of a publication's scope. Rather, each acknowledge that they could be resolved without wading into religious doctrine or impeding internal church governance. Br.57. The same is true of *Conley* (Resp.43) and *Hayden*. *Alief*, *Becker, Torralva*, and *Schoenhals* (Resp.39-40, 42) all referred to the given claimant's harm being confined to a respective church community to strengthen the conclusion that religious autonomy

[16] *Bryce* also noted that the church did not just invite "active members of the church" to the meeting, but also "some college students involved in an 'Episcopalians on Campus' ministry." 289 F.3d at 652.

applies. This, as the Diocese explained, is not the same. *See* Br.57 (discussing *Hubbard*). *Cha* did not analyze scope of publication, nor did *Pfeil*. (Resp.44). Finally, neither *Patton* (*id.* at 39) nor *Heard* (*id.* at 42-43) treated scope of publication as the "pivotal nuance." Br.56 (*Patton* holds no "bright-line rule"). Indeed, *Patton* and *Heard* limit their analysis to "the specific area of the church-minister relationship," which is only one component of a broader religious autonomy to determine and discuss church governance. *See Patton v. Jones*, 212 S.W.3d 541, 553 (Tex. App.—Austin 2006, pet. denied) (quoting *Heard*); *see also Our Lady*, 140 S. Ct. at 2060 (ministerial exception only "a component of this autonomy"). And with one exception (*Kavanagh*, discussed above in nn.4, 12), Guerrero simply ignores the cases cited by the Diocese that apply religious autonomy regardless of publication scope. Br.58 & n.17.

Third, Guerrero makes policy arguments about why the "pivotal nuance" approach will supposedly cause few problems. Resp.46-47. He claims religious autonomy protection will still cover statements made during worship services because, by "walking in the front door of the church, using the remote control to select the televised church service, or joining a zoom meeting or facebook live video," an individual "voluntary [*sic*] inserted his or herself into the internal discussion like in *Bryce*." *Id.* at 47. Setting aside that this is not what *Bryce* holds, *see* pp.24-25 above, Guerrero's supposed distinction between those scenarios and this case is illusory.

Here, as the Diocese explained, the Diocese posted the list on which Guerrero appears to its own website—nowhere else—and directed anyone interested in its contents (including the media) to its website, nowhere else. Br.21. Guerrero cannot explain how visiting a church website to read a list on clergy status is *not* "voluntarily inserting" oneself into an "internal dialogue," but visiting a church website to watch a worship service *is*. Either way, someone must click on a link to gain access. Indeed, Guerrero's odd distinction would undermine the results in multiple cases, in Texas and nationwide. *See* Br.58 & n.17.[17]

As the Diocese also explained, dictating how a religious community may speak based on the message's potential recipients raises needlessly complicated theological questions—with answers varying by denomination. *See id.* at 60-61. The Catholic Church, being a catholic (meaning "universal") church, has one understanding of membership scope. Smaller or more localized religions, however, have others. *See*, *e.g.*, Br.60-61 (discussing impact on Jewish communities). Guerrero's attempt to judicially impose standards for religious communication would, as *amici* Texas legislators explained, "intrude on the means churches use to communicate with members, requiring secure channels of communication re-

[17] One also wonders what Guerrero's "voluntary insertion" standard would make of Luther's 95 theses nailed to the door of the Wittenberg church. Is looking at the church door "insertion" enough?

gardless of the cost, feasibility, or limitations on access that would impose." Texas Legislators Br.6. He has no response to the immense liability this unbounded approach to defamation liability portends. His rule would effectively exile churches, synagogues, and mosques from cyberspace. That, too, is reason enough to grant mandamus, reverse the Court of Appeals, and dismiss this case. *See* Tex. R. App. P. 56.1(a)(4)-(6).

B. *Hosanna-Tabor* provides the proper limiting principle: where the communication is closely linked to a church's faith and mission, religious autonomy protections apply.

