

No. 17-1005

The Supreme Court of Texas

**IN RE JOHN DOE, INDIVIDUALLY AND AS
NEXT FRIEND FOR JOHN DOE, JR., A MINOR**

*Original Proceeding
From the Fifth Court of Appeals - Dallas
Cause No. 05-17-00493-CV*

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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REPLY ARGUMENT

The Episcopal School of Dallas asks this Court to endorse the court of appeals' opinion applying the Ecclesiastical Abstention Doctrine and granting ESD carte blanche to act contrary to the express representations it made concerning its secular education policies to induce Doe to pay significant sums of money. This request is in the face of evidence that, at a minimum, raises fact questions concerning whether: (1) ESD is a faith-based institution entitled to invoke the Doctrine; and (2) resolution of Doe's claims implicate religious doctrine or belief. Under these circumstances, case law—including that cited by ESD—compels the conclusion that the Doctrine does not require dismissal of Doe's claims.

ESD attempts to spin the issue here as well-settled, but it is not. This Court has held that the Doctrine prohibits a court from interfering in a *church's* internal affairs involving the *church's moral code*. But this Court has never decided whether the Doctrine applies to a private school claiming a religious affiliation. Nor has this Court determined if the Doctrine applies when the claims implicate a private school's "internal affairs"—even when the evidence shows those affairs do *not* concern religious doctrine and instead concern false representations about the school's secular education policies. The court of appeals held that the Doctrine applies, setting a dangerous precedent that encourages private schools to claim the sanctuary of religion to escape their express promises to parents, students, and

vendors alike.¹ As troublesome, the court of appeals' opinion can be read to give private schools, under the guise of religion, free reign to engage in abusive discipline of students and, relying on the Doctrine, avoid responsibility for egregious behavior simply because the school claims such conduct is part of its "internal affairs."

Even if ESD is correct that one of its purposes is to foster students' spiritual development, its primary purpose is providing students with a secular education in preparation of college. And the false and broken promises ESD made about how it would carry out that education are not governed by and do not implicate religious doctrine in any way. This Court should grant review to address the important question of whether and when the Doctrine applies to private schools claiming a religious affiliation and hold that the court of appeals abused its discretion in applying the Doctrine to preclude Doe's claims.

¹ Significantly, although ESD asserts the Doctrine to avoid claims concerning its promises to Doe in the Enrollment Agreement, ESD has filed a lawsuit against other parents to recover tuition amounts under the very same agreement. ESD cannot have it both ways. Either jurisdiction exists to resolve disputes over this secular education contract or it does not. ESD's petition in this other lawsuit, *The Episcopal School of Dallas v. Bishop*, Cause Number CC-17-01828-E in Dallas County, is attached in Appendix A; see also https://courtsportal.dallascounty.org/DALLASPROD/DocumentViewer/Embedded/XzpHvkBQf_89XHs1uzRgPMT0wSuZo7FEI9TjqzisTjgygaKImIa2IVLGzJQxk9hVi6tA9dsBfmcojNoqaCUb2zIT-EdFD5HVtn9xKqSLRwQ1?p=0.

I.

Neither the record nor the law supports ESD's claim that it is a "faith-based institution" as a matter of law.

ESD spends a considerable portion of its Response wrongly contending that Doe primarily argues that ESD is not "religious enough" to benefit from the Doctrine. Doe does not dispute that some evidence shows ESD has a nominal connection with the Episcopal religion. But the evidence does not "conclusively establish" that ESD is a "faith-based institution" as ESD contends. Response at 19. At most, the evidence creates a fact question regarding this issue. When such circumstances exist, "the trial court cannot grant the plea to the jurisdiction, and the fact issue must be resolved by the fact finder." *Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004); *see also C.L. Westbrook, Jr. v. Penley*, 231 S.W.3d 389, 398-99 (Tex. 2007).

