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SUPREME COURT OF TEXAS
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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

RELATORS' MOTION FOR REHEARING

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I.
MOTION FOR REHEARING

> *"The relationship between a private school and its student has by definition primarily a contractual basis. . . . If such were not the case, neither the school nor the student would have a remedy at a private institution in situations in which non-performance caused damage.*"
>
> – *Southwell v. Univ. of Incarnate Word*, 974 S.W.2d 351, 356 (Tex. App.—San Antonio 1998, pet. denied) (internal quotations and citation omitted).

For decades, Texas courts have recognized that, in most cases, a contract governs the relationship between a private school and its students. As such, when a dispute arises between the school and student (or a minor student's parents), courts have routinely looked to the enrollment agreement, the student handbook, and other related enrollment documents and applied ordinary contract principles to determine the parties' rights and obligations. So long as the dispute does not require the court to wade into doctrinal waters, this approach is what parents, students, and private schools with a religious affiliation have come to expect from Texas courts. The Dallas Court of Appeals ignored this precedent and ordered the trial court to dismiss the Does' lawsuit against ESD and individual staff member, leaving the Does without the recourse Texas precedent guarantees and jeopardizing the rights of parents and their children and the Texas private religious schools with whom they contract.

No doubt, courts across the nation wrestle with the bounds of religious liberty guaranteed by the First Amendment under all types of circumstances, including when a lawsuit is brought against a private school with a religious affiliation. The Court of Appeals here held there are no bounds and applied the Ecclesiastical Abstention Doctrine to preclude the Does' lawsuit simply because ESD is "faith based" and its discipline of Doe Jr. in violation express promises it made implicate the school's "internal affairs." In doing so, the Court of Appeals disregarded not only the evidence showing the Does' claims do not require consideration of religious doctrine, but also this Court's precedent showing that the First Amendment's reach has limits. The Court should take this opportunity to address whether this application of the First Amendment is correct and provide guidance to the thousands of students, parents, and private schools directly impacted by the Court of Appeals' decision.

ARGUMENT

Several amci filed letter briefs in support of the Does' Petition for Writ of Mandamus. Their primary concern is that the Dallas Court of Appeals' opinion will encourage "faith-based" private schools and their employees to mistreat and abuse children in their care. They are not wrong. By applying the Ecclesiastical Abstention Doctrine without regard to whether the underlying dispute requires the court to grapple with religious doctrine, the Court of Appeals applied the First

Amendment in an overly expansive way that this Court has rejected in disputes involving churches. *C.L. Westbrook, Jr. v. Penley*, 231 S.W.3d 389, 395 (Tex. 2007); *Tilton v. Marshall*, 925 S.W.2d 672, 675 (Tex. 1996). The concerns of the amici alone are sufficient to warrant rehearing.[1]

But there is another significant reason why the Court should take a closer look at this case. Texas courts have long recognized that the relationship between private schools and students (and their parents) is contractual in nature. This fundamental principle has guided courts when considering disputes between students, their parents, and private schools. And when the dispute does not require the court to resolve or interpret a religious tenet, the principle has applied when the suit involves a private school with a religious affiliation. *Pacheco v. St. Mary's Univ.*, No. 15-CV-1131 (RCL), 2017 WL 2670758, at *1, 8-9 (W.D. Tex. June 20, 2017); *Law v William Marsh Rice Univ*, 123 SW3d 786, 792-93 (Tex. App.—Houston 2003, pet. denied); *Southwell v. Univ. of Incarnate Word*, 974 S.W.2d

[1] Unfortunately, a recent trial court decision confirmed the amici have expressed valid concerns about faith-based institutions relying on the Ecclesiastical Abstention Doctrine when confronted with claims involving severe trauma to a child. *See* Cause No.17-CV-0566, *Maureen Beans individually and on behalf of minor C.R. v. Trinity Episcopal School et al.*, pending in the 405th Judicial District of Galveston. In this case, the trial court relied on the Ecclesiastical Abstention Doctrine to dismiss a lawsuit against Trinity Episcopal School for race discrimination and other claims arising from the school's alleged failure to stop constant racist bullying of her son. Trinity, whose counsel is likewise counsel for ESD, urged the same position ESD takes in this case: that the First Amendment applies to protect faith-based private schools from lawsuits about conduct that purports to implicate the school's internal affairs even when such conduct is not premised on religious tenet or doctrine. The matter is still in the trial court because claims against other students' parents remain pending.

