NO. 08-11-00329-CV

IN THE TEXAS COURT OF APPEALS
FOR THE EIGHTH JUDICIAL DISTRICT AT EL PASO

EL PASO INDEPENDENT SCHOOL DISTRICT,
DR. LORENZO GARCIA, AND MARK MENDOZA,

Appellants,

v.

MICHAEL MCINTYRE AND LAURA MCINTYRE, INDIVIDUALLY AND ON BEHALF OF THEIR CHILDREN, K.M., L.M., C.M., M.M., AND L.M.,

Appellees.

On Appeal from the 327th Judicial District
Court of El Paso County, Texas

APPELLEES' BRIEF

Charles "Chad" Baruch
THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
Telephone: (972) 412-7192
Facsimile: (972) 412-4028

Steven C. James
521 Texas Avenue
El Paso, Texas 79901
Telephone: (915) 543-3234
Facsimile: (915) 543-3237

Tom Sanders
Post Office Box 1860
Sugar Land, Texas 77487
Telephone: (281) 242-9700
Facsimile: (281) 242-8340

Counsel for Appellees

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Appellees tender this list of parties and counsel to assist the court in determining qualification and recusal under Rule 38 of the Texas Rules of Appellate Procedure:

El Paso Independent School District **Dr. Lorenzo Garcia**[1] **Mark Mendoza**	**Appellants (Defendants)**
S. Anthony Safi Mounce, Green, Myers, Safi, Paxson & Galatzan Post Office Box 1977 El Paso, Texas 79999-1977	*Counsel for Appellants*
Michael McIntyre **Laura McIntyre** **Individually and on Behalf of Their Children, K.M., L.M., C.M., M.M., and L.M.**	**Appellees (Plaintiffs)**
Charles "Chad" Baruch The Law Office of Chad Baruch 3201 Main Street Rowlett, Texas 75088	*Counsel for Appellees in the Court of Appeals*
Steven C. James 521 Texas Avenue El Paso, Texas 79901	*Counsel for Appellees Michael and Laura McIntyre*
Tom Sanders Post Office Box 1860 Sugar Land, Texas 77487	*Counsel for Minor Appellees K.M., L.M., C.M., M.M., and L.M.*

Trial Judge:

The Honorable Linda Chew
327th Judicial District Court, El Paso County

The following defendants were dismissed in the district court and are not parties to this appeal: Tracy McIntyre, Gene McIntyre, Shirene McIntyre, Sandy Berry, Patricia (Patti) Gallegly, and Micaela Varela.

[1] The McIntyres sued Dr. Garcia solely in his official capacity for prospective relief. Dr. Garcia no longer works for the District and should not be considered a party to this appeal.

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL i

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT REGARDING ORAL ARGUMENT 1

STATEMENT OF ISSUES 1

STATEMENT OF FACTS 2

SUMMARY OF THE ARGUMENT 11

ARGUMENT 12

Standard of Review 14

1. The Texas Tort Claims Act does not compel the McIntyres to elect between pursuing Mr. Mendoza and the District for declaratory and injunctive relief 15

2. The McIntyres were not required to exhaust administrative remedies 19

   a. Exhaustion as to the District 19

   b. Exhaustion as to Mr. Mendoza 25

3. Mr. Mendoza is not entitled to absolute prosecutorial immunity 27

4. Mr. Mendoza is not entitled to qualified immunity from the McIntyres' federal-law claims 31

   a. Due Process – The Fabricated Criminal Charges 31

   b. Due Process – Liberty Interests 35

   c. Equal Protection 38

   d. The First Amendment 40

5. Mr. Mendoza is not entitled to immunity under Section 22.0511(a) of the Texas Education Code 42

a. Section 22.0511 applies solely to tort claims 42

b. Mr. Mendoza's challenged actions were not within the scope and duties of his position 43

c. Mr. Mendoza's actions did not involve the exercise of discretion 44

6. Mr. Mendoza is not entitled to official immunity 44

7. Appellants forfeited their complaint about the district court's evidentiary rulings through inadequate briefing 45

8. The McIntyres concede their failure to provide proper TRFRA notice 47

CONCLUSION 47

CERTIFICATE OF SERVICE 48

INDEX OF AUTHORITIES

Cases:

Alcorta v. Tex.,
355 U.S. 28 (1957) 33

Alvin Indep. Sch. Dist. v. Cooper,
404 S.W.2d 76 (Tex. Civ. App.—Houston 1966, no writ) 19

Am. Med. Elecs., Inc. v. Korn,
819 S.W.2d 573 (Tex. App.—Dallas 1991, writ denied) 15

Arizona v. Youngblood,
488 U.S. 51 (1988) 33

Ashcroft v. al-Kidd,
___ U.S. ___, 131 S. Ct. 2074 (2011) 31

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 31

Austin v. Boriel,
830 F.2d 1536 (5th Cir. 1987) 28

Ball Indep. Sch. Dist. v. Kerrville,
504 S.W.2d 791 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) 15

Bearden v. Georgia,
461 U.S. 660 (1983) 38

Beavers v. Goose Creek Consol. Indep. Sch. Dist.,
No. 10-93-116-CV, 1994 WL 192203 (Tex. App.—Waco May 14, 1994), *opinion withdrawn, superseded by* 884 S.W.2d 932 (Tex. App.—Waco 1994, writ denied) 42

Birdville Indep. Sch. Dist. v. First Baptist Church,
788 S.W.2d 26 (Tex. App.—Fort Worth 1988, writ denied) 22

Bolkcom v. Cameron Appraisal Dist.,
No. 13-09-00577-CV, 2010 WL 3180334 (Tex. App.—Corpus Christi-Edinburg Aug. 12, 2010, no pet.) 24

Brittany B. v. Martinez,
494 F. Supp. 2d 534 (W.D. Tex. 2007) 26

Buckley v. Fitzsimmons,
509 U.S. 259 (1993) 27, 30

Burdett v. Doe,
No. 03-06-00198-CV, 2008 WL 5264913 (Tex. App.—Austin Dec. 17, 2008, no pet.) (mem. op.) 16

Butz v. Economou.,
438 U.S. 478 (1978) 28

Cty. of Cameron v. Brown,
80 S.W.3d 549 (Tex. 2002) 14

Castro v. McNabb,
319 S.W.3d 721 (Tex. App.—El Paso 2009, no pet.) 16

Central Power & Light Co. v. Sharp,
960 S.W.2d 617 (Tex. 1997) (per curiam) 22

Church of the Lukumi Babalu Aye v. City of Hialeh,
508 U.S. 520 (1992) 38

City of Beaumont v. Bouillion,
896 S.W.2d 143 (Tex. 1995) 16

City of Eagle Pass v. Wheeler,
No. 04-07-00817-CV, 2008 WL 2434228 (Tex. App.—San Antonio June 18, 2008, no pet.) (mem. op.) 17

City of Elsa v. M.A.L.,
226 S.W.3d 390 (Tex. 2007) (per curiam) 16

City of Keller v. Wilson,
168 S.W.3d 802 (Tex. 2005) 15

City of Webster v. Myers,
360 S.W.2d 51 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) 17

Collins v. City of Harker Heights, Tex.,
503 U.S. 106 (1992) 32

Cty. of Sacramento v. Lewis,
523 U.S. 833 (1998) 32, 33

Doe v. Phillips,
81 F.3d 1204 (2d Cir. 1996) 30

Dotson v. Grand Prairie Indep. Sch. Dist.,
161 S.W.3d 289 (Tex. App.—Dallas 2005, no writ) 22

Dunn v. Blumstein,
405 U.S. 330 (1972) 38

Engquist v. Oregon Dep't of Agriculture,
553 U.S. 591 (2008) 39, 40

Five Star Int'l Holdings, Inc. v. Thomson, Inc.,
324 S.W.3d 160 (Tex. App.—El Paso 2010, pet. denied) 47

Gibson v. Waco Indep. Sch. Dist.,
971 S.W.2d 199 (Tex. App.—Waco 1998), *vacated on other grounds*, 22 S.W.3d 849 (Tex. 2000) 19, 20, 23, 24

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 28, 31

Hartman v. Moore,
547 U.S. 250 (2006) 41

Hodorowski v. Ray,
844 F.2d 1210 (5th Cir. 1988) 28

Hoffman v. Harris,
511 U.S. 1060 (1994) 29

Hope v. Pelzer,
536 U.S. 730 (2002) 34

Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist.,
730 S.W.2d 644 (Tex. 1987) 24, 25

Imbler v. Pachtman,
424 U.S. 409 (1976) 27

Janik v. Lamar Consol. Indep. Sch. Dist.,
961 S.W.2d 322 (Tex. App.—Houston [1st Dist.] 1997, writ denied) 23

Jonathan L. v. Superior Ct.,
165 Cal. App. 4th 1074 (Cal. Ct. App. 2008) 41

Kalina v. Fletcher,
522 U.S. 118 (1997) 30

Kramer v. Union Sch. Dist.,
395 U.S. 621 (1969) 38

Limone v. Condon,
372 F.3d 39 (1st Cir. 2004) 33

Lochner v. New York,
198 U.S. 45 (1905) 37

Loving v. Virginia,
388 U.S. 1 (1967) 38

M.L.B. v. S.L.J.,
519 U.S. 102 (1996) 37, 38

Malley v. Briggs,
475 U.S. 335 (1986) 28, 31

Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding,
289 S.W.3d 844 (Tex. 2009) 15