Doe's Petition reserved for briefing on the merits the issue of whether ESD is a faith-based entity entitled to invoke the Doctrine. Nonetheless, the Petition identifies evidence that refutes ESD's claim that it is a "faith-based institution" as a matter of law. *See* Petition at 3-4, 16-17. Suffice to say here, this evidence shows that although students attend 25-minute daily chapel sessions, these sessions are sometimes led by non-Episcopalian speakers discussing nonreligious topics like "electronic safety" and "social media." MR:226. Further, ESD has no contract or formal affiliation with the Episcopal Church, has no clergy on its board, does not

require its staff or board members to be of a certain faith, is not controlled or managed by a church or clergy, and has no seminary preparation courses. MR:214-15, 220-25, 230, 258; *see also* SMR:782, 792, 795, 797. Over 85% of ESD students are not Episcopalian; many do not affiliate with any religion. SMR:786.

Additionally, the Episcopal Church does not provide ESD with financial support and does not have an ownership interest in ESD. MR:214, 255. As the Bishop of the Episcopal Church in Dallas testified, ESD is not a school formed from the vestry of the parish, is not part of or an auxiliary of the church, is not supervised by the church, and was formed “*as an independent school from the beginning.*” MR:255 (emphasis added).

ESD claims this evidence is irrelevant because the First Amendment “broadly protects a variety of organizations with religious missions and purposes.” Response at 11. But ESD is a markedly different organization than those in the cases ESD cites.

- In *In re St. Thomas High School* and *In re Vida*, the private schools were either located in the Catholic Diocese or expressly operated “under the laws of the Catholic Church.” *In re St. Thomas High School*, 495 S.W.3d 500, 502 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding); *In re Vida*, No. 04-14-00636-CV, 2015 WL 82717, at *1 (Tex. App.—San Antonio Jan. 7, 2015, orig. proceeding).

- In *Klouda v. Southwest Baptist Theological Seminary*, the seminary school was “strictly a religious institution” with the goal of “preparing persons for Christian ministry,” and “subject to the spiritual control and leadership of the [Southern Baptist] Convention.” 543 F. Supp. 2d 594, 600-01 (N.D. Tex. 2008).
- In *Leboon v. Lancaster Jewish Community Center Ass’n*, rabbis served as active advisors to the board and were involved in the hiring and firing of the organization’s employees. 503 F.3d 217, 227-28 (3rd Cir. 2007). Further, the organization received “instrumental financial support” from synagogues and local Jewish organizations. *Id.*
- In *Killinger v. Samford Univ.*, the defendant was a divinity school whose “inherent purpose ... is the study of God and God’s attributes.” 113 F.3d 196, 200 (11th Cir. 1997). The school’s trustees had to be Baptist and its largest single source of funding was the Baptist Convention. *Id.* at 199.²

² ESD cites several other cases to support its view that it is a faith-based institution as a matter of law. Response at nn.4-5. But those cases similarly involve entirely distinguishable organizations. *See, e.g., Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 224 (6th Cir. 2007) (suit by employee who made pastoral visits and served as chaplain against hospital with Clinical Pastoral Education program that operates “in accordance with the Social Principles of The United Methodist Church”); *Hall v. Baptist Mem. Health Care*, 215 F.3d 618, 620, 625 (6th Cir. 2000) (suit against hospital with “direct relationship” to Baptist church, managed by members of Baptist churches affiliated with State Baptist Conventions; and against college with “atmosphere [that] is permeated with religious overtones”); *Calvary Christian Sch., Inc. v. Huffstutler*, 238 S.W.3d 58, n.6 (Ark. 2006) (suit against parochial school expressly operating on “Biblical

Accordingly, as even ESD's cases show, ESD incorrectly contends that it is a faith-based institution as a matter of law simply because it declares an "Episcopalian faith and philosophy." Response at 13. Other factors, such as the school's purpose, the staff involved, financing, management, and governance by religious rules are relevant to the inquiry.

II.

The record and law also refute ESD's claim that the Doctrine's application is conclusively established.

A. The record does not show that this dispute concerns the ESD's "religious principles and values."

ESD claims that the Doctrine applies because Does' claims would require a court to consider the school's "religious principles and values." Response at 14. But ESD cites no evidence in support. And, in fact, the record establishes the contrary by showing that Does' claims concern ESD's secular education policies. *See* SMR:360 (code of conduct based on "principles of honor, respect, and integrity" with definitions that do not mention religious tenets); SMR:848 (disciplinary policy based on ESD's goal of developing "'educated conscience' inside each student" and premised on a "reasonable, consistent, and fair disciplinary structure").

principles"); *Gaston v. Diocese of Allentown*, 712 A.2d 757, 757-58, 760 (Pa. Super. Ct. 1998) (suit against Catholic Diocese and school operated by Diocese concerning bishop's expulsion decision).

