No. 20-0005

In the Supreme Court of Texas

DIOCESE OF LUBBOCK,

Petitioner,

v.

JESUS GUERRERO,

Respondent.

On Petition for Review from the Court of Appeals for the Seventh Judicial District, Amarillo, Texas, No. 07-19-00280-cv

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BRIEF FOR *AMICI CURIAE* PROFESSORS DOUGLAS LAYCOCK AND MICHAEL S. ARIENS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

Amici are professors Douglas Laycock and Michael S. Ariens, legal scholars whose research and scholarly interests focus on religious liberty. They also routinely represent parties or amici in litigation regarding the Religion Clauses.

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law and Professor of Religious Studies at the University of Virginia and the Alice McKean Young Regents Chair in Law Emeritus at the University of Texas, where he served for 27 years. He is one of the nation's leading authorities on the law of religious liberty, having taught and written about the subject for four decades at Texas, Virginia, the University of Chicago, and the University of Michigan. He has testified many times before Congress and the Texas legislature and has argued many religious freedom cases in the courts, including the U.S. Supreme Court. He was lead counsel for petitioner in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), a decision that controls this case. His many writings on religious liberty have been republished in a five-volume collection under the overall title *Religious Liberty*.

[*] No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to this brief's preparation or submission. *See* Tex. R. App. P. 11.

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INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, a tort plaintiff seeks to enlist the state courts in imposing liability on a church for removing one of its clergy and later explaining that removal to church members in accordance with internal church policy and the church's canon law. *Amici* submit this brief because imposing liability on the Diocese of Lubbock under the circumstances here would unambiguously violate the ministerial exception, a well-established constitutional doctrine that protects the autonomy of religious organizations to select—as well as to discipline and terminate—key religious personnel, including ordained ministers such as Plaintiff Jesus Guerrero, who until his removal served as a deacon in the Diocese.

As the Catholic Church in the United States has publicly recognized, instances of sexual abuse by church leaders have for the past two decades created a "crisis without precedent" for the Church and its members, prompting significant changes in internal Church governance. A:37.[1] Most recently, the Church announced a policy requiring dioceses to be "open and transparent" about allegations of sexual abuse, especially "with regard to informing parish and other church communities directly affected by sexual abuse." A:46.

[1] Record citations will be designated by "CR:__" while citations to the appendix accompanying the Diocese's Petition for Review will be designated by "A:__."

At issue in this case are actions the Diocese of Lubbock took to address credible allegations of sexual misconduct by its clergy in accordance with this policy. In 2019, the Diocese shared with its members a list of church leaders who had been credibly accused of sexually abusing "minors," which under canon law are defined to include persons who "habitually lack[] the use of reason." CR:28; *see also* A:51 n.1. Plaintiff was included because he had twice been credibly accused of engaging in sexual misconduct with such a person—a woman over 18 years of age who habitually lacked the use of reason. CR:29; *see also* CR:56 at ¶ 12. To protect the church community, Plaintiff was "Permanently Removed from Ministry." CR:28, *see also* CR:56 at ¶ 12. He was not, however, laicized; he therefore remains under the authority of the Church. Pet. for Review at 5.

The list—which included Plaintiff's name, his former assignments within the Diocese, and an explanation of his removal from the ministry—was posted on the Diocese's website, the primary avenue through which the Diocese communicates with its nearly 140,000 members. CR:55–57 at ¶¶ 7, 13; CR:132. Plaintiff demanded that his name be retracted from the list, given that the allegations against him did not involve a victim under the age of 18 and therefore, in his view, he could not be said to have "been accused of sexual abuse and/or misconduct against a minor." CR:8 at ¶ 17; *see also* CR:57 at ¶ 14.

In response, the Diocese revised the list, making clear that "[u]nder canon law . . . a person who habitually lacks the use of reason is considered equivalent to a minor"; that "[c]anon law . . . is binding on the Diocese of Lubbock and its clerics"; and that while the Diocese "has no information of a credible allegation of sexual abuse of a minor below the age of eighteen (18) by [Plaintiff]," "there is a credible allegation against [Plaintiff] of sexual abuse of a person who habitually lacks the use of reason." CR:28–29. Thus, the initial and revised lists—both of which were communicated to the faithful in the Diocese in accordance with internal church policy—were consistent with the Diocese's own interpretation and application of canon law.