McGowan v. Maryland,
366 U.S. 420 (1961) 39

Meyer v. Nebraska,
262 U.S. 390 (1923) 35-36, 37

Mission Consol. Indep. Sch. Dist. v. Garcia,
253 S.W.3d 653 (Tex. 2008) 16

Mission Indep. Sch. Dist. v. Diserens,
188 S.W.2d 570 (Tex. 1945) 19

Moore v. City of East Cleveland,
431 U.S. 494 (1977) 37

Moore v. Port Arthur Indep. Sch. Dist.,
751 F. Supp. 671 (E.D. Tex. 1990) 42

Morris v. Dearborne,
181 F.3d 657 (5th Cir. 1999) 33, 44

Nairn v. Kelleen Indep. Sch. Dist.,
No. 08-10-0030-CV, 2012 WL 561015 (Tex. App.—El Paso Feb. 22, 2012, no pet.) 19, 20

Napue v. Illinois,
360 U.S. 264 (1959) 33

Nkansah v. Univ. of Tex. at Arlington,
No. 02-10-00322-CV, 2011 WL 4916355 (Tex. App.—Fort Worth Oct. 13, 2011, pet. denied) (mem. op.) 16

Pasadena Indep. Sch. Dist. v. Emmons,
586 S.W.2d 151 (Tex. App.—Houston [1st Dist.] 1979, writ dism'd) 25

Patsy v. Florida Int'l Univ.,
634 F.2d 900 (5th Cir. 1981) 21

Pearson v. Callahan,
555 U.S. 223 (2009) 31

People v. DeJong (After Remand),
501 N.W.2d 127 (Mich. 1993) 41

Petta v. Rivera,
143 F.3d 895 (5th Cir. 1998) 32

Pierce v. Soc'y of Sisters,
268 U.S. 510 (1925) 35-36, 37

Poole v. West Hardin Consol. Indep. Sch. Dist.,
No. 09-10-00222-CV, 2011 WL 846188 (Tex. App.—Beaumont March 10, 2011, pet. granted) 24

Prince v. Massachusetts,
321 U.S. 158 (1944) 36

Reno v. Flores,
507 U.S. 292 (1993) 35

Santosky v. Kramer,
455 U.S. 745 (1982) 37

Schloss v. Bouse,
876 F.2d 287 (2d Cir. 1989) 29

Spielman v. Hildebrand,
873 F.2d 1377 (10th Cir. 1989) 28

Tex. Dep't of Parks & Wildlife v. Miranda,
133 S.W.3d 217 (Tex. 2004) 14

Tex. Dep't of Transp. v. Jones,
8 S.W.3d 636 (Tex. 1999) 14

Tex. Dep't of Transp. v. Sefzik,
355 S.W.3d 618 (Tex. 2011) 18

Tex. Educ. Agency v. Cypres-Fairbanks Indep. Sch. Dist.,
830 S.W.2d 88 (Tex. 1992) 23

Tex. Educ. Agency v. Leeper,
893 S.W.2d 432 (Tex. 1994) 3, 18, 19, 43, 44

Tex. Mut. Ins. Co. v. Sara Child Care Ctr., Inc.,
324 S.W.3d 305 (Tex. App.—El Paso 2010, pet. denied) 46

Tex. State Bd. of Pharmacy v. Walgreen Tex. Co.,
520 S.W.2d 845 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) 22

Tinker v. Des Moines Indep. Sch. Dist.,
393 U.S. 503 (1969) 37

Troxel v. Granville,
530 U.S. 57 (2000) 35, 37

United States v. Paternostro,
966 F.2d 907 (5th Cir. 1992) 21

Univ. of Tex. Health Sci. Ctr. at Houston v. Babb,
646 S.W.2d 502 (Tex. App.—Houston [1st Dist.] 1982, no writ)........................ 16-17

Van Emrik v. Chemung Cty. Dep't of Soc. Servs.,
911 F.2d 863 (2d Cir. 1990) 28

Venegas v. Silva,
No. 11-04-00246-CV, 2006 WL 2692877 (Tex. App.—Eastland 2006, pet. denied).. 26

Village of Willowbrook v. Olech,
528 U.S. 562 (2000) (per curiam).. 39, 40

Washington v. Glucksberg,
521 U.S. 702 (1997).. 35, 38

Wisconsin v. Yoder,
406 U.S. 205 (1972).. 36, 40

Wolff v. McDonnell,
418 U.S. 539 (1974).. 32

Yarris v. Cty. of Delaware,
465 F.2d 129 (3d Cir. 2006) 29

Ysleta Indep. Sch. Dist. v. Griego,
170 S.W.3d 792 (Tex. App.—El Paso 2005, pet. denied).. 19

Statutes, Rules, and Regulations:

U.S. CONST. amend. XIV 32

TEX. CONST. art. I, § 19 (West 2007).. 32

TEX. R. CIV. P. ANN. 166a (West 2004).. 15

TEX. R. APP. P. ANN. 38.1 (West Supp. 2012).. 46

TEX. R. APP. P. ANN. 44.1 (West 2003) 46

TEX. EDUC. CODE ANN. § 1.001 (West Supp. 2011) 3, 21

TEX. EDUC. CODE ANN. § 7.057 (West Supp. 2011) 21, 23

TEX. EDUC. CODE ANN. § 22.0511 (West Supp. 2011) 42

TEX. EDUC. CODE ANN. § 22.0514 (West 2006) 25

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2011) 15-16

TEX. PEN. CODE ANN. § 37.02 (West 2011) 34

Other Sources:

1 WILLIAM BLACKSTONE, COMMENTARIES *453 35

U.S. DEP'T OF EDUC., NO CHILD LEFT BEHIND (2008), available at http://www.2ed.gov/nclb/choice/schools/onefacts.pdf 13

Associated Press, *More Texas Parents Opt for Home Schooling*, http://wfaa.com/news/More-Texas-parents-opt-for-home-schooling-101292714.html 13-14

http://www.tepsac.org/faqs.cfm 43

http://mansfield.tea.state.tx.us/TEA.AskTED.TSD/TSDfiles/tsd2000/acnplst.pdf 43

http://www.tea.state.tx.us/index2.aspx?id=2147494532&menu_id=2147483702 43

http://ritter.tea.state.tx.us/taa/homeschools03232010.html 43

Statement of the Case

This interlocutory appeal challenges the denial of governmental pleas to the jurisdiction and summary judgment motions. Michael and Laura McIntyre, on behalf of themselves and five of their children, sued three family members, EPISD, and several district employees claiming malicious prosecution under section 1983 and violation of state and federal constitutional rights.[2] Appellees later dismissed their claims against the family members and three district employees. The District and its two remaining employees filed pleas to the jurisdiction[3] and motions for summary judgment[4] on exhaustion and immunity grounds. The trial court denied all of these motions and pleas[5] and appellants perfected this appeal.[6]

Statement Regarding Oral Argument

The McIntyres agree that given the number, complexity, and importance of the issues implicated by this appeal, oral argument would assist the court. But they do not believe additional argument time is necessary.

Statement of Issues

1. Whether the McIntyres' claims for injunctive relief under the Texas Constitution are subject to the Texas Tort Claims Act's election of remedies scheme.

---

[2] III C.R. at 968-1010.
[3] I C.R. at 129-34; II C.R. at 678-85.
[4] I C.R. at 112-15; II C.R. at 672-77.
[5] III C.R. at 1187-1201.
[6] III C.R. at 1202-03.

2. Whether the McIntyres—as private school parents—were required to exhaust public school administrative remedies before pursuing declaratory and injunctive relief.

3. Whether a pupil services administrator properly can assert prosecutorial immunity against a § 1983 claim and, if so, whether it protects Mr. Mendoza under these circumstances.

4. Whether genuine issues of material fact exist concerning Mr. Mendoza's claim of qualified immunity as to the McIntyres' § 1983 claim.

5. Whether statutory immunity under the Texas Education Code applies to non-tort claims and, if so, whether it protects Mr. Mendoza under these circumstances.

6. Whether genuine issues of material fact exist concerning Mr. Mendoza's claim of common law official immunity.

7. Whether the District forfeited its challenges to the district court's evidentiary rulings by failing to brief them adequately.

8. Whether the McIntyres provided proper notice of their TRFRA claims.[7]

Statement of Facts

Michael and Laura McIntyre reside in El Paso and are the parents of nine children, five of whom are the subjects of this lawsuit. None of the McIntyres' minor children ever attended any EPISD school. In December of 2004, motivated by their devout Christian faith, the McIntyres purchased equipment and curriculum materials, withdrew their

[7] The McIntyres concede error on this issue.

children from Immanuel Baptist School, and began educating them at home.[8] Since the Texas Supreme Court's decision in *Texas Education Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994), home schools in Texas have the same legal status as other private and parochial schools, which are not regulated by the Texas Education Code. *See* TEX. EDUC. CODE ANN. § 1.001(a) (West Supp. 2011).

Michael and Laura were 50% owners of a motorcycle dealership and—after obtaining permission from Tracy McIntyre, Michael's identical twin brother and the other 50% owner—used vacant office space at the dealership as their school.[9] Michael and Laura educated their children at the dealership until August of 2005, when Tracy demanded they cease all home education at the business premises. On August 22, 2005, Tracy became infuriated with Laura and began screaming obscenities at her. When Michael intervened to protect his wife, Tracy assaulted him.[10]

The next day, Michael and Tracy's parents, Gene and Shirene McIntyre, presented a list of demands to Michael and Laura. The top demand was to cease home educating their children because it constituted abuse: "Your children are being abused by: Lack of education by recognized authorities [and] lack of social development in a normal school

---

[8] II C.R. at 378.

[9] II C.R. at 378. The District implies the children were exposed to carcinogenic chemicals. But Tracy McIntyre testified only that the dealership's service facility has areas where there are fumes and chemical agents—not that the children were in or exposed to those areas. III C.R. at 867-69. And despite the District's statement of purported facts castigating the McIntyres' parenting, no evidence suggests that Mr. Mendoza or his staff knew any of these "facts" when making their decisions about the McIntyres. As a result, none of these criticisms—even if true—could have guided the District's actions.

