Cause No. 20-0005

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, No. 07-19-00280-CV

REPLY IN SUPPORT OF PETITION FOR REVIEW

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Oral Argument Requested

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REPLY BRIEF

The Diocese's Petition for Review ("TCPA.Pet.") explained that two principal issues warrant review.

First, the Court of Appeals affirmed in part the denial of a motion to dismiss under the Texas Citizens Participation Act (the "TCPA") without identifying clear and specific evidence of a single defamatory statement made with negligent fault as to Guerrero. TCPA.Pet.14-18.

Second, the Court of Appeals' decision radically reshaped religious autonomy in Texas. TCPA.Pet.18-19.[1] By limiting the scope of religious autonomy to the "confines of the church," even statements based in church law and directed to church members—claims that, if adjudicated, will impede church governance—are unprotected. As we point out in both the parallel Mandamus Petition and the TCPA Petition, reaching these questions violated religious autonomy under the Texas and federal constitutions and went beyond the jurisdiction of the Texas courts, thus warranting mandamus. Mand.Pet.10-20; TCPA.Pet.12 n.9. But should the Court nevertheless reach the merits despite the jurisdictional issue, the violation of religious autonomy separately warrants review as irreconcilable with the TCPA. TCPA.Pet.18-20.

[1] The Court of Appeals specifically incorporated its mandamus opinion (containing the religious autonomy analysis) into its TCPA opinion. A:4, A:15.

In response, Guerrero does not apply the clear and specific evidence requirement and he expressly limits any response on the religious autonomy issue to his mandamus response, TCPA.Resp.20. Instead, he argues the merits, claiming that the Diocese could only have meant "child" when it said Guerrero was credibly accused of sexually abusing a "minor," because the Diocese's reliance on Catholic canon law went initially unmentioned. TCPA.Resp.8-9. He further argues that, unless the Diocese communicated with Catholics in an "exclusive" manner (TCPA.Resp.9) requiring a "login/password" (*id.*), the Diocese must have meant "child" when it said "minor"—plus local television reports about church reforms (including the list) "contain[ed] references to 'children,'" TCPA.Resp.11. And, as the news media are apparently for Guerrero a stand-in for the "reasonable, ordinary person," he argues that the media's reporting—not the context in which the *Diocese* discussed the list—demonstrates what the Diocese meant by "minor." TCPA.Resp.16-17.

None of Guerrero's arguments diminish the need for review. Guerrero does not point to clear and specific evidence of a defamatory statement made *as to him*. Instead, he makes merits arguments about how to construe the "context" and the "reasonable, ordinary person." Those arguments are no reason to deny review. Indeed, they only serve to emphasize the need for review. Established Texas precedent forecloses Guerrero's effort to replace the context in which the Diocese released its list with an invented context. The same is true of Guerrero's bald factual

distortions, including his extended reliance on evidence specifically excluded by the trial court as unauthenticated and hearsay (TCPA.Resp.9-10, 14-15).

Finally, Guerrero's reservation of the religious autonomy issue to his mandamus response (1) confirms that religious autonomy as a jurisdictional issue warrants mandamus in the first instance (*see* TCPA.Pet.12 n.9) and (2) completely ignores that religious autonomy is *also* a merits issue, because the TCPA is designed to "protect[] citizens ... from retaliatory lawsuits" when they exercise a core First Amendment right: "speak on matters of public concern." *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015).

The Court should grant the Mandamus Petition and resolve the threshold jurisdictional question of religious autonomy. TPCA.Pet.12 n.9. If necessary, it should grant review here.

I. Reply to Issue 1: Guerrero cannot meet the "clear and specific evidence" standard.

A. Guerrero identifies no clear and specific evidence.

Review is warranted because Guerrero is unable to identify evidence that is "clear" (meaning "unambiguous, sure, or free from doubt") and "specific" (meaning "explicit or relating to a particular named thing") that the Diocese made a defamatory statement with negligent fault as to him. TCPA.Pet.14-18 (quoting *In re Lipsky*, 460 S.W.3d at 590). In response, Guerrero does not dispute the "clear and specific" evidentiary

requirement—thereby conceding it governs. *See Thigpen v. Locke*, 363 S.W.2d 247, 249 (Tex. 1962) (argument "waived as it was not argued in the briefs").

Under the TCPA's clear and specific evidence standard, Guerrero's defamation claims fail. The only statement the Diocese made *as to Guerrero* was that he was credibly accused of sexually abusing a minor based on the Diocese's determination. CR:60. This statement, based on the Catholic canon law understanding of "minor," is true—and Guerrero does not dispute that understanding. TCPA.Pet.5-8. As the Court of Appeals conceded, "the [list] used the term 'minor,' not 'child' or 'children.'" A:25. And the Diocese never used Guerrero's name anywhere else but on the (initial and revised) list. TCPA.Pet.5-8. In media discussions, the Diocese clearly said the list was one part of a "context" of church reforms to both "protect children from sexual abuse, and . . . promote healing and a restoration of trust in the Catholic Church" through additional transparency and accountability. CR:123-124 (Diocesan press release). The media spoke with the Diocese about both the list and the broader reforms. Sometimes, the Diocese discussed its safe environment programs geared toward children. *See* CR:119 (interview of Diocesan Chancellor Marty Martin). In other segments, it discussed the list.