Given that the subject of sexual abuse by leaders of the Catholic Church continues to be a matter of intense public interest, the Diocese's actions were reported by local news outlets, and representatives of the Diocese gave public statements and interviews. *See* CR:111–38. Neither the Diocese nor any of its representatives, however, mentioned Plaintiff's name publicly apart from his inclusion on the list posted on the Diocese's website. *Id.*

Plaintiff filed his lawsuit to prohibit the Diocese from speaking to its members about his removal from the ministry and the reasons for it. *See, e.g.*, CR:10 at ¶ 35. He seeks not only to impose monetary liability on the Diocese but also to force the Diocese to retract its explanation of his discharge and effectively exonerate him—in

direct contravention of the Diocese's understandings of the internal policies and canon laws of the Church. As explained more fully below, this is precisely the type of legal remedy that the ministerial exception prohibits courts from imposing on churches at the request of their ministers. The ministerial exception extends not just to a church's selection, removal, or supervision of a minister but also to the church's explanation of that decision to its faithful, as the Diocese did here. It applies equally to any claim—including Plaintiff's defamation claim—seeking to impose monetary or other liability on a church for such explanations.

The court of appeals incorrectly held that the Diocese forfeited this First Amendment right because its explanation of Plaintiff's removal from the ministry went beyond "the confines of the church." A:31. The Court should firmly reject this unduly narrow view of the ministerial exception; it penalizes churches for carrying out their fundamental religious mission, unavoidably entangles courts in theological questions, and contravenes *Hosanna-Tabor*'s bar on inquiring into church motives. The Diocese's removal of Plaintiff from the ministry, and its explanation of that removal to its members, is a matter of prime ecclesiastical concern, and authority over that decision belongs to the Diocese alone.

ARGUMENT

I. The ministerial exception provides an absolute defense to civil liability for a church's actions in selecting, controlling, and discharging its ministers.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), the United States Supreme Court explicitly and unanimously affirmed 40 years of unanimous lower court precedent establishing that the First Amendment to the United States Constitution protects the right of religious organizations to autonomously select and control those who perform significant religious functions, including ordained members of the clergy such as Plaintiff. *Id.* at 186–90. As the Court explained, "the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone" and is immune from interference by the courts. *Id.* at 194–95 (citation omitted). This principle, known as the ministerial exception, falls within the broader constitutional doctrine of church autonomy and provides a targeted legal defense that protects churches from civil liability for their decisions concerning the hiring, removal, or supervision of clergy.

The ministerial exception is a crucial safeguard of core religious rights. The First Amendment "protects the freedom of religious groups to engage in certain key religious activities . . . as well as the critical process of communicating the faith . . . in its own voice, both to its own members and to the outside world." *Id.* at 199, 201

(Alito, J., concurring). Courts have recognized that "[a] religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses," and thus, "a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very 'embodiment of the message' and 'its voice to the faithful.'" *Id*. at 201 (quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006)).

The principle that government has no authority to interfere with a church's internal affairs "has long meant, among other things, that religious communities and institutions enjoy meaningful autonomy and independence with respect to their governance, teachings, and doctrines." Thomas C. Berg, et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 175 (2011). This includes the church's right to "control . . . the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. Ensuring the religious institution's autonomy over the selection and control of those with significant religious responsibilities, and especially of its leaders, is an essential component of the religious freedoms enshrined in the First Amendment.

The ministerial exception is thus rooted in three of the First Amendment's protections: the Free Exercise Clause, the Establishment Clause, and freedom of association. The Free Exercise Clause protects the right of churches to select and

control the individuals who perform important religious functions on their behalf, because those activities are central to the church's ability to "shape its own faith and mission." *Id*. The Establishment Clause, meanwhile, prevents courts from appointing ministers, reinstating ministers whom a religious organization has disciplined or terminated, or evaluating the reasons a church disciplined or terminated a minister. "[G]overnment involvement in such ecclesiastical decisions" is "prohibit[ed]." *Id*. at 189. Thus, these two clauses form a "two-way street, protecting the autonomy of organized religion and not just prohibiting governmental 'advancement' of religion." Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 HARV. J. L. & PUB. POL'Y 821, 834 (2012). Finally, freedom of association demands the ministerial exception because the "very existence [of a religious group] is dedicated to the collective expression and propagation of shared religious ideals." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). Freedom of association thus protects the right of churches to control their membership, their leadership, and those authorized to speak for them. In sum, it protects the right of churches to autonomously shape their message and mission.