[10] II C.R. at 378. Tracy contends that Michael assaulted him.

setting . . . ."[11] Michael and Laura then moved their private school out of the business location and into a rent house they owned.

Around this same time, Gene invited Michael and Laura to a meeting with Doris Sipes, Tracy's attorney. During the meeting, Ms. Sipes told Michael and Laura: "As far as the homeschool is concerned, all I have to do is send over a truant officer to shut that homeschool down."[12] Despite this threat, Michael and Laura continued to home educate their children.

With Michael and Laura refusing to bow to their demands, Gene, Shirene, and Tracy intensified their campaign against the home schooling by forcing Michael and Laura out of the immensely profitable dealership they owned and operated with Tracy.[13] Gene and Tracy sued Michael and Laura claiming they were neither officers nor directors of that company and essentially seeking judicial declaration squeezing them out of the business. Michael and Laura counter-sued. In July 2011, after six years of litigation and a three-week jury trial, Michael and Laura obtained judgment against Gene and Tracy for more than $2 million in that lawsuit.[14]

Meanwhile, back in 2006, three days after Gene and Tracy filed their lawsuit and shortly after Ms. Sipes threatened to shut down the McIntyre home school, EPISD received an "anonymous" truancy report on the McIntyre children. Although the District insists that this report came anonymously, its intake form includes the handwritten name

---

[11] II C.R. at 378-79, 389.
[12] II C.R. at 378.
[13] II C.R. at 378.
[14] The parties settled that case, agreeing to vacate the judgment while it was on appeal to this court. *See Mr. Yamaha, Inc. v. McIntyre*, No. 08-11-00295-CV, 2012 WL 225697 (Tex. App.—El Paso, Jan. 25, 2012, no pet.) (mem. op.).

"Tracy" at the top, along with home and cellular telephone numbers for Gene and Shirene McIntyre.[15] EPISD pupil services employee Sylvia Maldonado testified that while she originally heard the complaint came anonymously, she now knows that is untrue.[16] And during the pendency of the McIntyre family litigation, Tracy's corporate attorney visited the justice court twice to monitor the truancy cases.[17]

On February 2, 2006, EPISD dispatched a truancy officer both to the home school location and to Michael and Laura's home. When Michael and Laura informed the truancy officer that they were home educating their children, he told them they needed only to call the District and report that fact.[18] Laura then spoke by telephone with Ms. Maldonado and informed her of the home schooling. At that point, Michael and Laura considered the matter resolved.[19] The District's brief never mentions this first encounter with the McIntyre home school, instead intimating that a later visit was the first contact (Appellants' Brief at 6). But when viewed in light of this earlier visit, Laura's later frustration and claims of harassment become more understandable.

In September of 2006, around seven months after the "anonymous" complaint and Michael and Laura's original report to the District of their home school, the oldest McIntyre child, Tori, ran away from home and went to stay with her aunt and uncle, Maby and Kathy McIntyre. An EPISD official contacted Michael to inform him that the District was enrolling Tori in high school. When Michael objected, the official told him

---

[15] II C.R. at 383, 513.
[16] 2 R.R. at 22.
[17] One of the court clerks told Laura McIntyre that the lawyer misrepresented himself as representing the District to gain access to the records. II C.R. at 551.
[18] II C.R. at 380.
[19] II C.R. at 380.

Tori would be enrolled—despite his objection—based on Kathy McIntyre's execution of a "responsible person affidavit."[20] Gene McIntyre listed himself as Tori's father on school records.[21] Neither Michael nor Laura consented to the enrollment of their child in public school, and neither Gene, Kathy, nor the District obtained any judicial order divesting Tori's parents of decision making authority or vesting such authority in anyone else. Nevertheless, the District enrolled Tori over her parents' objection.[22]

During this same time period, Gene and Shirene (a longtime EPISD teacher) began demanding that the District intervene to stop the home education of their grandchildren. Their campaign escalated to a meeting with EPISD Director of Pupil Services Mark Mendoza in November of 2006.[23] During that meeting, Gene and Shirene objected to the home education of their grandchildren, expressing doubt about its adequacy.[24] But neither Gene nor Shirene informed Mr. Mendoza of the bitter litigation with Michael and Laura putting millions of dollars at stake.[25]

The following month, two more EPISD employees visited Michael and Laura, this time demanding that they tender their curriculum for District review or sign a form[26] pledging to use a TEA-approved curriculum—even though TEA does not accredit and disclaims any oversight of private schools. Michael and Laura declined to sign the form because public school curriculum does not incorporate a Christian worldview—which

---

[20] II C.R. at 381.
[21] II C.R. at 381.
[22] II C.R. at 381.
[23] II C.R. at 519.
[24] II C.R. at 424, 515.
[25] II C.R. at 413-19, 519.
[26] 3 R.R., Exh. P-39.

was, after all, their principal motive for home education in the first place. As to permitting a curriculum review, Michael and Laura asked to consult legal counsel before responding.[27]

During this visit, the District employees made a notation that Michael and Laura owned an RV with a "Jesus Saves" bumper sticker. But they did not make any notation concerning three other vehicles at the McIntyre home—none of which had any bumper sticker evidencing Christian faith. And, in any event, the notation does not indicate what relevance a religious bumper sticker has to a truancy inquiry.[28]

Following this encounter, the Home School Legal Defense Association sent a letter to EPISD on behalf of Michael and Laura, asserting their right to home educate their children without governmental interference. The HSLDA pointed out that under *Leeper*, the McIntyre home school was a private school not required to submit documentation to EPISD. Finally, HSLDA asked that the District inform it if the information provided did not resolve the situation.[29] When the District did not respond,[30] the McIntyres again considered the matter concluded.[31]

A month later, the McIntyres received notices from EPISD directing them to appear at three different schools for meetings to discuss truancy issues with their children. Each District-promulgated *Notice of Absences and Request for Conference* stated: "You are hereby warned that your child must attend school as required by law.

[27] II C.R. 381.
[28] 3 R.R., Exh. P-42.
[29] 3 R.R., Exh. P-4.
[30] II C.R. at 474.
[31] II C.R. at 382.

You are required to attend a conference to discuss the absences. Contact the ~~assistant principal at~~ Mr. Mendoza to set up an appointment."[32] HSLDA sent another letter explaining that the McIntyres were home educating their children and were not required to submit any information to the District other than to inform them of the home school. This time, HSLDA threatened legal action if the District failed to drop the matter.[33]

Again, the District ignored HSLDA.[34] But three months later, in May of 2007, the McIntyres received criminal citations. Mr. Mendoza had filed criminal complaints against Michael, Laura, and their three oldest children.[35] In those complaints, Mr. Mendoza and another EPISD employee swore under oath that Michael and Laura had "not met homeschool verification requirement."[36] Neither the Texas Education Code nor the Texas Penal Code lists any offense related to any homeschool verification requirement.

Upon receiving the citations, Laura called Mr. Mendoza; there is no dispute about their conversation because Laura recorded it. Claiming to have received anonymous complaints, Mr. Mendoza demanded that Michael and Laura provide him with a curriculum and progress report for each of their children.[37] Suspecting the involvement of her in-laws, Laura asked Mr. Mendoza whether he knew Shirene McIntyre. Despite having met with Shirene and acting at her behest, Mr. Mendoza answered: "Do I know

---

[32] II C.R. at 857-60; 3 R.R., Exh. P-6 & Exh. P-7.
[33] II C.R. at 382, 587; 3 R.R., Exh. P-5.
[34] II C.R. at 474.
[35] II C.R. at 393-405.
[36] Mr. Mendoza signed several of the complaints. 3 R.R., Exh. P-43 at 0024-26, 0042-44, 0060-61, 0074-75. Patti Gallegly signed the rest. 3 R.R., Exh. P-43 at 0002-04. Each of the complaints contained the same sworn allegations.
[37] II C.R. 445, 449, 450, 453.

this person personally? No."[38] Not realizing Mr. Mendoza's deception, Laura informed him of the family litigation and accompanying threats to use the District as a weapon against Michael and Laura.[39]

During the conversation, Mr. Mendoza insisted he had the right to investigate home private schools. When Laura asked Mr. Mendoza if the District demanded similar information from Cathedral High School, a prominent local private school, he responded: "No. ma'am. They are an accredited school." But when Laura—apparently suspecting the legal efficacy of this answer—asked if Cathedral was exempt from these "investigation" provisions, Mr. Mendoza immediately backtracked: "I wouldn't be able to answer that. That doesn't apply in this situation. I'm responding to an anonymous complaint."[40]

During the conversation, Mr. Mendoza admitted that despite having sworn in the criminal complaints that the McIntyres were breaking the law, he knew they were not:

> Mrs. McIntyre: So the law that I'm breaking is that I home-school and I haven't shown you my curriculum?
>
> Mr. Mendoza: No ma'am, that's not it at all.
>
> Mrs. McIntyre: What law is it that I'm breaking?
>
> Mr. Mendoza: ***You are not breaking a law at this time.*** We are suspecting, due to lack of evidence, that your students may not be being schooled in the appropriate manner.[41]

---

[38] II C.R. at 452.
[39] II C.R. at 453.
[40] II C.R. at 449-50.
[41] II C.R. at 454 (emphasis added). When the McIntyres' counsel questioned Mr. Mendoza about this statement during his deposition, asking him point-blank whether he knew all along that the McIntyres had never broken any law, his attorney instructed him not to answer. II C.R. at 459.