This is consistent with the basis for the Texas Bishops' actions, the U.S. Conference of Catholic Bishops' *Charter for the Protection of Young*

People (the "*Charter*")—a public document since 2002. A:36. *See* CR:56 ¶10 (affidavit of Bishop Coerver explaining *Charter* as basis for list); CR:154 (Diocese explaining reliance on *Charter* and canon law to Guerrero before his lawsuit); TCPA.Pet.3-4; https://perma.cc/27G8-86SL. The *Charter* requires "open and transparent" communication on the sexual abuse of *minors*, which the *Charter* specifically confirms must be understood under Catholic canon law.[2] *See* A:46 (Article 7); A:51 (canon law definition of "minor"). In other articles, the *Charter* discusses "safe environment" programs for *children* that Dioceses are expected to implement. *See, e.g.*, A:46 (Article 9). The Diocese followed this distinction when speaking about the list (i.e., list refers to those credibly accused of abusing "minors," while some other reforms are regarding "children"). TCPA.Pet.7-8.[3]

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[2] Canon law defines "minor" as both someone "below the age of eighteen years" and "a person who habitually lacks the use of reason." A:51 (quoting article 6 §1 of *Sacramentorum sanctitatis tutela*); CR:56 ¶9; Mand.Pet.3.

[3] Guerrero chides the Diocese for attaching the *Charter*. *See* TCPA.Resp.12. But the *Charter* is not a document that was "never made public." *Id.* at 14. And it has always been cited as the impetus for the action taken by the Texas bishops here. *See* CR:154 (Diocese explaining reliance on canon law and *Charter* to Guerrero before lawsuit); CR:55-56 (Bishop Coerver explaining reliance on canon law and the *Charter*). In fact, it has been a public document since 2002, A:36, and any court can take judicial notice of it. *See, e.g.*, *Bethel Conservative Mennonite Church v. C.I.R.*, 746 F.2d 388, 392 (7th Cir. 1984) ("not necessary" for remand to consider "church documents which detail the history of various ...

That some media reporting about the list understood this distinction, *see* A:32 (KAMC reporter) while others did not, *see* CR:117 (FOX34 anchor) does not matter; what matters is what the *Diocese* said. *See Bentley v. Bunton*, 94 S.W.3d 561, 586 (Tex. 2002) ("We do not suggest for a moment that a talk show host is liable for a guest's statements to which the host does not voice objection.").

By concluding otherwise, the Court of Appeals erred, warranting review. TCPA.Pet.17-18.

B. Guerrero may not replace the actual context of the Diocese's list with a context of his own making.

Guerrero offers four counterarguments, all directed at replacing the context in which the Diocese actually presented the list with one of his own invention.

First, Guerrero says the Diocese must have meant "child" when it said "minor," because the list did not initially note its reliance on Catholic canon law. TCPA.Resp.7-9. This argument goes beyond even what the Court of Appeals held. Even the Court of Appeals agreed that the list alone referred only to "minor," (A:9) and it was only by the court's—revisionist—assessment of "context" that "minor" meant only "child." *Id.*

Both the Court of Appeals opinion and Guerrero's argument contradict this Court's established "reasonable person" standard. The "reasonable person" "exercises care and prudence" when reading a statement. *New*

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practices. These documents are clearly the kind for which judicial notice by an appellate court is appropriate.").

Times, Inc. v. Isaacks, 146 S.W.3d 144, 157 (Tex. 2004). This includes accounting for "the general tenor ... of the source itself." *City of Keller v. Wilson*, 168 S.W.3d 802, 811 (Tex. 2005). The opinion of the Court of Appeals imposes the opposite standard: imposing *non*-church definitions on a *church*, speaking on a *church* website, in a message directed to *church* members. No case from this Court allows that result.

Second, Guerrero claims that religious autonomy protections would apply to the Diocese's publication of the list on its own website only if the website were restricted to "lay Catholics" through a "login/password." TCPA.Resp.8-9.[4] The premise of this argument is that churches enjoy religious autonomy only when they exclude non-adherents from communications—online or in church. Aside from potentially penalizing evangelism, Guerrero's argument also contradicts cases in Texas and other jurisdictions where member-directed church communications on religious issues were relayed on platforms accessible to non-members. *See* Mand.Pet.17-20; Mand.Reply.9-11. This argument thus only further confirms why mandamus on religious autonomy grounds is warranted. *See* TCPA.Pet.12 n.9.

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[4] Guerrero says another alternative would be for the Diocese to state its reliance canon law in the communication. TCPA.Resp.9. But this directly contradicts his earlier statement that the revised list, which *did* explain the reliance on canon law, nevertheless continued the "assault on Guerrero." TCPA.Resp.4.