II. The ministerial exception extends not just to the removal of clergy but also to a religious organization's explanation of that removal to its faithful.

To fulfill its function of preserving autonomy over a church's ecclesiastical functions, the ministerial exception extends not just to a church's hiring, discipline,

or termination of a minister but also to its explanation of that decision to its faithful. The ministerial exception would be meaningless if it protected a religious organization's decision to remove a minister but exposed it to liability for announcing and explaining that removal to parishioners.

The purpose of the ministerial exception is to protect "the internal governance of the church." *Hosanna-Tabor*, 565 U.S. at 706; *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1871) ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them . . . ."). Church self-governance by definition includes the communication of decisions about church discipline and removal of ministers to the congregation; such communications are part of the church's "voice." The Supreme Court held almost 150 years ago that "[t]he right to organize voluntary religious associations to assist in the *expression* and *dissemination* of any religious doctrine" is "unquestioned." *Watson*, 80 U.S. (13 Wall.) at 728–29 (emphases added). Justices Alito and Kagan echoed this fundamental idea in *Hosanna-Tabor*, explaining that the ministerial exception plays a central role in protecting the ability of religious organizations to express their religious messages: "both the content and credibility of a religion's *message* depend vitally on the character and conduct of its teachers. . . . For this reason, a religious

body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very 'embodiment of its message' and '*its voice* to the faithful.'" *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (emphases added) (citation omitted). If the "character and conduct" of a church's leaders are central to its religious message, the ministerial exception must extend to a religious organization's explanation regarding the hiring, discipline, and removal of those leaders.

Here, the record demonstrates that the Diocese disclosed Plaintiff's name only twice, and did so as part of communications directly to members of the Church: first, in the initial list posted on January 31, 2019, and second, in the revised list posted in response to Plaintiff's complaint about the use of the word "minor" on April 10, 2019. CR:57 at ¶¶ 13–14; *see also* CR:59–65. Both lists were posted to the Diocese's website, which is the "ordinary means" used by the Bishop of Lubbock to "communicat[e] with the Catholic faithful of his diocese." CR:55 at ¶ 7 (declaration of Bishop Robert M. Coerver). For example, the Bishop posted a letter in March of this year advising parishioners that, in light of the Coronavirus outbreak, they may avoid using the Chalice during Communion or offer a nonphysical greeting during the Sign of Peace.[2]

[2] Bishop Robert M. Coerver, *Letter to the People—Coronavirus*, CatholicLubbock.org (March 2020), https://catholiclubbock.org/Letter%20to%20the%20People%20%20Coronavirus%20March%202020.pdf.

The Diocese's use of its ordinary means of communicating with parishioners to explain its earlier removal of Plaintiff falls within the core of the ministerial exception. Indeed, in *Westbrook v. Penley*, this Court affirmed the dismissal of civil claims against a church leader for communicating confidential information about a disciplined church member under the doctrine of church autonomy, a broader set of constitutional principles that includes the ministerial exception. 231 S.W.3d 389, 404–05 (Tex. 2007). The Court explicitly acknowledged that imposing liability on a church for communicating with its members would "impinge upon [the church]'s ability to manage its internal affairs." *Id.* at 400. Plaintiff's claim here is far more damaging to the Diocese's internal governance. Here, the alleged wrong derives from the Church informing the congregation about the misconduct of *a minister*; in *Westbrook*, the alleged wrong derived from the church informing the congregation about the misconduct of *another member*. *See id*. at 393. The interest of the church in informing its members about the removal of a minister is even more important than its interest in disciplining a church member. A minister is the church's voice, messenger, and representative. *See Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). Thus, the claim here implicates not just broader principles of church autonomy but the narrower—and at the same time stronger—protections of the ministerial exception.

III. A civil tort claim—like the defamation claim here—is barred by the ministerial exception if it interferes with a religious organization's assessment or evaluation of its clergy.

The ministerial exception is not confined only to statutory employment claims like the antidiscrimination claim at issue in *Hosanna-Tabor*. The doctrine applies equally to any claim that would impose monetary or other liability on a church for its explanation concerning the selection, discipline, or removal of a church leader—including the defamation claim at issue here. As *Hosanna-Tabor* explained, "[a]n award of such relief would operate as a penalty on the Church for terminating an unwanted minister"—which is "precisely" the type of liability "that is barred by the ministerial exception." 565 U.S. at 194; *cf. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335–36 (1987) (explaining that "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission"). If application of the ministerial exception turned on the plaintiff's civil cause of action (for example, if its application depended on whether the claim was based on common-law tort, a contract, or a civil rights statute), then a plaintiff could nullify the doctrine through artful pleading.