ESD's testimony emphasizes how this dispute does not implicate religious doctrine. ESD could not identify a religious tenet that guided ESD's decision to expel Doe Jr. MR:231-34. Further, ESD admitted that no clergy or Episcopalian provided input on the decision; rather, ESD only consulted its attorney and (Jewish) board chair before expelling Doe Jr. MR:236-37; SMR:831-32.

In short, ESD and the court of appeals are wrong that, as a matter of law, Doe's claims regarding ESD's false representations about its education policies requires consideration of "religious principles and values."

B. The cases ESD cites do not stand for the sweeping proposition that the Doctrine applies to all "internal affairs" regardless of whether they implicate religious doctrine.

ESD contends that the "First Amendment forbids judicial interference with a religious institution's internal affairs" without regard to whether inquiry into those affairs involves resolution of a religious controversy. Response 13-18 (citing cases). But none of the Texas cases ESD cites support this position.

First, it is true that in *Penley*, this Court applied the Doctrine to claims against a church that encroached "on the church's ability to manage its internal affairs." 231 S.W.3d at 395. But those internal affairs concerned the "church's decision to discipline members for conduct considered outside of the *church's moral code*." *Id.* at 399 (emphasis added). Here, ESD neglects to cite evidence showing a church moral code is at issue. In fact, it admitted under oath that no

religious tenet is involved. MR:231-34. Also, unlike in *Penley*, Doe's claims do not concern a pastor's conduct or church rules the plaintiff knew about; instead, they involve a school's broken promises and false representations about its secular education policies.

Second, although *St. Thomas* and *Vida* involved expulsions of students, the courts applied the Doctrine only because either the school's decision was based on an express rule in the "Diocese's policy manual," *Vida*, 2015 WL 82717, at *2, or the parents' allegations against the school implicated "spiritual standards and references to Catholic teaching," *St. Thomas*, 495 S.W.3d at 512-13. Not so here. No church promulgated ESD's education policies, and ESD admitted that Doe never claimed ESD violated any religious doctrine. MR:231-35. Further, unlike in *Vida* and *St. Thomas*, ESD made false representations about its policies and absconded with Doe's money after failing to act as promised. Doe seeks return of this money and, in stark contrast to the plaintiffs in *Vida* and *St. Thomas*, is not seeking relief that would have Doe Jr. reinstated in the school.

Finally, ESD is flat wrong to claim the dispute here is "categorially different" from the dispute in *Tilton*. Response at 16 (citing *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996)). In *Tilton*, a plurality of this Court determined that the First Amendment does not preclude a fraud claim against a minister who solicited money in exchange for a false promise that he would personally read, touch, and

pray upon the plaintiffs’ requests. 925 S.W.2d at 679. The plurality observed that “[t]he federal constitution ... distinguishes between the freedom to believe, which is absolute, and the freedom to act, which ‘remains subject to regulation for the protection of society.’” *Id.* at 677 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)). Thus, the fraud claims did not infringe on the minister’s constitutional rights because they were not “based on statements of religious doctrine or belief, but on Tilton’s alleged promises to perform particular acts.” *Id.* at 679.

As in *Tilton*, ESD promised to perform certain “acts” through its education policies. In particular, ESD promised its student discipline would *not* be “punitive in nature,” that ESD would *not* be “a zero-tolerance school,” that ESD would *not* expel students after a first alleged alcohol or drug offense, and that ESD would require “verifiable evidence” before imposing any discipline. SMR:848-50. Like in *Tilton*, these secular representations are not based on a “statement of religious doctrine or belief.” *Id.* at 679. This case is thus directly analogous to *Tilton*.

III.

ESD’s response underscores how the court of appeals failed to follow *Miranda*.

ESD attempts to defend the court of appeals’ decision by claiming that the court correctly determined the evidence conclusively proved ESD’s faith-based status and that the dispute “turns solely on constitutionally-protected questions.”

