No. 20-0127
In the Supreme Court of Texas

IN RE DIOCESE OF LUBBOCK,

RELATOR.

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

Brief of *Amicus Curiae* CHILD USA in Support of Real Party in Interest

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CHILD USA is the leading national nonprofit think tank working to end child abuse and neglect in the United States. CHILD USA pairs the best social science research with the most sophisticated legal analysis to determine the most effective public policies to end child abuse and neglect. CHILD USA produces the evidence-based solutions and information needed by courts, policymakers, organizations, the media, and society as a whole to increase child protection and the common good.[1]

[1] No fee was or will be paid for the preparation of this brief. Tex. R. App. P. 11(c).

INTRODUCTION

Although the Diocese characterizes its sought-after immunity from defamation liability as necessary for it to engage in the admirable act of atoning for harms to known victims of clergy abuse, the Diocese's legal theories would, if adopted, empower abusers in the religious community to silence and retaliate against victims who have yet to come forward.

Nothing reveals that danger more clearly than the Diocese's argument—not advanced in its initial petition—that this Court should confine the neutral principles of law doctrine to church-property disputes. Pet.'s Br. at 38-39. Neutral principles of law form the foundation of every tort claim that victims of religious actors use to vindicate their rights, to hold accountable those who abuse their authority to exploit the vulnerable, and to obtain some measure of compensation for life-altering wrongs that no amount of money can undo. Neutral principles of law are what courts rely on to adjudicate the claims of the very same victims of sexual abuse whose interests the Diocese purports to advance. *See, e.g.*, *State v. Wenthe*, 839 N.W.2d 83, 90-91 (Minn. 2013); *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 450-51 (Tenn. 2012); *Malicki v. Doe*, 814 So.2d 347, 364 (Fla. 2002); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 985 P.2d 262, 277 (Wash. 1999); *Moses v. Diocese of Colo.*, 863 P.2d 310, 321 (Colo. 1993) (en banc); *Doe v. Diocese of Raleigh*, 776 S.E.2d 29, 38 (N.C. App. 2015); *Smith v. O'Connell*, 986 F. Supp. 73, 79 (D.R.I. 1997); *Konkle v.*

Henson, 672 N.E.2d 450, 456 (Ind. Ct. App. 1996). To put out of reach neutral principles of law is to take away the only civil tool that victims have to seek justice on their own.

Amicus CHILD USA submits this brief to highlight that the Diocese's theory not only would have devastating consequences for victims of abuse but also has no basis in law.

ARGUMENT

I. The Neutral Principles of Law Doctrine Applies to Civil Rights and Personal Injury Claims

The United States Supreme Court first recognized the "neutral principles of law" concept in *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). That case involved a dispute about who owned physical church properties in Savannah, Georgia: two local church communities or the larger Presbyterian Church in the United States (PCUS) to which the local communities had once belonged. *Id.* at 442. To resolve that dispute, Georgia courts applied what was known as the "departure from the doctrine" test. Under that test, who stood as the rightful owner of property "was made to turn on . . . whether the general church [PCUS] abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it." *Id.*

The U.S. Supreme Court held that the departure-from-the-doctrine test violated the First Amendment. To determine whether a church had "departed" from religious doctrine would require a court to "make its own interpretation of the meaning of church doctrines." *Id.* at 450-51. That inquiry and the related determination of the "correct" view of religious doctrine, the Supreme Court explained, would necessarily transgress the fundamental principle that, "[i]n this country, . . . [t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Id.* at 447 (citation omitted). The Court contrasted the impermissible departure-from-the-doctrine test, focused as it was on interpreting religious tenets, with "neutral principles of law." *Id.* at 449. The latter could constitutionally be applied to a dispute such as the one before the *Mary Elizabeth* Court because neutral principles are "developed for use in all property disputes [and] can be applied without 'establishing' churches to which property is awarded." *Id.*