Now told that the ***criminal*** charges were the result of her failure to provide documentation (rather than, say, actual ***criminal*** conduct), Laura asked Mr. Mendoza what documentation she could submit to end the criminal case. But he refused to tell her:

> Mrs. McIntyre: What type of evidence –
>
> Mr. Mendoza: Ma'am, I'm not going to get into this argument with you.
>
> Mrs. McIntyre: Okay. I'm sorry, it's not an argument, I'm just being – I mean, you've pressed criminal charges against me, and I'm asking you what criminal charges –
>
> Mr. Mendoza: Yes, ma'am, and there is an arena to answer to those, and my office is not that arena.
>
> Mrs. McIntyre: So you're not willing to cooperate with me at this point?
>
> Mr. Mendoza: At this point, I would recommend that you talk very strongly to the judge.[42]

The McIntyres never submitted any complaint to EPISD or requested any meeting with its officials.[43] Rather, in reliance on what they believed to be their liberty interests and in opposition to what they considered illegal harassment, and because the District had instituted a criminal case and directed them to respond in that venue, they refused to provide the District with information about their curriculum. Instead, they answered the criminal charges and filed this lawsuit in July of 2007.[44]

---

[42] II C.R. at 454-455.

[43] 4 R.R., Exh. D-2 at 8-9.

[44] I C.R. at 31-39. The McIntyres even received demand letters from a law firm representing El Paso County. The law firm sent the letters directly to the McIntyres even though they were represented by counsel. Those letters stated that "if an arrest warrant has been issued in your case, you may be arrested ay any time by any police officer." 3 R.R., Exh. P-44 at 43-50. The County contends those letters were sent mistakenly. I C.R. at 172.

Eventually, the El Paso District Attorney sought and obtained dismissal of all criminal charges against the McIntyres.[45] As a result of the McIntyre case, the District Attorney's office changed its policy regarding processing of EPISD truancy complaints. Formerly, the District filed charges directly without review by the District Attorney's office; as a result of the McIntyres' case, the District Attorney has changed that policy and now insists on reviewing all cases before proceeding with criminal charges.[46]

Summary of the Argument

The McIntyres' seek injunctive and declaratory relief rather than damages under their state-law claims against Mr. Mendoza. Both the Texas Constitution and the Declaratory Judgments Act provide independent waivers of immunity for these claims, rendering the election of remedies scheme under the Tort Claims Act inapplicable.

The McIntyres were not required to exhaust administrative remedies because their claims involve pure issues of law rather than questions of fact. Moreover, no public school administrative scheme applies to the McIntyres as private school parents; the Texas Education Code applies only to taxpayer-funded institutions. In any event, the McIntyres' claims fall within established exhaustion exceptions for constitutional claims and where irreparable harm would attach to requiring exhaustion before litigation.

With respect to immunity District cites no case where any American court has applied absolute prosecutorial immunity to a school district administrator. Even if prosecutorial immunity did apply, Mr. Mendoza could not rely on it because his act

[45] II C.R. at 386; 574-586.
[46] I C.R. at 169.

occurred in an investigative capacity, and because the making up of non-existent crimes is no part of any legitimate prosecutorial function. Mr. Mendoza is not statutorily immune because statutory immunity applies solely to tort claims and, in any event, because his actions did not involve the exercise of discretion. And genuine issues of material fact concerning whether Mr. Mendoza acted in good faith preclude relief based on common law official immunity.

Finally, at a minimum, genuine issues of material fact exist concerning whether Mr. Mendoza is qualifiedly immune against the McIntyres' § 1983 claims. Under clearly established federal law, the use of perjured testimony and other methods to "frame" a criminal defendant violates the Due Process Clause. A fact issue exists concerning whether a reasonable public official would have known that his conduct in conditioning criminal prosecution on providing information and committing perjury to bring criminal charges against people he knew had committed no crime—not to mention making up a non-existent criminal offense against them—likewise violated the due process guarantee. Similar fact issues exist with respect to the McIntyres' other constitutional claims. As a result, the district court properly denied the various pleas and motions.

Argument

This case involves a public school district's attempt—in violation of established law and constitutional liberties—to seize inquisitorial powers over Texas parents who choose to home school their children. Instead of conceding its mistake and apologizing, that district continues to insist on its authority to demand detailed information from private schools outside the Texas public education system—and to use that authority

selectively against a faith-based home school. The district court properly rejected this startling assertion of sweeping governmental power.

The importance of this case extends far beyond home schools. In Texas, home schools operate under the same constitutional and statutory rights and scheme as other private and parochial schools. There is no legal distinction between a home school and any other private school. If EPISD acted within its legal authority in demanding curriculum materials and grade reports from the McIntyres, then any Texas public school district could demand that same information from any private school, from Cathedral High School in El Paso to Yavneh Academy in Dallas. And if the District properly filed criminal charges against the McIntyres for declining to provide the information, any district can just as readily file charges against the hundreds of parents choosing to send their children to Cathedral or Yavneh should those schools balk at capitulating to governmental demands.

The implications for Texas private school education are enormous and troubling. According to the U.S. Department of Education, private schools now account for about one-quarter of all American elementary and secondary schools; about three-quarters of those private schools have some religious affiliation. U.S. DEP'T OF EDUC., NO CHILD LEFT BEHIND 1 (2008).[47] Similarly, home private schooling is an ingrained part of the education landscape; the Texas Home School Coalition estimates that more than 300,000

---

[47] *Available at* http://www2.ed.gov/nclb/choice/schools/onpefacts.pdf.

Texas students are educated at home.[48]

Standard of Review

This is an appeal from the denial of pleas to the jurisdiction and motions for summary judgment concerning governmental immunity. A governmental unit generally is immune from suit absent waiver of that immunity. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225-26 (Tex. 2004); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). Unless waived, a governmental unit's immunity from suit deprives a trial court of subject matter jurisdiction. *Miranda*, 133 S.W.3d at 224; *Jones*, 8 S.W.3d at 638.

Appellate review of a trial court's ruling on a plea to the jurisdiction is *de novo*. *Miranda*, 133 S.W.3d at 226. In reviewing a plea to the jurisdiction, pleadings are construed in the plaintiff's favor. *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). If the pleadings do not affirmatively demonstrate subject matter jurisdiction but the deficiency appears curable, "the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend." *Miranda*, 133 S.W.3d at 226-27 (*citing Brown*, 80 S.W.3d at 555). Only if the pleadings affirmatively negate the existence of subject matter jurisdiction may a plea to the jurisdiction be granted without an opportunity to amend. *Id.* at 227. And when disputed evidence of material jurisdictional facts implicates the merits of the case, the facts must be determined by the fact finder before the plea can be granted. *Miranda*, 133 S.W.3d at 227-28.

---

[48] Associated Press, *More Texas Parents Opt for Home Schooling*, http://www.wfaa.com/news/More-Texas-parents-opt-for-home-schooling-101292714.html (last visited June 2, 2012).

Appellate review of an order denying summary judgment also is *de novo*. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). A party moving for traditional summary judgment bears the burden of showing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. TEX. R. CIV. P. 166a(c) (West 2004). In evaluating the existence of a fact issue, the court reviews the evidence in the light most favorable to the non-movant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Fielding*, 289 S.W.3d at 848 (*citing City of Keller v. Wilson,* 168 S.W.3d 802, 827 (Tex. 2005)). A defendant seeking summary judgment on an affirmative defense must conclusively prove all elements of the affirmative defense. *See Am. Med. Elecs., Inc. v. Korn,* 819 S.W.2d 573, 576 (Tex. App.—Dallas 1991, writ denied).

1. The Texas Tort Claims Act does not compel the McIntyres to elect between pursuing Mr. Mendoza and the District for declaratory and injunctive relief.

The District seeks dismissal of the McIntyres' state-law claims against Mr. Mendoza under the election of remedies provision of the Tort Claims Act, which provides that:

> (a) The filing of a suit ***under this chapter*** against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.
>
> . . .
>
> (e) If a suit is filed ***under this chapter*** against both a governmental unit and any of its employees, the employees

> shall immediately be dismissed on the filing of a motion by the governmental unit.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2011) (emphasis added). The purpose of Section 101.106 is to force a plaintiff "to make an irrevocable election at the time suit is filed between suing the governmental unit under the Tort Claims Act or proceeding against the employee alone." *Castro v. McNabb*, 319 S.W.3d 721, 731 (Tex. App.—El Paso 2009, no pet.).

Texas courts have held that a claim seeking damages for constitutional violations is brought under the Tort Claims Act for purposes of section 101.106. *See, e.g., Nkansah v. Univ. of Tex. at Arlington*, No. 02-10-00322-CV, 2011 WL 4916355, at *2 (Tex. App.—Fort Worth Oct. 13, 2011, pet. denied) (mem. op.); *Burdett v. Doe*, No. 03-06-00198-CV, 2008 WL 5264913 at *3 (Tex. App.—Austin Dec. 17, 2008, no pet.) (mem. op.). But the McIntyres do not seek damages from Mr. Mendoza for any state-law claim. Instead, they seek only declaratory and injunctive relief against him under those claims.

The Texas Constitution provides its own waiver of immunity for injunctive relief distinct from the Tort Claims Act. While the Constitution does not authorize recovery of damages, it permits equitable relief for violations without necessity of any separate waiver of immunity. *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007) (per curiam) (*citing City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995)).

Claims against the government brought under separate waivers of sovereign immunity are not brought "under" the Tort Claims Act. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008). Thus, the McIntyres' claims for injunctive

relief are brought under the Constitution—not the Tort Claims Act. *See, e.g.*, *Univ. of Tex. Health Sci. Ctr. at Houston v. Babb*, 646 S.W.2d 502, 506 (Tex. App.—Houston [1st Dist.] 1982, no writ). The District simply misconstrues the two decisions it cites as establishing that ***any*** claim for constitutional violations necessarily implicates the Tort Claims Act.