Response at 19. But to reach this conclusion, one must turn a blind eye to the mountain of evidence that reasonable fact finders would not disregard. This evidence—cited in Doe’s Petition and this Reply—shows that, at a minimum, fact issues exists concerning whether (1) ESD is a faith-based institution entitled to invoke the Doctrine; and (2) the present controversy requires resolution of a religious controversy.

The fact that the court of appeals mentioned some of the evidence ESD presented on these issues does not render the court’s decision valid. Response at 19. To the contrary, by acknowledging the conflicting evidence but summarily dismissing it in ESD’s favor, the court of appeals impermissibly stepped into the fact-finder’s shoes contrary to this Court’s clear instructions in *Miranda*, 133 S.W.3d at 228, that if evidence “creates a fact question ... then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder.”

The bottom line is the court of appeals was not faithful to *Miranda* because it accepted the evidence supporting ESD’s position, ignored Doe’s evidence when reasonable jurors would not, and ordered the trial court to dismiss the case. Because the law entitles Doe to his day in court on the disputed issues, the court of appeals abused its discretion.

PRAYER

Doe prays that the Court grant the Petition and order the relief requested therein.

Respectfully submitted,

By: /s/ Craig T. Enoch

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CERTIFICATE OF COMPLIANCE

Relying on the word count function in word processing software used to produce this document, counsel for Relators certifies that this Reply in Support of Petition for Writ of Mandamus (when excluding the caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, signature, certificate of compliance, certificate of service, and appendix) contains 2,385 words.

/s/ Marla Broaddus
Marla Broaddus

MANDAMUS CERTIFICATION

Pursuant to Texas Rule of Appellate Procedure 52.3(j), I certify that I have reviewed this Reply and that every factual statement in the reply is supported by competent evidence included in the appendix or record.

/s/ Marla Broaddus
Marla Broaddus

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Reply in Support of Petition for Writ of Mandamus has been sent to the following counsel of record via electronic service on January 19, 2018:

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No. 17-1005

The Supreme Court of Texas

**IN RE JOHN DOE, INDIVIDUALLY AND AS
NEXT FRIEND FOR JOHN DOE, JR., A MINOR**

*Original Proceeding
From the Fifth Court of Appeal - Dallas
Cause No. 05-17-00493-CV*

APPENDIX

- A. Petition in *The Episcopal School of Dallas v. Bishop*, Cause No. CC-17-01828-E, in the County Court at Law No. 5 of Dallas County, Texas, April 6, 2017

APPENDIX A

NO. CC-17-01828-E

THE EPISCOPAL SCHOOL OF DALLAS,	§	IN THE COUNTY COURT
	§	
Plaintiff,	§	
	§	
v.	§	OF DALLAS COUNTY, TEXAS
	§	
MICHAEL BISHOP AND ELYSIANN	§	
BISHOP,	§	
	§	COUNTY COURT NO. _____
Defendants.	§	

**PLAINTIFF’S ORIGINAL PETITION
AND REQUEST FOR DISCLOSURE**

Plaintiff, The Episcopal School of Dallas (“Plaintiff” or “ESD”), files this original petition and request for disclosure against Defendants, Michael Bishop and Elysiann Bishop, and alleges as follows:

DISCOVERY CONTROL PLAN

1. Plaintiff intends to conduct discovery under Level 2 of Texas Rule of Civil Procedure 190.3 and affirmatively pleads that this suit is not governed by the expedited-actions process in Texas Rule of Civil Procedure 169 because Plaintiff seeks monetary relief over \$100,000.

CLAIM FOR RELIEF

2. Plaintiff seeks monetary relief over \$100,000 but not more than \$200,000.

PARTIES

3. Plaintiff, ESD, is a corporation doing business in Dallas County at 4100 Merrell Road, Dallas, Texas, 75229.

4. Defendants, Michael Bishop and Elysiann Bishop, individuals, may be served with process at Defendants’ usual place of abode in Dallas County at 9400 Rockbrook Drive,

Dallas, Texas, 75220. Defendant Michael Bishop may also be served at 1410 Westway Circle, Carrollton, Texas, 75006.