351, 356 (Tex. App.—San Antonio 1998, pet. denied); *Eiland v. Wolf*, 764 S.W.2d 827, 837-38 (Tex. App.—Houston [1st Dist.] 1989, writ denied); *Texas Military Coll. v. Taylor*, 275 S.W. 1089, 1090-91 (Tex. Civ. App.—Beaumont 1925, no writ); *Vidor v. Peacock*, 145 S.W. 672, 674-75 (Tex. Civ. App.—San Antonio 1912, no writ).

Texas state and federal courts' historical recognition of the contractual nature of the relationship between private schools on the one hand and students and their parents on the other aligns with decisions in other states. These decisions show courts routinely address disputes between students and parents and secular ***and*** religious private schools. *See, e.g., Ross v. Creighton Univ.*, 957 F.2d 410, 413, 415-17 (7th Cir. 1992); *Goodman v. President & Trs. of Bowdoin Coll.*, 135 F.Supp.2d 40, 53-56 (D. Me. 2001); *Christensen v. S. Normal Sch.*, 790 So. 2d 252, 253-54 (Ala. 2001) (per curiam); *CenCor, Inc. v. Tolman*, 868 P.2d 396, 398-99 (Colo. 1994) (en banc); *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 473-74 (Minn. Ct. App. 1999); *Squires v. Sierra Nev. Educ. Found.*, 823 P.2d 256, 257-58 (Nev. 1991). When a private religious school is a party, the First Amendment applies to foreclose the court's involvement only "when the legal claim would require the resolution of ecclesiastical questions (and thus deference to any answers the church has provided to those questions)." *Winkler by Winkler v Marist*

Fathers of Detroit, Inc., 901 N.W.2d 566, 576 (Mich. 2017); *Saint Augustine Sch. v. Cropper*, 533 S.W.3d 186, 188-89 (Ky. 2017).

To the extent a footnote in *In re St. Thomas*, 495 S.W.3d 500 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding) suggests that other states have applied the Ecclesiastical Abstention Doctrine broadly to foreclose claims involving a faith-based private school's discipline decisions regardless of whether religious doctrine is involved, this is flat wrong. *See id*. n.1. The Michigan Supreme Court reversed the court of appeals decision cited for this proposition. *Winkler by Winkler*, 901 N.W.2d at 576. The other case discussed in the footnote, *Gaston v. Diocese of Allentown*, 712 A.2d 757, 757–58 (Pa. Super. Ct.1998), was abrogated by the Pennsylvania Supreme Court in a subsequent decision holding that the Ecclesiastical Abstention Doctrine precludes resolution of a dispute about a private school's discipline decision only when the court must "construe religious doctrine to assess the claims." *Chestnut Hill Coll. v. Pennsylvania Human Relations Comm'n*, 158 A.3d 251, 263 (Pa. Cmwlth. 2017), *appeal denied*, 173 A.3d 262 (Pa. 2017) (discussing *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084, 1108 (Pa. 2009)). The court in *In re St. Thomas* applied the same approach by holding that the Ecclesiastical Doctrine applied because the claims evolved around the allegation that the school had not adhered to the "tradition of the Basilian Fathers and the sacred mission of St. Thomas" as promised. 495 S.W.3d at 504.

In short, the Dallas Court of Appeals' opinion represents a radical departure from the law in Texas and decisions of other states regarding the scope of the Ecclesiastical Abstention Doctrine. It also casts aside the principle of contractual freedom guaranteed by the Texas Constitution and its "indispensable partner—contract enforcement." See Tex. Const. art. I, § 16; *Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 490 (Tex. 2016). Before the decision, parents and their children who attend faith-based private schools had assurances that, so long as the dispute was not entangled with religious doctrine, the judicial system would be available to address claims if a school did not uphold contractual promises and misrepresentations that induced the payment of significant tuition dollars. But now, because the Dallas Court of Appeals made no inquiry into whether the Does' dispute requires consideration of religious doctrine—and ignored evidence showing it does not—students, parents, and any other persons or entities that contract with religious private schools in Texas no longer have the guarantee of judicial recourse because the school need only allege the matter involves its "internal affairs."