Initially, the only discussion of injunctive relief for constitutional violations in *Wheeler* relates to reliance on the Declaratory Judgments Act as an independent waiver of immunity. The court held such reliance improper because the absence of any claim for prospective relief necessarly rendered the claim one for damages. *City of Eagle Pass v. Wheeler*, No. 04-07-00817-CV, 2008 WL 2434228 (Tex. App.—San Antonio June 18, 2008, no pet.) (mem. op.). The election of remedies issue in *Wheeler* turned on whether intentional tort claims remain subject to that scheme—not whether constitutional claims for injunctive relief do. *Id. Wheeler* has nothing to do with this case.

Similarly, the plaintiff in *Myers* sought damages against both the governmental entity and its employee. *City of Webster v. Myers*, 360 S.W.3d 51, 59 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). The court properly noted that damages claims under the Constitution are tort claims. But the decision had nothing to do with injunctive relief. Indeed, the *Myers* court noted that "money damages cannot be awarded for violations of the Texas Constitution but . . . injunctive relief is available." *Id.* at 60.

No case cited by the District changes or calls into question the longstanding and well-established Texas rule that claims seeking injunctive relief for constitutional violations are brought under the Constitution rather than the Tort Claims Act. Because

the McIntyres seek injunctive relief, they need not make any election.

Independently, the McIntyres sued for declaratory judgment concerning the interpretation of Texas statutes and scope of rights under the Texas and United States Constitutions. The parties differ over the scope and meaning of the Texas truancy statutes. The District argues that Mr. Mendoza acted properly under his "broad authority" to investigate truancy (Appellants' Brief at 24-25). And the District flatly denies the existence of an absolute constitutional right to home school, even for religious reasons (Appellants' Brief at 37). Finally, while Mr. Mendoza testified the District has "no intention" of filing additional criminal charges (at least absent undefined "dramatic changes"),[49] this hardly forecloses the possibility of further exercise of the "broad investigative authority" the District claims for its employees. So long as that is the District's position, the McIntyres (and every other private school parent in El Paso) live under the threat of "investigation" and criminal charges.

In these circumstances, the Declaratory Judgments Act also provides a waiver independent of the Tort Claims Act. Texas law distinguishes between suits against governmental units in which a party seeks a declaration to clarify rights under a statute or regulation, for which the Declaratory Judgments Act provides a waiver of immunity, and suits in which the request for declaratory relief is no more than a recasting of a claim for money damages, for which the Act does not provide a waiver of immunity. *Compare Leeper*, 893 S.W.2d at 446, *with Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 620 (Tex. 2011). Like the plaintiffs in *Leeper*, the McIntyres seek a declaration of the

---

[49] III C.R. at 848.

application of the state compulsory attendance law to them—and of the District's ability to demand detailed information from them under it. This request for declaratory relief requires no additional waiver of immunity. *Leeper*, 893 S.W.2d at 446.

2. The McIntyres were not required to exhaust administrative remedies.

a. Exhaustion as to the District.

Texas law generally requires an aggrieved party to exhaust all remedies provided under the applicable administrative scheme if the party's claim: (1) concerns the administration of school laws; and (2) involves questions of fact. *Nairn v. Killeen Indep. Sch. Dist.*, No. 08-10-00303-CV, 2012 WL 561015, at *5 (Tex. App.—El Paso Feb. 22, 2012, no pet.) (*citing Mission Indep. Sch. Dist. v. Diserens*, 188 S.W.2d 568, 570 (Tex. 1945) *and Ysleta Indep. Sch. Dist. v. Griego*, 170 S.W.3d 792, 795 (Tex. App.—El Paso 2005, pet. denied)).

Initially, the McIntyres' claims do not involve questions of fact; "an aggrieved party need not exhaust his administrative remedies when the issue presented is purely a question of law." *Gibson v. Waco Indep. Sch. Dist.*, 971 S.W.2d 199, 200-03 (Tex. App.—Waco 1998), *vacated on other grounds*, 22 S.W.3d 849 (Tex. 2000) (citations omitted); *see also, e.g., Ball v. Kerrville Indep. Sch. Dist.*, 504 S.W.2d 791, 794 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (whether teacher's wearing of Vandyke style beard violated school policy); *Alvin Indep. Sch. Dist. v. Cooper*, 404 S.W.2d 76, 77 (Tex. Civ. App.—Houston 1966, no writ) (whether school board had legal right to prohibit child of school age who was also a parent from attending school).

While there exist many disputed facts in this case, none of them affects the issue on which the District contends exhaustion of administrative remedies was required: does the District have the authority to demand to review (and, by implication, approve or disapprove) a home school's curriculum and obtain progress reports for its students (or require compliance with TEA-mandated curriculum as an alternative), and file criminal charges as a consequence for failure to capitulate to this demand? While this appeal implicates immunity questions hinging on disputed fact issues, those questions do not trigger any exhaustion requirement. The only exhaustion requirement would relate to the claims brought by the McIntyres against the District and Mr. Mendoza—and those claims involve pure questions of law. "The issue of whether a particular action was taken without authority or violates a statute is generally a question of law." *Gibson*, 971 S.W.2d at 201 (citations omitted).

Additionally, Texas law requires exhaustion only under "the applicable administrative scheme." *Nairn*, 2012 WL 561015, at *5. Thus, the lack of an applicable scheme excuses any exhaustion requirement. The District advances the novel proposition that private school students must submit to the public education administrative scheme before filing suit for constitutional violations resulting from an attempt to apply public education policies to private school students. In other words, private school students must submit themselves to public school law before challenging whether they must submit themselves to public school law. This circular argument places private school students in a legal "Catch-22."

Section 7.057 of the Texas Education Code requires an administrative appeal to

the Commissioner of Education where a person is aggrieved by either "the school laws of this state" or "actions or decisions of any school district board of trustees that violate the school laws of this state . . . ." TEX. EDUC. CODE ANN. § 7.057(a) (West Supp. 2011). The phrase *school laws of this state* refers to Titles 1 and 2 of the Education Code and rules adopted under those titles. But neither Title 1 nor Title 2 applies to private schools or their students. The very first statement of the Education Code states that "[t]his code applies to all educational institutions supported in whole or in part by state tax funds unless specifically exempted by this code." *Id.* § 1.001(a). Thus, neither the state's administrative appeal provisions nor the District's local policies apply to the McIntyres, whose children never attended public school.

Of course, the District—not the McIntyres—first sought a judicial remedy in this dispute. Only ***after*** the District sought judicial intervention did the McIntyres file their lawsuit. The District cannot seek a judicial remedy, then subsequently insist on exhaustion of administrative remedies when the responding party likewise resorts to the judiciary. The exhaustion of remedies doctrine exists to prevent judicial interference in administrative procedures before the agency can complete its own decision and review processes. *Patsy v. Florida Int'l Univ.*, 634 F.2d 900, 903 (5th Cir. 1981). In interpreting corresponding federal exhaustion requirements, the Fifth Circuit has held that where the government itself "decides to pursue a judicial remedy, the exhaustion of remedies doctrine is simply not applicable." *United States v. Paternostro*, 966 F.2d 907, 912 (5th Cir.1992).

Even if the administrative scheme does apply, Texas law recognizes several exceptions to the exhaustion requirement. Exhaustion of administrative remedies is not necessary if: (1) the claims are for a violation of a constitutional or federal statutory right; (2) the aggrieved party will suffer irreparable harm and the administrative agency is unable to provide relief; (3) the cause of action involves pure questions of law and the facts are not disputed;[50] (4) the commissioner of education lacks jurisdiction over the claims; (5) the administrative agency acts without authority; or (6) the claims involve parties acting outside the scope of their employment with the school district. *Dotson v. Grand Prairie Indep. Sch. Dist,* 161 S.W.3d 289, 291-92 (Tex. App.—Dallas 2005, no pet.). Several of these exceptions apply in this case.

(i) Constitutional Questions

Administrative agencies lack the power to resolve constitutional issues. *See Birdville Indep. Sch. Dist. v. First Baptist Church,* 788 S.W.2d 26, 29 (Tex. App.—Fort Worth 1988, writ denied); *Tex. State Bd. of Pharmacy v. Walgreen Tex. Co.,* 520 S.W.2d 845, 848 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.). Where an agency lacks power to rectify the error claimed, "there is no sound reason for forcing a litigant through the administrative process . . . ." *Central Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex. 1997) (per curiam) (*quoting Bd. of Pharmacy*, 520 S.W.2d at 848). The McIntyres' constitutional claims are not subject to any exhaustion requirement.

The District argues that exhaustion of remedies is required even for constitutional

[50] This doctrine is sometimes listed as an element for application of the exhaustion requirement, and sometimes as an exception. Either way, it obviates any need for exhaustion by the McIntyres.

claims, citing *Janik v. Lamar Consol. Indep. Sch. Dist.*, 961 S.W.2d 322, 323 (Tex. App.—Houston [1st Dist.] 1997, writ denied), in which the court of appeals held the constitutional exception to exhaustion applies solely to federal constitutional claims. But the District overlooks a critical change in the Education Code that occurred after *Janik*.

When *Janik* was decided, former section 11.13(a) of the Education Code provided in pertinent part that:

> [P]ersons having any matter of dispute among them arising under the school laws of Texas or any person aggrieved by the school laws of Texas or by actions or decisions of any board of trustees or board of education may appeal in writing to the commissioner of education . . . .