As the Diocese explained in its opening brief, its communication to its members regarding Guerrero is closely linked to its faith and mission, and therefore is encompassed within the First Amendment's religious autonomy guarantee. *See, e.g.*, Br.62-63. This result, as the Diocese also explained, follows logically from *Hosanna-Tabor* and is consistent with nationwide precedent in this area. *See id.* And it is also consistent with *Our Lady*—the United States Supreme Court's latest religious autonomy precedent, issued after the Diocese filed its opening brief. *See Our Lady*, 140 S. Ct. at 2060 (the First Amendment protects religious institutions' "autonomy with respect to internal management decisions that are essential to the institution's central mission," as such matters of church governance are "closely linked" to faith and mission). Moreover, this limiting principle will ensure that religious organizations can speak transparently and accountably on matters of clergy sexual abuse, while also providing a judicially administrable distinction with victim lawsuits to

redress misconduct that have nothing to do with a religious group's faith or mission. *See* Br.63; *see also* p.7 above. The Court should grant mandamus and adopt this rule, rather than ensconce an anomalous approach toward religious autonomy in an area of First Amendment law with growing litigation. Br.63 n.18 (noting growing docket of similar cases in Texas and nationwide).

Guerrero has no response to *Hosanna-Tabor*'s substantive application, so he merely denies its relevance. Resp.47-49. He claims that, because this case "has nothing to do with preaching, training, or carrying out the 'mission or faith' of the church," *Hosanna-Tabor* is inapposite. *Id.* at 47. But this misunderstands *Hosanna-Tabor*, as *Our Lady* recently confirmed. The "ministerial exception" at issue in *Hosanna-Tabor* is merely one "component" of a broader religious "autonomy" that also encompasses "internal management decisions that are essential to the institution's central mission." *Our Lady*, 140 S. Ct. at 2060. As the Diocese has already explained, the list's creation and release were precisely such decisions. *See* Br.6-20; pp.4-6 above; *see also Tran*, 934 S.W.2d at 744 (protecting ability to "inform[] members of the Catholic Church of the status of its clergy"); *In re Vida*, 2015 WL 82717, at *3 (protecting "the manner in which the Diocese formally executes and adopts a policy"). They therefore fall comfortably within religious autonomy's protection for actions facilitating a religious organization's faith and mission.

Guerrero's parting shot is that dismissing this case under *Hosanna-Tabor* and *Our Lady* "would mean an abuser could publish defamatory statements about a victim, with no consequence." Resp.50. This is both inaccurate and inappropriate. The "internal Charter on sexual abuse," as Guerrero calls it (*id.* at 32), is—as the Diocese described in detail in the opening brief—the result of the Catholic Church's lengthy internal decision-making process engaged in by hundreds of bishops and the Vatican. Br.8-18. The result of that process was a commitment in the *Charter* to require what the list manifested: transparent communication about clergy sexual abuse. *See id.*; *see also* CR:123-124 (list released to "restore some confidence among the ranks of the Faithful"); CR:131 ("an effort to improve the safety of all Catholics within the state"). Implementing that Church-wide decision falls well within the religious autonomy afforded by the First Amendment, and ensures victims are heard. By contrast, and as noted above, courts routinely distinguish between lawsuits where a clergyman accused of abuse brings a defamation claim against his church and lawsuits brought by victims of sexual abuse. One involves an "internal church decision that affects the faith and mission of the church"; the other does not. *Our Lady*, 140 S. Ct. at 2062 (quoting *Hosanna-Tabor*, 565 U. S. at 190.)

* * *

In an effort to further the faith and mission of the Catholic Church, the bishops of Texas, including Bishop Coerver, spoke transparently with

Catholics about the church discipline and credibly-accused status of clergymen. This is a good thing, not a bad thing. And it is protected under the First Amendment's religious autonomy jurisprudence. The case must therefore be dismissed.

PRAYER

The Diocese respectfully prays that the Court grant the Petition for Writ of Mandamus, vacate the trial court's denial of its plea to the jurisdiction, and order the trial court to enter a new order granting the plea to the jurisdiction and thereby dismiss the case. The Diocese prays for all other relief, whether at law or in equity, to which it is entitled, including the granting of its Petition for Review and remanding to the trial court for appropriate proceedings under the TCPA on attorney's fees, costs, and sanctions.

Respectfully submitted,

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