No matter how a plaintiff pleads it, a claim is barred by the ministerial exception if it would require civil courts to review a church's evaluation of a minster's job performance or its handling of the minister's hiring, firing, or

supervision. A contract claim for unpaid salary for time actually worked could proceed; a contract claim alleging that the church lacked adequate cause to discharge the plaintiff could not. A personal injury or worker's compensation claim for a slip-and-fall on the church steps could proceed; the defamation claim here, which challenges a church's statement of its reasons for discharging a minister, cannot.

This is why courts have applied the ministerial exception to dismiss a variety of civil claims that question a church's official treatment of clergy or others in positions of religious leadership. In *Sixth Mount Zion*, for example, the Third Circuit applied the ministerial exception to bar a minister's claim for alleged breach of his employment contract after the church removed him for "failing to provide adequate spiritual leadership." *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 121 (3d Cir. 2018). The court held that to adjudicate the claim would "intrude on internal church governance, require consideration of church doctrine, constitute entanglement prohibited under the ministerial exception, and violate the Establishment Clause." *Id*. at 122. In another example, the Sixth Circuit, in *Ogle v. Church of God*, affirmed the dismissal of a minister's claims for defamation, breach of implied contract, tortious interference with business relationships, conspiracy, and invasion of privacy, all of which were based on an internal church complaint regarding allegations of inappropriate sexual behavior. 153 F. App'x 371 (6th Cir. 2005) (unpublished). Dismissal was required because adjudicating the minister's

claims would "implicate the Church of God's internal disciplinary proceedings." *Id*. at 376. This conclusion was sufficiently unremarkable that the decision was not designated for publication.

Defamation claims, in particular, are routinely dismissed under the ministerial exception. *Ogle*, for example, applied the ministerial exception to a defamation claim because the claim implicated "disciplinary proceedings which were initiated precisely because Ogle's actions violated the Church of God Minutes of the General Assembly." *Id*. The claim, like Plaintiff's defamation claim here, called into question the church's self-governance under internal church policy; it was therefore categorically barred. *Id*.

The list of cases in which courts have barred defamation claims on the basis of the ministerial exception is lengthy. *See, e.g.*, *Patton v. Jones*, 212 S.W.3d 541, 552 (Tex. App.—Austin 2006, pet. denied) ("[W]e find ample support for the conclusion that allegedly defamatory statements made in connection with a church's decision to terminate a minister's employment are protected from secular review, even if the statements do not expressly involve religious doctrine or are not made prior to the church's decision."); *Heard v. Johnson*, 810 A.2d 871, 883 (D.C. Cir. 2002) (collecting cases denying defamation claims against religious organizations); *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594, 613 (N.D. Tex. 2008) (holding that "defendants enjoy First Amendment protection" against "all of

the claims" raised by plaintiff including, specifically, defamation); *Bourne v. Ctr. on Children, Inc.*, 838 A.2d 371, 380 (Md. Ct. Spec. App. 2003) ("Even if Reverend Allison made defamatory statements in this letter and placed appellant in a false light, this Court may not consider the issue because it relates to appellant's employment with the Church. Clearly, any statements made by appellees with regard to appellant's performance as a minister are protected . . . .").

Plaintiff's defamation claim here is likewise subject to the ministerial exception and must be dismissed.

IV. A church does not lose the protections of the ministerial exception merely because its representatives speak publicly about matters of intense public concern.

The court of appeals held that, by "opting to leave the confines of the church," the Diocese forfeited its First Amendment right to freely communicate its internal assessment and evaluation of clergy without fear of state interference. A:31. As an initial matter, this view ignores undisputed record facts.

The Diocese's statements about Plaintiff—the only statements by the Diocese that mentioned Plaintiff by name—were made directly to Church members through the Diocese's website, the ordinary avenue used to communicate with the faithful. CR:55 at ¶ 7. The court of appeals treated this posting as going outside the Church. *See* A:26. But every effective and affordable method of reaching current and former Church members within the Diocese would inevitably reach non-Catholics as well.