Act of Aug. 26, 1986, 69th Leg., 2d C.S., ch. 4, § 3, 1986 Tex. Gen. Laws 6, 10 (repealed 1995) (current version at TEX. EDUC. CODE ANN. § 7.057(a) (West Supp. 2011)). Under this provision, a person could appeal a claim that resulted from being aggrieved by ***any*** action or decision of a local board. *See Tex. Educ. Agency v. Cypress-Fairbanks Indep. Sch. Dist.*, 830 S.W.2d 88, 90-91 (Tex. 1992) (interpreting former section). Constitutional claims fell within this category. *Id.*

The current statute limits administrative consideration of constitutional claims. Now, a person may file an appeal ***only*** where the person is aggrieved by local board actions that violate the "schools laws of this state" (or a provision of a written employment contract). TEX. EDUC. CODE ANN. § 7.057(a) (West Supp. 2011). The amended statute "does not provide an administrative appeal for state or federal constitutional challenges to the actions or decisions of a school board." *Gibson*, 971 S.W.2d at 199. Lacking an administrative remedy to resolve such claims, an aggrieved

party "need not seek administrative relief before filing a suit which raises constitutional challenges to actions or decisions of a school board." *Id.*; *see also, e.g.*, *Poole v. West Hardin Cons. Indep. Sch. Dist.*, No. 09-10-00222-CV, 2011 WL 846188 (Tex. App.—Beaumont Mar. 10, 2011, pet. granted); *Bolkcom v. Cameron Appraisal Dist.*, No. 13-09-00577-CV, 2010 WL 3180334 (Tex. App.—Corpus Christi-Edinburg Aug. 12, 2010, no pet.).

(ii) Irreparable Harm

No exhaustion is required where irreparable harm will be suffered and the agency cannot provide relief. *See Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist.*, 730 S.W.2d 644, 645 (Tex. 1987). In this context, irreparable harm means an award of damages months later will not provide adequate compensation. *Id.* at 646.

When the McIntyres filed this lawsuit, they and three of their children faced criminal charges filed by the District. They faced a continuing demand by the District for curriculum information and progress reports. Mr. Mendoza explicitly told Laura that the criminal prosecution resulted from failure to provide that information, though he refused to tell her precisely what information would satisfy him.[51] The McIntyres were under continuing threat concerning the District's repeated demands for information, and both they and their children faced the prospect of additional criminal complaints so long as their children remained un-enrolled in EPISD and they would not permit the District to sit in judgment of their curriculum and grading.

The Commissioner of Education lacks authority to order immediate injunctive

[51] II C.R. at 454.

relief. *Id.* (*citing Pasadena Indep. Sch. Dist. v. Emmons*, 586 S.W.2d 151, 152 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ dism'd). If the McIntyres were required to navigate the administrative process before obtaining injunctive relief, they would have no possibility of an adequate remedy; any irreparable harm would already be suffered by the time relief can be obtained. Under these circumstances, no exhaustion is required. *See Houston Fed'n of Teachers*, 730 S.W.2d at 646 (teachers would suffer irreparable harm because the Commissioner of Education had no authority to enjoin school board pending review through the administrative process).

b. Exhaustion as to Mr. Mendoza.

Effective 2003, the Texas Education Code provides that:

> A person may not file suit against a professional employee of a school district unless the person has exhausted the remedies provided by the school district for resolving the complaint.

TEX. EDUC. CODE ANN. § 22.0514 (West 2006). Mr. Mendoza contends that he was entitled to dismissal under this provision.

Initially, the arguments against exhaustion under the common law apply with equal force to Mr. Mendoza's exhaustion argument. Most notably, the Education Code applies only to public schools; this statutory exhaustion provision simply does not apply to private school families. Additionally, the exceptions for claims involving pure questions of law, constitutional claims, and irreparable injury all apply with equal force to exhaustion under section 22.0514.

The District contends that section 22.0514 institutes a broader exhaustion scheme not limited to claims involving school law. But the two cases the District cites do not

even remotely suggest this is true. The first of those cases, *Venegas*, does not even concern section 22.0514. It was decided under the common law scheme; section 22.0514 is only referenced—without comment or interpretation—in a footnote. *Venegas v. Silva*, No. 11-04-00246-CV, 2006 WL 2692877, at n.2. (Tex. App.—Eastland 2006, pet. denied) (mem. op.). The other case contains a two-sentence reference to prior dismissal of claims based on exhaustion but contains no details or explanation—and certainly no discussion of the scope or meaning of section 22.0514. *Brittany B. v. Martinez*, 494 F. Supp. 2d 534, 537 (W.D. Tex. 2007). The McIntyres have no idea what the District thinks these cases establish. But they do not even hint that the longstanding exceptions to exhaustion of administrative remedies would not apply to this provision.

Finally, the statutory exhaustion provision applies only to remedies provided by the school district for resolving the complaint. The District contends it had two separate policies providing an administrative remedy to the McIntyres. But the first of these policies, the FNG (Local) Policy, plainly applies only to families whose children attend EPISD schools. That policy requires a Level One conference with "the principal," which does not even arguably apply to the McIntyres.[52] The other policy[53] purports to apply to members of the public, but Mr. Mendoza's explicit statement to Laura that any response needed to be filed with the court rather than his office at least creates a fact issue concerning applicability of the policy. The District misconstrues this as a waiver argument. In fact, the McIntyres contend that the District never provided any

[52] 4 R.R. Exh. 1, at Exh. 5.
[53] 4 R.R. Exh. 1, at Exh. 5.

administrative remedy. Mr. Mendoza's statements constitute evidence of this. Thus, fact issues preclude relief on this basis.

Finally, the District itself sought a judicial remedy. Nothing in the Education Code suggests that a public school district may prefer criminal charges against private school parents, tell them to address the matter with the courts rather than the district, and then insist on exhaustion of some administrative remedy when the parents seek judicial intervention themselves.

3. Mr. Mendoza is not entitled to absolute prosecutorial immunity against the McIntyres' federal law claim.

In enacting section 1983, Congress did not intend "to abrogate immunities well grounded in history and reason." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (internal quotation marks omitted). These traditional common-law immunities include a prosecutor's absolute immunity from claims for damages arising out of prosecutorial duties "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

The District asks this court to become the first in America to extend this doctrine of prosecutorial immunity to a school pupil services employee. The District then asks that this newly-created immunity be applied to an administrator who knew the defendants had broken no existing law, so simply made up non-existent "criminal" charges against them.

The District identifies no legal authority supporting the extension of prosecutorial immunity to school district administrators. The Supreme Court has hesitated to extend absolute immunity beyond the common-law tort immunities that existed when Congress

enacted section 1983 in 1871. *Malley v. Briggs*, 475 U.S. 335 (1986). As the Court has noted, its role "is to interpret the intent of Congress in enacting § 1983, not to make a free-wheeling policy choice . . . ." *Id.* at 342.

In seeking application of absolute—rather than qualified—immunity, Mr. Mendoza bears the burden of showing that public policy requires an exemption of that scope. *Butz v. Economou*, 438 U.S. 478, 506 (1978). But he fails to establish that the function at issue is: (1) "so sensitive as to require a total shield from liability," *Harlow v. Fitzgerald*, 457 U.S. 800, 812-13 (1982); and (2) that absolute immunity is essential if that function is to be properly performed. *Butz*, 438 U.S. at 506-07. But the District fails to establish that the functions of a pupil services administrator are inadequately protected by qualified immunity.

The closest Mr. Mendoza can come to applicable legal authority is to analogize his functions to those of a social worker and point to federal circuit decisions extending prosecutorial immunity to those workers. But he fails to reveal the wide-open circuit-split on this question. Several circuits—including the Fifth Circuit—have held that social workers are entitled only to qualified immunity. *See, e.g.*, *Van Emrik v. Chemung County Dep't of Soc. Servs.*, 911 F.2d 863, 865-66 (2d Cir. 1990); *Hodorowski v. Ray*, 844 F.2d 1210, 1215 (5th Cir. 1988); *Spielman v. Hildebrand*, 873 F.2d 1377, 1383 (10th Cir. 1989). The Fifth Circuit has explicitly refused to grant prosecutorial immunity to social workers even where the law charges them with filing sworn complaints alleging criminal conduct. *Hodorowski*, 844 F.2d at 1214; *see also Austin v. Borel*, 830 F.2d 1356 (5th Cir. 1987).

While the U.S. Supreme Court has yet to resolve the conflict among the circuits, two sitting justices have expressed doubt about extending prosecutorial immunity in this fashion. *See Hoffman v. Harris*, 511 U.S. 1060, 1062-63 (1994) (Thomas, J., and Scalia, J., dissenting from denial of cert.).

In the end, this court need not decide whether Mr. Mendoza is entitled to prosecutorial immunity because even if he is, it would not protect him under these circumstances. A government official lacks absolute immunity for acts "manifestly or palpably beyond his authority." *Schloss v. Bouse*, 876 F.2d 287, 291 (2d Cir. 1989). Where an official acts without "any colorable claim of authority," no immunity attaches to the challenged actions. *Id.* (citation omitted). In this case, neither of Mr. Mendoza's challenged actions even arguably fell within any legitimate prosecutorial function.

First, Mr. Mendoza's fabrication of a fictional criminal charge was outside the scope of any legitimate prosecutorial function. In *Yarris v. County of Delaware*, 465 F.3d 129 (3d Cir. 2006), the Third Circuit considered claims against a prosecutor for destroying evidence. The court held there is a critical difference between destroying evidence and failing to turn over exculpatory evidence. While the decision whether to turn over exculpatory evidence is part of the prosecutorial function and therefore protected by absolute immunity, destroying evidence is not within the scope of a prosecutor's functions and therefore remains unprotected. *Id.* at 136-37. Similarly, even if the decision ***whether*** to file dubious charges was part of some quasi-prosecutorial function, the ***making up*** of a non-existent charge because Mr. Mendoza knew the

McIntyres had broken no ***actual*** law could not possibly have been part of any such function.