The Court addressed the neutral principles of law concept three more times within the next decade. In *Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, the Court found that Maryland courts' resolution of a property dispute did not violate the First Amendment because it "involved no inquiry into religious doctrine." 396 U.S. 367, 368 (1970) (per curiam). In *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, the Court found that the Illinois Supreme Court, despite a

claim to limit itself to neutral principles of law, ran afoul of the First Amendment because it "substituted its interpretation" of religious doctrine for that of church authorities in order to resolve the case. 426 U.S. 696, 721 (1976). And in *Jones v. Wolf*, though the Court found a remand necessary, it endorsed the neutral principles doctrine once more. 443 U.S. 595, 602-03 (1979). *Jones* further clarified that even neutral principles of law can infringe First Amendment rights if, when applied to the facts of a particular case, they require a court to "resolve a religious controversy" or "doctrinal issue." *Id.* at 604.

Each of these cases arose in the context of a property dispute, but nothing in the U.S. Supreme Court's reasoning is so limited. Rather, the lesson of these cases is that the mere religious identity of parties or religious foundation of a dispute does not automatically preclude court adjudication; instead, it is the need to interpret religious doctrine, if it arises, that restrains a court from resolving what would otherwise be an ordinary claim before it. That is because only the interpretation of doctrine impermissibly requires a court—and thus the State—to "plac[e] its official stamp of approval upon one particular" interpretation of religion in violation of the First Amendment. *Engel v. Vitale*, 370 U.S. 421, 429 (1962).

This reasoning applies equally to disputes over civil rights that happen to involve religious parties. Indeed, although the phrase "neutral principles of

law" did not appear until *Mary Elizabeth*, it is closely rated to the settled rule that "neutral, generally applicable" laws are valid even when applied to religiously motivated conduct. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881 (1990). That black letter concept traces back to *Reynolds v. United States*, in which the U.S. Supreme Court rejected that a religious motive could serve as a defense to a bigamy prosecution. 98 U.S. 145, 167 (1878). To allow that, the Court explained, "would be to make the professed doctrines of religious belief superior to the law of the land." *Id.*

Consistent with this understanding, numerous courts around the country, both state and federal, have held that neutral principles of law are properly applied "where church property *and* civil rights disputes can be decided without reference to questions of faith and doctrine." *Bowie v. Murphy*, 624 S.E.2d 74, 79 (Va. 2006) (defamation and assault); *see also, e.g.*, *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, No. 19-60293, --- F.3d ---, 2020 WL 4013074, at *2 (5th Cir. July 16, 2020) (defamation, intentional interference with business relationships, and intentional infliction of emotional distress); *Banks v. St. Matthew Baptist Church*, 750 S.E.2d 605, 607 (S.C. 2013) (defamation); *Connor v. Archdiocese of Phila.*, 975 A.2d 1084, 1112 (Pa. 2009) (defamation). The Diocese's position that the neutral principles doctrine should be limited to property disputes is thus not only out of step with Supreme Court precedent and lower courts' interpretation of it, but also leaves

open the glaring question of how, if at all, victims of a range of tortious conduct could seek a remedy.[2]

In fact, without invoking the specific words "neutral principles," this Court has already applied the doctrine outside the context of property disputes. In *Tilton v. Marshall*, a group of plaintiffs sued a pastor for fraudulently inducing them to donate to his church. 925 S.W.2d 672, 676 (Tex. 1996). This Court applied ordinary and neutral common law fraud principles. Specifically, the Court allowed the plaintiffs' claims based on the pastor's false promises to "read[], touch[], and pray[] over plaintiffs' prayer requests" to go forward because they were based on allegedly false "promises to perform particular acts," not allegedly false "statements of religious doctrine or belief." *Id.* at 679. Conversely, this Court held that the plaintiffs' claims based on allegedly false "representations of religious doctrine" were barred by the First Amendment because resolving them would necessitate interpreting such doctrine to declare its truth or falsity. *Id.* That faithful application of Supreme Court precedent demonstrates the error of the Diocese's reimagination of the doctrine as limited