ESD's own conduct underscores that it has always believed its contract encompassing promises about its education and discipline procedures to be secular and subject to judicial review. When the Dallas Court of Appeals released its decision, ESD filed a motion asking the court to change its opinion to dismiss all

claims except ESD's claim that Doe had breached the Enrollment Agreement by bringing the lawsuit. This is the very same agreement over which ESD and the Does litigated for ***one year and seven months*** before ESD filed its plea to claim civil courts lack jurisdiction to enforce it.

ESD's lawsuit against other parents to recover tuition due under the same agreement it has with the Does provides yet another reason why the Court of Appeals' decision should be reviewed. ESD's suit mirrors those of other private religious schools that have sued to enforce an enrollment agreement when parents decide not to send their child to the school. *See e.g., Pierre v. St. Benedict's Episcopal Day Sch.*, 750 S.E.2d 370, 373 (Ga. Ct. App. 2013); *Turner v. Atlanta Girls' Sch., Inc.*, 653 S.E.2d 380, 381 (Ga. Ct. App. 2007); *Gunderson v. Park W. Montessori, Inc.*, 901 N.Y.S.2d 899 (Table), 24 Misc. 3d 1242(A), 2009 WL 2712169, at *2 (N.Y. Sup. Ct. Aug. 24, 2009); *Montessori Children's House of Durham v. Blizzard*, 781 S.E.2d 511, 514 (N.C. Ct. App. 2016), *review denied*, 792 S.E.2d 505 (N.C. 2016). The schools obviously believe a civil court should resolve these disputes concerning the school's membership and thus "internal affairs" when religious doctrine is not involved. But the Court of Appeals' decision strips the court of jurisdiction. It is thus not just parents and students who lose contractual rights under the Court of Appeals' decision. It is the faith-based schools themselves.

Furthermore, ESD did not file its plea until after significant discovery was conducted and revealed that ESD had verifiable objective evidence disproving its allegations at the time it expelled Doe Jr. and knew that others students who engaged in far worse proven conduct had been disciplined less harshly. But ESD mistreated Doe Jr. despite all this in violation of promises the school made about its education and discipline procedures as a means to deflect from staff's mishandling of the allegation against Doe and embarrassing conduct of the Head of School and her son. The Does have a right to have a constitutional protected right for a jury to consider this evidence and resolve their claims. TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate."), art. V, § 10 ("In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury. . . ."). The Court of Appeals did not explain why the Does must lose this significant right along with their right to enforce a contract when, as even ESD admits, religious doctrine has nothing to do with the controversy at hand.

That faith-based private schools play an important role in Texas is not dispute. According to the last report on the subject by the National Center for Education Statistics, over 200,000 students were enrolled in private schools in Texas. A large number certainly attend a faith-based school; NCES reports that 67% of private religious schools nationwide have a religious affiliation. *See*

Stephen P. Broughman, Adam Rettig & Jennifer Peterson, Characteristics of Private Schools in the United States: Results From the 2015-16 Private School University Survey First Look, U.S. Dep't of Educ., National Center for Education Statistics, 2 (NCES 2017-073, August 2017), https://nces.ed.gov/pubs2017/2017073.pdf. This Court has consistently provided guidance to Texans when a decision directly impacts the education and welfare of Texas children. Because the Court of Appeals does just that and obliterates fundamental constitutional guarantees in the process, this Court should grant rehearing and address the serious issues this case presents.

PRAYER

Relator Doe respectfully requests this Court grant its motion for rehearing, ask the a parties to provide briefing on the merits with respect to the important questions this case raises, grant mandamus relief, and reverse the lower court's judgment and remand the Does' claims to the trial court for further proceedings. Relator further asks for any other relief to which it may be entitled at law or equity, including costs and fees.

Respectfully submitted,

By: /s/ *Marla D. Broaddus*

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CERTIFICATE OF COMPLIANCE

Relator John Doe certifies that this Motion for Rehearing (when excluding the caption, signature, certificate of service, and certificate of compliance) contains 2,175 words.

/s/ *Marla D. Broaddus*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic service on the following counsel of record on July 23, 2018.

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