The Diocese includes nearly 140,000 current members, and one in five American adults identifies as Catholic.[3]

Additionally, the posting implored members and former members of the church who had been victims of sexual abuse to come forward. CR:27. "[I]n spite of its best efforts," the Diocese could not be sure it had identified all of these Church members unless they came forward individually, *id*., and relying only on in-person communications made during Church meetings would be ineffective. The Diocese could not be confident that each potential victim was still attending services and, in any event, Church meetings do not include parishioners unable to attend services for health or other reasons, nor do they include former members of the Diocese who have relocated.

Finally, the fact that third-party media entities also independently reported Plaintiff's name, *see* CR:113–38, does not mean that the Diocese itself "opt[ed] to leave the confines of the church," A:31. It instead reflects what is obvious: the subject matter, allegations of sexual abuse by Catholic clergy, is of intense public concern and will unavoidably be the subject of discussion among both Church members and the general public.

[3] *See* CR:132; *see also, e.g.*, Pew Research Center, *In U.S., Decline of Christianity Continues at Rapid Pace*, PewForum.org (Oct. 17, 2019) https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/ (reporting data from various sources, including a Pew survey, concerning religious affiliation in the United States).

But even putting aside the particular facts of this case, the court of appeals' unduly narrow view of church autonomy is contrary to the protections afforded by the ministerial exception. The court of appeals' notion that the Church forfeited its religious liberty because it spoke to the world at large is fundamentally inconsistent with the Church's mission to evangelize the world and bring others to what the church understands to be the saving grace of Jesus Christ. *See* Catholic Diocese of Lubbock, *Catechesis*, CatholicLubbock.org, https://catholiclubbock.org/Catechesis.html ("Rooted in the God who loves us, we are missionary disciples through evangelization."). That mission is shared by substantially all Christian churches, and many other faiths have similar evangelizing goals for their teachings. And there can be no doubt that the scandal of sexual abuse in the Catholic Church is a substantial obstacle to evangelism—an obstacle that, to be overcome, must be addressed publicly and transparently.

If the court of appeals' reasoning were accepted, it would penalize a fundamental religious mission, unavoidably entangle courts in theological questions, and contravene *Hosanna-Tabor*'s bar on inquiring into church motives. More fundamentally, it would impede the ability of churches to control their message by explaining—in their own voice, as the Diocese did here—the misconduct of clergy and actions taken to protect church members.

"When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). Thus, the ministerial exception must be broad enough to "protect[ ] the freedom of [each] religious group[] to engage in certain key religious activities, . . . as well as the critical process of communicating the faith . . . in its own voice, both to its own members *and to the outside world*." *Id*. at 199, 201 (emphasis added); *see also Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 658 (10th Cir. 2002) (explaining that the First Amendment protects "rights of the church to discuss church doctrine and policy freely" and includes "the right of the church to engage freely in ecclesiastical discussions with members *and non-members*" (emphasis added)). The ministerial exception "gives concrete protection to the free expression and dissemination of any religious doctrine." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (quoting *Watson*, 80 U.S. (13 Wall.) at 727). Imposing liability on the Diocese for disclosing the reasons for Plaintiff's removal from the ministry would directly impinge on "the critical process of communicating the faith . . . in [the Diocese's] own voice." *Id*. at 199, 201. That process of communication becomes more important—not less—when the subject matter implicates a topic of public interest.

Contrary to the court of appeals' decision, it does not matter if the Diocese's dissemination of the two lists containing Plaintiff's name was both "a church matter"

and also a matter relevant to "society at large." A:29. Sexual abuse of Church members by the clergy is plainly an internal matter that has equally plainly become a matter of public concern. Legitimate public attention to the issue does not make it any less a matter of Church governance; the world is watching to see if the Church can govern itself.

Moreover, a church's motivation for explaining the removal of a minister can be secular as well as ecclesiastical, or secular instead of ecclesiastical, and still receive the protections of the ministerial exception. The courts do not inquire into the church's motive. In *Hosanna-Tabor*, the Court explained that application of the ministerial exception cannot depend on whether the church articulated "a religious reason" for its conduct. 565 U.S. at 194. The ministerial exception is absolute, meaning that the right to assess and evaluate ministers—whether done publicly or in private—"is the church's alone," even if motivated entirely by nonreligious concerns. *Id.* at 194–95. "[T]he mere adjudication" of the Church's reasons "would pose grave problems for religious autonomy" by placing "a civil factfinder . . . in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Id.* at 205–06 (Alito, J., concurring). The court of appeals violated this clear directive by attempting to identify and evaluate the Diocese's motives for explaining its internal assessments about certain clergy. *See* A:29–30.