Second, Mr. Mendoza's conditioning of filing criminal charges on reviewing curriculum and grade-report information are outside the scope of prosecutorial function. Mr. Mendoza demanded that the McIntyres provide information to avoid criminal charges. Demanding information in avoidance of criminal charges is not part of the prosecutorial function. *See, e.g., Doe v. Philips*, 81 F.3d 1204, 12-11-1212 (2d Cir. 1996) (conditioning dismissal of criminal charges on a defendant's agreement to swear innocence on a bible not a prosecutorial act and therefore unprotected by prosecutorial immunity). Thus, Mr. Mendoza would remain unprotected by prosecutorial immunity even were he entitled to it.

Finally, prosecutorial immunity does not apply when a prosecutor acts as an investigative official or administrator. *Kalina v. Fletcher*, 522 U.S. 118 (1997). In determining whether a prosecutor enjoys absolute immunity against any particular claim for damages, the courts are to apply a "functional approach." *Buckley*, 509 U.S. at 269. The ultimate question is whether the prosecutor was functioning as an "advocate" when engaging in the challenged conduct. *Id.* at 268-71. If the challenged conduct is not a traditional function of a prosecutor or part of the adversarial function, the prosecutor is not entitled to absolute immunity.

In this case, Mr. Mendoza has admitted that all his actions—including demanding curriculum information and filing charges based on the need for "verification"—were part of his "investigation" of the McIntyre home school. He explicitly said so to Laura

McIntyre. All these efforts were directed not toward advocating for criminal punishment but at obtaining information to determine whether any crime occurred. As a result, these actions are unprotected by prosecutorial immunity—even if it applies to a public school administrator.

4. Mr. Mendoza is not entitled to qualified immunity from the McIntyres' federal-law claim.

The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal. *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). But this immunity does not protect officials "who knowingly violate the law." *Malley,* 475 U.S. at 341. The district court properly denied Mr. Mendoza's summary judgment motion on qualified immunity grounds because genuine issues of material fact concerning his knowing violation of the law.

The basic steps of a qualified-immunity inquiry are well-known: a plaintiff seeking to defeat qualified immunity must show: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd,* __ U.S. __, 131 S. Ct. 2074, 2080 (2011) (*citing Harlow,* 457 U.S. at 818). Courts have discretion to decide which prong of the qualified-immunity analysis to address first. *Pearson v. Callahan,* 555 U.S. 223, 236 (2009).

a. Due Process – The Fabricated Criminal Charges.

There is at least a genuine issue of fact about whether Mr. Mendoza (1) committed perjury by swearing under oath that the McIntyres committed a crime while knowing that

was untrue, and (2) made up a non-existent criminal offense so he could allege criminal conduct despite the absence of any crime. The notion that a public official may initiate criminal proceedings based on his own perjured allegations of criminal conduct without violating due process is untenable.

The Fourteenth Amendment to the United States Constitution provides that no State may "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Similarly, the Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19 (West 2007).

"The touchstone of due process is protection against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Thus, "a plaintiff whose claim is not susceptible to proper analysis with reference to a specific constitutional right may still state a claim under § 1983 for a violation of his or her Fourteenth Amendment substantive due process right, and have the claim judged by the constitutional standard which governs that right." *Petta v. Rivera*, 143 F.3d 895, 901 (5th Cir. 1998). "[T]he Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing its power, or employing it as an instrument of oppression." *Collins v. City Harker Heights, Tex.*, 503 U.S. 106, 126 (1992) (quotation omitted).

Under this claim, the threshold question is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998).

Conduct so offensive it fails to "comport with traditional ideas of fair play and decency" meets this standard. *Id.* (citation omitted). Once this standard is met, a court must next determine whether there exist historical examples of recognition of the claimed liberty protection at some appropriate level of specificity. *See id.*

In this case, there can be little doubt that by filing criminal charges he knew to be untrue, Mr. Mendoza committed conduct that shocks the contemporary conscience. *See, e.g., Morris v. Dearborne*, 181 F.3d 657, 668 (5th Cir. 1999) (fabrication of sexual molestation charges shocks the conscience). And there exist historical examples of this claimed liberty protection.

The Supreme Court has held that a prosecutor's knowing use of perjured testimony violates the Due Process Clause. *See, e.g., Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Tex.*, 355 U.S. 28 (1957). Similarly, a bad faith failure to preserve exculpatory evidence violates due process. *Arizona v. Youngblood*, 488 U.S. 51 (1988). As the First Circuit has observed:

> [I]f any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and ***framing individuals for crimes they did not commit*** . . . Actions taken in contravention of this prohibition necessarily violate due process (***indeed, we are unsure what due process entails if not protection against deliberate framing under color of official sanction***).

Limone v. Condon, 372 F.3d 39, 44-45 (1st Cir. 2004) (emphasis added).

If framing individuals for crimes they did not commit or using the perjured testimony of others violates due process, how can an official who commits perjury

himself to institute criminal charges against people he knows have not violated any law possibly comport with due process? The idea that a public official may knowingly file criminal charges against innocent citizens consistent with the Constitution violates the most basic tenets of due process.

The McIntyres' constitutional right to be free from false prosecution for non-existent crimes based on perjured statements was clearly established. In addition to the Supreme Court's decisions concerning use of perjured testimony, perjury is a crime under Texas law. TEXAS PEN. CODE ANN. § 37.02 (West 2011). Any argument that Mr. Mendoza could reasonably believe committing perjury, making up non-existent crimes, and charging innocent citizens with criminal conduct violated no constitutional provision defies rationality. And the District's attempt to compare this conduct to a prosecution simply lacking probable cause is inaccurate and disturbing.

In determining entitlement to qualified immunity, the inquiry is whether the officials "were on notice that their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (citation omitted). In making this determination, "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question . . . ." *Id.* at 741. Mr. Mendoza had more than fair warning that his conduct violated the McIntyres' constitutional liberties with obvious clarity. At a minimum, then, a genuine fact issue exists concerning Mr. Mendoza's knowing violation of the McIntyres' constitutional due process rights.

b. Due Process – Liberty Interests.

The U.S. Supreme Court has long recognized that the Due Process Clause "guarantees more than fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). It also "provides heightened protection against governmental interference with certain fundamental rights and liberty interests." *Id.* at 720; *see also Reno v. Flores*, 507 U.S. 292, 301-302 (1993). The right to home school one's children—just like the right to choose private rather than public schools— flows from this liberty interest.

"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the U.S. Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). A parent's right to raise children free from interference is deeply embedded in Anglo-American law and government. At common law, the State did not interfere with the family. Indeed, the common law limited the State's ability to interfere in family matters to protecting the parent-child relationship. 1 WILLIAM BLACKSTONE, COMMENTARIES *453. The Supreme Court in several cases has recognized a fundamental liberty interest in familial integrity.

The U.S. Supreme Court recognized the right of parents to raise children without State interference more than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), striking down a state statute prohibiting the teaching of children in languages other than English. Two years later, the Court relied on *Meyer* to strike down an Oregon statute requiring children to attend public schools as interfering with parental rights, stating that:

> The fundamental theory upon which all governments in this

> Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925). The Court returned to the issue in *Prince v. Massachusetts*, 321 U.S. 158 (1944), again confirming that the parental right to direct the upbringing of children has a constitutional dimension.

Finally, in *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), the Court addressed the issue of compulsory school attendance in light of religious belief. *Yoder* concerned a Wisconsin statute requiring children to attend school until they reached the age of 16. In accord with the tenets of their Old Order Amish religion, the Amish refused to send their children to public or private high school based on a belief it would risk discipline by the church and endanger their salvation. Using a balancing test, the Court concluded the statute impermissibly infringed on the free exercise of religion without a compelling state interest. *Id*. at 234. According to the Court, *Yoder* squarely presented "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children." *Id*. at 232.

Over the years, the Court consistently has recognized the primacy of parental rights—and cast a skeptical eye on government attempts to burden them. Even in cases yielding divided opinions, the Court's justices find common ground in their agreement that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the

Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting). Indeed, even justices who do not view parental rights as constitutionally protected nevertheless concede their place among the "unalienable Rights" the Declaration of Independence posits are bestowed on all Americans by "their Creator." *See Troxel*, 530 U.S. at 91 (Scalia, J., dissenting).

This right to rear children free of unnecessary State intrusion, then, is the most enduring substantive personal liberty recognized by the U.S. Supreme Court. Though established during the "*Lochner* era,"[54] *Meyer* and *Pierce* remain valid even while other substantive due process cases borne of the same period are repudiated. *See Moore v. City of East Cleveland*, 431 U.S. 494, 501 n.8 (1977) (plurality opinion). Only a decade ago, the Court reiterated that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' . . . [and] sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citation omitted).

Of course, even fundamental parental rights are not absolute. Children are "persons" within the meaning of the Fourteenth Amendment, possessing their own liberty interests. *See, e.g., Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969). In this case, then, the McIntyre children also have fundamental liberty interests at risk.

State action impeding parental decision-making may occasionally be tolerated when it furthers a child's independent constitutional rights, or when the infringement is

[54] *See Lochner v. New York*, 198 U.S. 45 (1905).

narrowly tailored to serve a compelling state interest. *Glucksberg*, 521 U.S. at 721 (citation omitted). The strict scrutiny compelled by the Constitution is not "'water[ed] . . . down' but 'really means what it says.'" *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 545 (1992) (citation omitted).

Mr. Mendoza violated the McIntyres' fundamental liberty interests, first by asserting a right to review and determine the adequacy of the McIntyres' home faith-based curriculum, and then by filing criminal charges for the McIntyres' refusal to capitulate to these demands. Moreover, the McIntyres' liberty interests in making decisions about the education of their children is clearly established by a line of U.S. Supreme Court cases extending back nearly a century.

c. Equal Protection.