JURISDICTION AND VENUE

5. The Court has subject-matter jurisdiction over this lawsuit because the amount in controversy exceeds this Court's minimum jurisdictional requirements.

6. Venue is proper in Dallas County under Texas Civil Practice & Remedies Code Section 15.002 because all or a substantial part of the events or omissions giving rise to the claim occurred in Dallas County, and Defendants, natural persons, reside in Dallas County.

FACTS

7. ESD is an independent Episcopal private school located in Dallas, Texas. Its academic school year begins in August and runs through May of each year.

8. Each year, ESD engages in an admission and enrollment process. During that process, students' parents or guardians execute enrollment contracts indicating the students will attend ESD the following school year. These enrollment contracts are binding agreements to pay ESD tuition and fees for the relevant school year. In exchange, ESD admits the students into its school for that year and provides an education and related benefits to those students.

9. Based on the enrollment contracts that parents and guardians execute, ESD makes budget and enrollment decisions which impact its total enrollment numbers and admission decisions regarding other applicants.

10. On February 16, 2016, and February 26, 2016, respectively, in keeping with ESD's admission and enrollment process, Defendants executed enrollment contracts indicating that each of their four children would be attending ESD for the 2016-2017 school year ("Enrollment Contracts").

11. “[I]ntending to be legally bound,” Defendants executed the Enrollment Contracts, stating, “I understand and agree that the obligation to pay the tuition and other required fees for the full academic year is unconditional.” Defendants further stated, “I understand and agree that the Student is admitted for the entire academic year and that no[] tuition or fees will be refunded for reasons of absence, failure to matriculate, withdrawal, suspension or dismissal, or for any other reason”

12. In the aggregate, Defendants agreed to pay ESD \$106,925 in tuition pursuant to the Enrollment Contracts.

13. Despite having executed these Enrollment Contracts, Defendants did not enroll their children in ESD for the 2016-2017 school year, and they did not pay the required \$106,925 in tuition.

CAUSE OF ACTION I: BREACH OF CONTRACT

14. Plaintiff incorporates the Facts stated above as if fully set forth herein.

15. Plaintiff and Defendants executed a valid and enforceable written contract.

16. ESD was excused from performing its contractual obligations under the Enrollment Contracts because Defendants’ children failed to matriculate.

17. Defendants breached the Enrollment Contracts by failing to pay tuition.

18. Plaintiff seeks damages in the amount of at least \$106,925, which is within the jurisdictional limits of this Court.

19. Plaintiff is entitled to recover reasonable and necessary attorney fees under Texas Civil Practice and Remedies Code chapter 38 because this is a suit for breach of a written contract. Plaintiff retained counsel, who presented Plaintiff’s claim to Defendants. To date, Defendants have not tendered the amount owed.

CAUSE OF ACTION II: PROMISSORY ESTOPPEL

20. Plaintiff incorporates the Facts stated above as if fully set forth herein.

21. In the alternative to Cause of Action 1, Defendants made a promise to ESD that Defendants did not keep, namely executing the Enrollment Contracts and agreeing to pay \$106,925 in tuition and fees to ESD, but failing to pay the tuition and fees.

22. ESD reasonably and substantially relied on the promise to its detriment, making budgetary and enrollment decisions which impacted its total enrollment numbers as well as the admission decisions regarding other applicants.

23. ESD's reliance was foreseeable by Defendants.

24. Injustice can be avoided only by enforcing Defendants' promise.

CONDITIONS PRECEDENT

25. All conditions precedent to Plaintiff's claims for relief have been performed or have occurred.

REQUEST FOR DISCLOSURE

26. Under Texas Rule of Civil Procedure 194, Plaintiff requests that Defendants disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

PRAYER

27. For these reasons, Plaintiff asks that the Court issue citation for Defendants to appear and answer, and that Plaintiff be awarded a judgment against Defendants for the following:

- a. Actual damages;
- b. Prejudgment and post-judgment interest;

- c. Court costs;
- d. Attorney fees; and
- e. All other relief to which Plaintiff is entitled.

Dated: April 6, 2017

Respectfully submitted,

HAYNES AND BOONE LLP

/s/ Timothy A. Newman

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