The court of appeals assumed that the Diocese's expression of concern about, and desire to engage with, "society at large" meant there was no "nexus between the Diocese's conduct and any theological, dogmatic, or doctrinal reason for engaging in it" and no nexus with "the internal management of the church." *Id.* This improper evaluation of the Diocese's motives was an integral part of the court of appeals' justification for holding that principles of religious autonomy do not protect the Diocese. *See* A:26–31 (emphasizing the Diocese's motives throughout its entire analysis). The United States Supreme Court unanimously rejected this approach in *Hosanna-Tabor*, instead adopting a bright-line rule that precludes any inquiry into a church's motivations in cases implicating the ministerial exception. *Hosanna-Tabor*, 565 U.S. at 194–95. As the Court explained, "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason." *Id*. at 194. "The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,' is the church's alone." *Id*. (citation omitted). The Court must apply that bright-line rule here and hold that authority over the Diocese's clergy—whether exercised publicly or privately—"is the [Diocese's] alone." *Id*. at 194–95.

In any event, the record on appeal shows that the Diocese had a special need to explain its decision, a need that was directly connected to its religious message. The problem of sexual abuse within the Catholic Church has been heavily

publicized, and the subject has been eroding trust in the Church among both members and nonmembers alike. *See* CR:57 at ¶ 15; CR:117; CR:124–25. In fact, much of the problem the Church was trying to solve through the disclosures at issue in this case was rooted in secrecy and lack of transparency. *See* CR:55 at ¶ 7; CR:57 at ¶ 15; CR:119; CR:125.

Consistent with these concerns, the Diocese communicated to its faithful information about its own internal assessments of clergy credibly accused of sexually abusing minors. CR:57 at ¶ 7. This was done pursuant to internal Church policy and in a manner consistent with canon law. *See* CR:55–56. Plaintiff does not dispute that the Diocese's disclosures accurately reflected Church records and were made pursuant to the Church's official policies and internal laws. Indeed, Plaintiff directly challenges those policies and laws, asking the court to substitute his preferred secular definition of "minor" for the Catholic Church's definition of "minor" and to dispute the findings of the Church's own investigation of his alleged wrongdoing. CR:67–74. His affidavit, for example, disputes the Diocese's investigation, procedures, and ultimate determination about his misconduct. CR:148–51. Judicial inquiry into these matters would severely entangle the court in the Diocese's internal disciplinary procedures and its interpretation and application of Catholic canon law.

In its filings before this Court, the Diocese cites numerous court decisions recognizing church autonomy despite disclosures to the public and nonmembers. *See* Mandamus Pet. at 18; *see also Doe v. Pontifical Coll. Josephinum*, 87 N.E.3d 891, 896 (Ohio Ct. App. 2017) (invoking ecclesiastical abstention to affirm dismissal of claims based on a public posting regarding the plaintiff's expulsion from a Catholic seminary). The court of appeals cited a number of cases to support its conclusion that the Diocese lost the protections of the First Amendment when it spoke publicly about its efforts to address allegations of sexual abuse within the Church. *See* A:22–26. The lower court's interpretation of those cases, however, is inconsistent with both the purpose of the ministerial exception outlined above and *Hosanna-Tabor*'s bright-line rule barring inquiry into a church's motivations. And none of the cases involved facts analogous to those here, where a church communicated directly to the faithful to explain its removal of a minister in connection with an issue of intense public concern and, separately, discussed that issue publicly because it would unavoidably become a subject of news reporting. *See, e.g.*, *Patton*, 212 S.W.3d at 555 & n.12 (acknowledging only that "some courts have distinguished between defamatory remarks published to members of the church versus communications with third parties" without analyzing or considering the circumstances under which imposing liability on a church for its public communications would violate the First

Amendment). For all of these reasons, those cases, and the lower court's interpretation of them, have no persuasive value here.

V. The Court cannot apply "neutral principles" to impose liability on a church for its decision to discharge a clergyman and explain that decision to its members.