Third, Guerrero claims that the Diocese must have meant "child" because its media communications "contain[ed] references to 'children.'" TCPA.Resp.11. This argument ignores the record. The Diocese spoke to the media about new church policies. The transparency manifested by the list is but one part of those reforms, some of which don't involve the canon law understanding of "minor" but safe environment programs for children. *Supra* pp.4-5; TCPA.Pet.7-8. Guerrero's primary "evidence" that the Diocese conflated "minor" and "child" when discussing the list comes from content that the trial court specifically excluded as unauthenticated and hearsay. *Compare* TCPA.Resp.9-10, 14-15 (citing article at CR:137 and the same content reprinted in another article Guerrero attached to his response) *with* TCPA.Pet.7 n.5 (discussing content in article at CR:136-138, which the trial court excluded from evidence (CR:236)). The Court could strike this already-excluded material. At a minimum, it should disregard this argument and look at the actual record—which confirms how the Diocese spoke with the media. TCPA.Pet.7-9.

Fourth, Guerrero claims that the "reasonable, ordinary person" would understand the Diocese to accuse Guerrero of sexually abusing a "child" (not a "minor") because some news media interpreted the list this way. TCPA.Resp.16-17. This argument repeats the Court of Appeals' error—imputing statements from the media to the Diocese. *Supra* p.6; TCPA.Pet.11-12; A:12 (primarily because "one media outlet announced"

the list on television that "the Diocese incorporated the word "'children' into its public rhetoric about the List").

Moreover, this argument misstates the limits placed by this Court on the "reasonable observer." The reasonable observer is a "hypothetical" person, and news reporters in the record are neither hypothetical nor necessarily reasonable observers. *New Times, Inc.*, 146 S.W.3d at 158. "Intelligent, well-read people act unreasonably from time to time," while the hypothetical reasonable observer "does not." *Id.* Misinterpreting church communications—as some news media did while others did not (*supra* p.6)—was unreasonable. TCPA.Pet.9, 17-18.

More fundamentally, this argument confirms the religious autonomy problems here that warrant mandamus. *See* TCPA.Pet.12 n.9. If religious autonomy means anything, it protects a religious organization's right to speak according to its religious terms and understandings without fear that it will be sued because news media misunderstood or mischaracterized what it said. *Cf. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) (religious organization has no obligation to "predict which of its activities a secular court will consider religious," and would be "significant[ly] burden[ed]" were it otherwise). Concluding otherwise would chill myriad forms of religious expression. As *amici* point out, rabbis would be unable to tell congregants to avoid certain grocery stores or restaurants when they violate a certain understanding of "kosher" that varies from

"common perception[s]" of kosher. Jewish Coalition for Religious Liberty Br. 6-8. This standard is untenable.

II. Reply to Issue 2: Religious autonomy is not restricted to the "confines of the church" or a password-protected website.

As we explained, the Court of Appeals erred in holding that religious autonomy is limited to a "church's" "confines." TCPA.Pet.18-19. In a time of coronavirus, when church services are prohibited in many places, this is a recipe for barring all worship, even "virtual worship."

Guerrero does not brief the religious autonomy issue in his response, instead referring the Court to his response to the Mandamus Petition. TCPA.Resp.20. But even in his response here, he argues that any member-directed church communications about religious issues that lack a "login/password" are not protected by religious autonomy. TCPA.Resp.9 & n.3. As the Diocese explains in the Mandamus Petition at 17-20 and Reply, Mand.Reply.8-11. Guerrero's "password" argument is more reason to grant review of the Court of Appeals' unprecedented rule.

III. This case warrants mandamus relief, but if not, review under the TCPA.

The Court should not bypass the jurisdictional bar imposed by religious autonomy requiring mandamus. *See* TCPA.Pet.12 n. 9. But if it does, the Court should grant review under the TCPA. The TCPA, which is designed to protect speech on matters of public concern from retaliatory lawsuits, must include broad protection for religious speech that will not require denomination-by-denomination assessments of what it means to

"leave" a "church's" "confines." That is only more so since similar claims are pending against the Diocese of Corpus Christi, and analogous cases are increasing nationwide. TCPA.Pet.20. Indeed, the Court of Appeals' unprecedented rule will only increase the number of these lawsuits, by allowing "suit[s] against a church for doing exactly what the Legislature has required by law in other circumstances." Texas Legislators Br. 12.

PRAYER

Petitioner respectfully prays that the Court grant the Petition for Review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petition complies with Rule 9 of the Texas Rules of Appellate Procedure and the word count of this document is 2,363 words. The word processing software used to prepare this filing and calculate the word count is Microsoft Word for Office 365.

Date: April 7, 2020

/s/Eric C. Rassbach
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Petition was filed and served this seventh day of April, 2020, served electronically through eFile.TXCourts.gov on all known counsel of record, listed below:

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