[2] *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986), the only case that the Diocese cites as stating that neutral principles of law do not apply outside of church property disputes, involved a routine application of the "ministerial exception" to employment disputes. *See Gen. Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 409 (6th Cir. 2010). Its statement purporting to limit the neutral principles doctrine to property disputes was dicta, conflicts with a separate statement in *Hutchinson* that, "in a [different] fact situation . . . , th[e] Court could find jurisdiction," 789 F.2d at 396 (discussing the facts of *Alberts v. Devine*, 479 N.E.2d 113 (Mass. 1985)), and stands against the great weight of authority.

to property disputes; and the same approach as applied in *Tilton* is warranted here.

There is, in short, no basis under either U.S. Supreme Court precedent or this Court's precedent for the Diocese's position that the neutral principles doctrine can be applied only to church-property disputes.

Nor does the Diocese's brief policy justification merit confining the neutral principles doctrine to property claims. The Diocese contends that only property disputes may be resolved without implicating constitutional principles because they involve deciding what the "church's decision [regarding the use of church property] was in the first place," whereas tort suits involve "a conflict between the civil law and an internal church decision." Pet.'s Br. at 39 (quoting Michael McConnell & Luke Goodrich, On Resolving Church Property Disputes, 58 Ariz. L. Rev. 307, 336 (2016)).[3] The Diocese leaves unanswered why a court dictating what a church's "real" decision is offends First Amendment principles less than applying religiously neutral laws to activity (here, publishing statements about Mr. Guerrero) stemming from an "internal church decision" (the formulation of the Charter). The former—that is, property disputes—concern disputes among church members that result in a declaration that one group of worshipers does not represent the church to

[3] The McConnell and Goodrich article does not advocate for limiting the neutral principles doctrine to property disputes, but instead only addresses what is the best way to apply the doctrine to such disputes.

which they thought they belonged. And such disputes can, in the case of a split congregation, leave the losing side searching for a new property at which to worship. By contrast, tort suits concern whether religious actors' violated generally applicable legal principles and, in cases like Mr. Guerrero's, implicate such actors' interactions with the general public.

More fundamentally, under the First Amendment, the fact that unlawful conduct is rooted in religious decisionmaking or belief does not, on its own, justify an exemption from neutral laws. *See, e.g.*, *Cantwell v. State of Connecticut*, 310 U.S. 296, 303–04 (1940) (the "freedom to act" on religious beliefs "remains subject to regulation for the protection of society"); *United States v. Lee*, 455 U.S. 252, 253 (1982) ("The tax system could not function if denominations were allowed to challenge it because tax payments were spent in a manner that violates their religious belief."); *Smith*, 494 U.S. at 881; *Reynolds*, 98 U.S. at 167.

II. Neutral Principles of Law May be Applied in This Case

Once neutral principles are applied, this is a straightforward case. Under Texas defamation law—the governing "neutral principle"—the relevant question is "how a person of ordinary intelligence" would understand the allegedly defamatory statements. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000). Here, that means answering, from the perspective of the objectively reasonable member of the public, whether the challenged statements identified Mr. Guerrero and whether they accused him of sexually

abusing a child in stating that he abused a "minor." Assuming those questions are answered in the affirmative based on the current record,[4] Mr. Guerrero's claim should be permitted to move forward.