The court of appeals purported to invoke "neutral principles" in concluding that this suit could proceed. *See* A:21, 30–31. The "neutral principles" methodology, however, has no place here. As explained above, the ministerial exception is absolute. Once the Court determines that the ministerial exception applies to the Diocese's explanation of Plaintiff's discharge, "the First Amendment requires dismissal of [Plaintiff's] suit against [the Diocese]." *See Hosanna-Tabor*, 565 U.S. at 194. Courts are not permitted to apply "neutral principles" to determine whether a church followed its own procedures or provided valid justifications for its actions. *See id.* at 187, 194–95. Indeed, it is not for courts to balance secular and religious interests—"the First Amendment has struck the balance for us." *Id.* at 196.

Here, the Plaintiff's claim depends on a determination that the Diocese's explanation for his removal was wrong, and that Plaintiff was not discharged based on credible allegations that he had sexually abused a "minor." "[I]t is precisely such a ruling that is barred by the ministerial exception." *Id.* at 194. "[T]he authority to select and control who will minister to the faithful," and the underlying procedures

and explanations used to arrive at those decisions, are "strictly ecclesiastical" and therefore "the church's alone." *Id.* at 195.

Accordingly, the United States Supreme Court has never applied "neutral principles" to a dispute concerning the discharge of a clergy member. *See Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929). The Court has instead held that "it is impermissible for the government to contradict a church's determination of who can act as its ministers." *Hosanna-Tabor*, 565 U.S. at 185.

Texas courts have likewise "long recognized that courts 'should not involve themselves in matters relating to the hiring, firing, discipline, or administration of clergy.'" *Mouton v. Christian Faith Missionary Baptist Church*, 498 S.W.3d 143, 150 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (quoting *Lacy v. Bassett*, 132 S.W.3d 119, 123 (Tex. App.—Houston [14th Dist.] 2004, no pet.)); *cf. Westbrook*, 231 S.W.3d at 397 ("While it might be theoretically true that a court could decide whether Westbrook breached a secular duty of confidentiality without having to resolve a theological question, that doesn't answer whether its doing so would unconstitutionally impede the church's authority to manage its own affairs."). "This is because '[t]he relationships between an organized church and its ministers is its

lifeblood'" and thus "[m]atters concerning this relationship must be recognized as a prime ecclesiastical concern." *Mouton*, 498 S.W.3d at 150–51 (quoting *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.)).

The cases in which the United States Supreme Court has applied "neutral principles" involved church property disputes—not disputes questioning the selection, supervision, or removal of individuals identified by a church as clergy. *See Jones v. Wolf*, 443 U.S. 595 (1979); *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969). This Court has adopted the same approach to the neutral principles methodology. In *Westbrook*, it explained that "[t]he Supreme Court has recognized an exception to the doctrine of church autonomy when neutral principles of law may be applied to resolve disputes over *ownership of church property*." 231 S.W.3d at 398 (emphasis added). Several years later, this Court expressly held in *Masterson v. Diocese of Northwest Texas* "that Texas courts should use the neutral principles methodology *to determine property interests* when religious organizations are involved." 422 S.W.3d 594, 607 (Tex. 2013) (emphasis added).

The court of appeals mistakenly relied on this Court's decision in *Masterson* in concluding that the "neutral principles" analysis applies to the dispute here. A:20–21. But in *Masterson*, the Court addressed only the methodology to be used in

resolving church property disputes. *Episcopal Diocese of Fort Worth v. Episcopal Church*, 422 S.W.3d 646, 650 (Tex. 2013) ("In *Masterson* we addressed the deference and neutral principles methodologies for deciding property issues when religious organizations split."). "*Masterson* 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." *Mouton*, 498 S.W.3d at 150.

The court of appeals misapplied the law when it relied on neutral principles in this case. Under both federal and Texas case law, there is no place for applying neutral principles to Plaintiff's dispute. The Diocese's removal of Plaintiff from the ministry, and its explanation of that removal to its members, is a matter of "prime ecclesiastical concern," *id*. at 151, and the authority to resolve it is "the church's alone," *Hosanna-Tabor*, 565 U.S. at 195.

PRAYER

For the foregoing reasons, the Court should reverse the court of appeals' decision and dismiss respondent's claims with prejudice.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), I certify that this brief contains 6,128 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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CERTIFICATE OF SERVICE

I certify that, on March 20, 2020, a true and correct copy of the foregoing Brief for *Amici Curiae* was served via electronic service on all counsel of record.

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