This case, in other words, involves none of the thornier issues regarding the relationship between the First Amendment and tort claims that the Diocese attempts to inject. This is a case based on statements made to the general public and grounded in how that an ordinary member of the public would understand those statements. There is no dispute about the content of religious doctrine. Although the Diocese places much weight on the Catholic definition of "minor," that definition, as just explained, is not actually at issue. Indeed, Mr. Guerrero does not dispute that definition because his claim turns on the understanding of the "person of ordinary intelligence," not on the meaning Catholic doctrine. Nor does this case involve the more difficult questions that may arise when statements are disseminated only to church members or prospective members. *See, e.g.*, *In re Godwin*, 293 S.W.3d 742, 749 (Tex. App. 2009) ("Under the facts of this case, [a false] accusation of inappropriate sexual behavior would likely not be protected."); *Pfeil v. St. Matthews Evangelical Lutheran Church of Unaltered Augsburg Confession of Worthington*,

[4] Although the legal theories that the Diocese marshals in its defense have significant and detrimental implications for amicus's work and for the individuals on whose behalf amicus advocates, amicus takes no position on how, under the precise factual context here, an ordinary person would have understood the allegedly defamatory statements. Accordingly, amicus assumes for purposes of this analysis that the Court of Appeals' holding is correct.

877 N.W.2d 528, 540 (Minn. 2016) (leaving "for another day" whether liability would attach if a pastor "accuse[s] a parishioner of molesting children while knowing the accusation is false" during a "church disciplinary proceeding"); *Korean Presbyterian Church of Seattle Normalization Comm. v. Lee*, 880 P.2d 565, 569 (Wash. App. 1994) (positing that statements made with "actual malice" are not "undertaken for religious purposes").

Nonetheless, the Diocese asserts that liability based on neutral principles would impose a chilling effect on its religious practices. The Diocese's fear of a chill on communications with the church community is unwarranted. Pet.'s Br. at 58-59. Liability for defamatory statements made as part of the Diocese's efforts to shape public opinion—what Mr. Guerrero seeks—does not translate into automatic liability for statements made during livestreaming services or on church websites, as the Diocese claims. Communications with church members and with non-members who voluntarily involve themselves in church matters receive substantial protection. *See, e.g.*, *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 658 (10th Cir. 2002) (no liability where non-member "voluntarily" attended church meetings); Restatement (Second) of Torts § 596 cmt. e (communications to "prospective member[s]" are privileged under tort law unless made with malice). That conclusion is not affected by whether the livestream is password-protected any more than the protection

afforded to statements made from the physical pulpit are affected by whether the front door to the church is locked.

The Diocese also complains of a chill on communications with the general public should Mr. Guerrero's suit be allowed to proceed. But any incidental chilling effect that Texas law generates exists as a byproduct of the effort to combat a harm—injury to reputation—that civil and common law authorities have long sought to protect against. And whatever the extent of the chilling effect with respect to communications with the general public, it is no different for religious entities than it is for all members of society. The Diocese's focus on the potential existence of a chilling effect is therefore misplaced. The relevant issue is whether the Constitution precludes Texas from regulating the harmful conduct at issue in this case.

It does not. Mr. Guerrero's claim, to repeat, is based on statements made to the *general public*, and he seeks compensation for the harm done to his reputation in the *general public*. Amicus is aware of no case holding that tortious speech or conduct aimed at members of the general public is immune simply because it has a religious motive or relates to religious discipline of a church member.[5] But there is ample authority allowing such claims. *See, e.g.*, *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404, 407

[5] That speech is aimed at the general public is, of course, not dispositive. If such speech generates a dispute over religious doctrine—for example, whether an advertised product was actually "kosher"—courts cannot intervene. *See supra* at 7.

(Iowa 2003) (defamatory statements published outside church community); *Wollersheim v. Church of Scientology*, 66 Cal. Rptr. 2d 1, 12 (Ct. App. 1989), *vacated on other grounds* 499 U.S. 914 (1991) (claim based on campaign to bankrupt plaintiff's business actionable); *Alberts v. Devine*, 479 N.E.2d 113, 123 (1985) (allowing claim based on interference with doctor-patient relationship); *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 107 (1975) (allowing claim based on "tortious interference with a business relationship" to proceed). This line in the case law reflects that the "autonomy" the First Amendment affords religious institutions pertains to "internal affairs." *C.L. Westbrook, Jr. v. Penley*, 231 S.W.3d 389, 400 (Tex. 2007). Actively reaching out to unaffiliated members of the public, who have not voluntarily associated with the church, crosses that boundary. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012) ("*outward* physical *acts*" do not receive the protection granted to "*internal* church *decisions*") (emphasis added).

The immunity the Diocese seeks would, moreover, carry significant consequences. Immunity would allow abusers to attempt to silence victims from coming forward by threatening to spread defamatory information or to retaliate against victims if they do come forward.[6] Immunity would allow the

[6] *See, e.g.*, *In re Christian A.*, No. F045534, 2005 WL 698986, at *4 (Cal. Ct. App. Mar. 28, 2005) ("Christian's mother attempted to defame the [rape] victim by claiming the victim had several abortions."); Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 Brook. L. Rev. 397, 400 (2014) ("Abusers commonly threaten the child to maintain

Diocese to interfere with an individual's private business relationships, so long as that conduct was rooted in religious belief—the correctness of which no court can question—about the church's mission. *See, e.g.*, *Wollersheim*, 66 Cal. Rptr. 2d at 12; *cf. Willey v. Harris Cty. Dist. Attorney*, 4:20-cv-1736, Complaint, ¶ 1 (S.D. Tex. May 18, 2020) (free speech challenge to prohibition of solicitation of represented clients by attorney who, based on his "deeply held Christian faith," felt a "calling to protect the rights of people who are accused of crimes").

And, under the Diocese's expansive view that, "when a religious organization's publication pertains to a church's 'faith and mission,' it is free to share that publication with non-adherents," Pet.'s Br. at 61-62, immunity would extend even to statements made about people outside the church community. What if the Catholic Church determined that its "faith and mission" required exposing not just abusers within the Church leadership, but all abusers across society—why should potentially baseless allegations against *anyone* be shielded from the liability?

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the silence."); Micaela Crisma, et al., *Adolescents who experienced sexual abuse: fears, needs and impediments to disclosure*, Child Abuse & Neglect 28 (2004) 1035-1048, at 1044 (explaining that fear of retaliation and causing family distress serves as a barrier to victims reporting of abuse); Cheryl A. Whitney, *Non-Stranger, Non-Consensual Sexual Assaults: Changing Legislation to Ensure That Acts Are Criminally Punished*, 27 Rutgers L.J. 417, 445 n.113 (1996) (discussing abusers' practice of defaming victims in court filings, where litigation privilege provides immunity); Jay Tokasz and Dan Herbeck, Rev. Biernat: *Bishop Grosz used blackmail to silence my report of sex abuse*, The Buffalo News (Sep. 8, 2019), https://perma.cc/HW3X-S7DF (blackmail used to silence victim); *Deacon candidate accuses Minnesota bishop of blackmail*, Dayton Daily News (May 10, 2017), https://perma.cc/5E8Z-DSBC (same).

Finally, the Diocese asserts that immunity is necessary for it to "effectuat[e] policies that treat sexual abuse claims by clergy with transparency and accountability." Pet.'s Br. at 63. Based on amicus's considerable experience working on behalf of victims, that simply is not true. But, even if it were, the problem applies equally to religious and non-religious actors alike and is not rooted in the Diocese's religious nature. And it is a policy concern that the Diocese must take up with the Texas legislature. Critically, that type of narrow legislative immunity would not carry the negative consequences for victims that would come with the Diocese's proposed unbridled immunity not just for all defamation claims, but for all tort claims based on neutral principles.

CONCLUSION

This Court should affirm the Court of Appeals and deny the petition for mandamus.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4, I certify that this Brief contains 3,458 words, excluding the case caption, table of contents, index of authorities, identity of amicus curiae, and certificates. The text of the document is at least 14-point font except for the footnotes, which are in 12-point font.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on the following counsel of record via electronic transmission on August 3, 2020:

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