The Fourteenth Amendment guarantees citizens equal protection under law. Because the District is impinging on the McIntyres' attempt to exercise a fundamental right, this court reviews the statute with heightened scrutiny. Traditionally, this analysis was referred to as "strict scrutiny" necessitating a "compelling state interest." *See, e.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Kramer* v. *Union Sch. Dist.*, 395 U.S. 621, 626-29 (1969); *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972). Recently, however, the U.S. Supreme Court has applied a more fluid standard of review, inspecting "the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other." *M.L.B.*, 519 U.S. at 120-21 (citing *Bearden* v. *Georgia*, 461 U.S. 660, 666-667 (1983)). Regardless of the precise standard of review

employed, the intrusion on the McIntyres' fundamental rights cannot survive any heightened level of equal protection scrutiny.

Initially, the McIntyres have a valid equal protection claim based on the District's different treatment of home and non-home private schools. As Mr. Mendoza conceded, the District does not insist on a similar right to demand information from non-home private schools. Demanding information only from home private schools violates the Equal Protection Clause by establishing an unreasonable and arbitrary distinction not rationally related to any compelling state interest.

Independently, the McIntyres have a valid claim under the "class of one" equal protection theory. Equal protection typically concerns itself with governmental classifications that "affect some groups of citizens differently than others." *McGowan v. Maryland,* 366 U.S. 420, 425 (1961). But the U.S. Supreme Court has recognized that an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims being singled out as a so-called "class of one." *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000) (per curiam). This is precisely the McIntyres' claim in this case. The District has singled them out as a "class of one" without any jusitification.

The District contends the McIntyres' reliance on this theory is improper under the Supreme Court's decision in *Engquist v. Oregon Dep't of Agriculture*, 553 U.S. 591 (2008). Again, however, the District misunderstands that decision. In Engquist, the Court reaffirmed that the Fourteenth Amendment "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the

privileges conferred and in the liabilities imposed." *Id.* at 602 (citations omitted). "Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a 'rational basis for the difference in treatment.'" *Id.* (*citing Olech,* 528 U.S. at 564).

In *Engquist*, the Court held this type of claim does not apply in the public employment context because employment decisions are discretionary decisions based on subjective, individualized determinations. Here, however, there is at minimum a fact issue as to whether Mr. Mendoza's Javert-like pursuit of the McIntyres was based on any articulable difference between them and any other private school (or, for that matter, any other private home school). After all, with very few exceptions, there is no evidence that at the time he filed the criminal charges, Mr. Mendoza knew the various "facts" he now relies upon as justifying his decisions. Thus, the district court properly denied the summary judgment motion on qualified immunity grounds.

d. First Amendment.

The McIntyres also assert a First Amendment right to home educate their children on the basis of religious liberty. In *Yoder*, the sole Supreme Court case directly addressing home education, the Court concluded that members of the Old Order Amish religion possessed a constitutional right to exempt their children from Wisconsin's compulsory education law after the eighth grade. As the Court stated "[a] State's interest in universal education . . . is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with

respect to the religious upbringing of their children so long as they . . . 'prepare [them] for additional obligations.'" *Yoder*, 406 U.S. at 214. Under *Yoder*, the McIntyres possess a constitutional right to home educate their children for religious reasons.

The District relies on a California decision in claiming no constitutional right exists to home educate children. But that case actually held only that such a right was not ***absolute***. Even the California court conceded that home education implicates fundamental constitutional rights and therefore demands application of the strict scrutiny standard. *Jonathan L. v. Superior Court*, 165 Cal. App. 4th 1074, 1101-02 (Cal. Ct. App. 2008). And at least one other state supreme court has held that home education for religious reasons implicates the Free Exercise Clause. *People v. DeJonge (After Remand)*, 501 N.W.2d 127 (Mich. 1993).

Independently, the McIntyres have a valid claim for prosecution in retaliation for their exercise of religious liberty. The U.S. Supreme Court has held that "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). There is no conceivable basis on which to argue this prohibition against retaliatory prosecution would not also apply to religious liberty under the First Amendment.

To prevail on a claim for retaliatory prosecution under section 1983, the McIntyres must prove that (1) their conduct was constitutionally protected, (2) was a substantial or motivating factor in Mr. Mendoza's challenged actions, and (3) there was no probable cause for the prosecution. *Id.* In this case, the McIntyres' right to home educate their

children is constitutionally protected. Even the District apparently concedes the existence of such right, arguing only that it is not "absolute." And Mr. Mendoza admitted knowing there was no basis for the criminal charges. That leaves only the "substantial or motivating factor" element, and the notations by Mr. Mendoza's workers concerning the "Jesus Saves" bumper sticker are enough at least to establish a fact issue whether the religious nature of the home school factored into Mr. Mendoza's actions.

5. Mr. Mendoza is not entitled to immunity under Section 22.0511(a) of the Texas Education Code.

Section 22.0511(a) of the Texas Education Code provides that:

> A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.

TEX. EDUC. CODE ANN. § 22.0511(a) (West Supp. 2011). Mr. Mendoza claims this statute insulates him from liability for state-law claims, but that is incorrect for several reasons.

(a) Section 22.0511 applies solely to tort claims.

Section 22.0511 applies only to tort claims, not to state or federal constitutional claims. *Moore v. Port Arthur Indep. Sch. Dist.*, 751 F. Supp 671, 672-73 (E.D. Tex. 1990).[55] As previously noted, the McIntyres do not assert any state-law tort claims

[55] In 1994, the Waco Court of Appeals issued a lengthy opinion questioning the *Moore* holding—but withdrew that opinion and replaced it with one containing no mention of *Moore*. *See Beavers v. Goose Creek Consol. Indep. Sch. Dist.*, No. 10-93-116-CV, 1994 WL 192203 (Tex. App.—Waco May 14,

against Mr. McIntyre. As a result, this provision does not apply in this case.

(b) Mr. Mendoza's challenged actions were not within the scope of duties of his position.

Section 22.0511 applies only to acts within the scope of duties of Mr. Mendoza's position. Again, while the Texas Education Code empowers Mr. Mendoza to investigate truancy, it does not permit him to demand information from private schools pertaining to their enrolled students. It also does not authorize him to make up non-existent criminal charges. These actions were not within the legal authority of the District or Mr. Mendoza.

Contrary to the District's continuing assertion of the right to sit in judgment of private schools, nothing in the Education Code grants the District any right to demand curriculum or grade information from a private school. The Education Code applies solely to taxpayer-funded institutions, not to private schools. In *Leeper*, the Texas Supreme Court held that home schools are private schools within the meaning of the Education Code. *Leeper*, 893 S.W.2d at 443-444.

In the aftermath of *Leeper*, the Texas Education Agency stopped accrediting private schools in Texas.[56] The agency now disclaims any oversight of private and parochial schools (including home schools) in Texas.[57] Nothing in the Education Code or *Leeper* suggests that the District has the authority to demand curriculum information or

---

1994), *opinion withdrawn, superseded by* 884 S.W.2d 932 (Tex. App.—Waco 1994, writ denied). Since then, Moore was cited favorably in a decision affirmed by the Fifth Circuit. *Doe v. S&S Consol. Indep. Sch. Dist.*, 149 F. Supp. 2d 274 (E.D. Tex. 2001), *aff'd*, 309 F.3d 307 (5th Cir. 2002).

[56] http://www.tepsac.org/faqs.cfm. Indeed, TEA no longer lists private schools—even those formerly accredited—in its listing of accreditation statuses.
Compare http://mansfield.tea.state.tx.us/TEA.AskTED.TSD/TSDfiles/tsd2000/acnplst.pdf
and http://www.tea.state.tx.us/index2.aspx?id=2147494532&menu_id=2147483702.

[57] http://ritter.tea.state.tx.us/taa/homeschools03232010.html.

grade reports from any private school in Texas. And certainly nothing suggests that EPISD may seize this power in the absence of legislative or administrative sanction. In *Leeper*, the Texas Supreme Court said that "the TEA is not precluded from requesting evidence of achievement test results in determining whether children are being taught in a bona fide manner." *Id.* at 444. But nothing the court said suggests that an individual district may demand anything—and certainly not curriculum and grade reports—absent any grant of authority from the Texas Legislature or TEA.

(c) Mr. Mendoza's actions did not involve the exercise of discretion.

Mr. Mendoza's actions in seeking to compel information from a private school, and then in manufacturing non-existent criminal charges, are unprotected by the immunity statute. As the Fifth Circuit has noted: "Manufacturing evidence of sexual abuse of a child is not within the parameters of any imaginable discretion granted by the Texas statute. The argument that [defendant] could, with immunity violate the Texas criminal statute forbidding false child abuse reports, is without merit." *Morris*, 181 F.3d at 674 (citation omitted). Similarly, the notion that Mr. Mendoza could, with immunity, commit perjury lacks merit.

6. Mr. Mendoza is not entitled to official immunity.

Mr. Mendoza also contends he is entitled to common law official immunity. But official immunity only applies to actions related to performance of (1) discretionary duties, (2) undertaken in good faith, and (3) within the scope of the official's authority.

Initially, as previously discussed, Mr. Mendoza lacked any discretion to make up criminal charges. Moreover, again as previously discussed, if Mr. Mendoza truly

contends he was acting under an authority to investigate truancy, then those actions were ministerial rather than discretionary due to the mandatory language of the governing statutes. There is no discretion as to "how" to perform the act of filing criminal charges.

More important, a fact issue exists concerning whether Mr. Mendoza acted in good faith. The McIntyres informed Mr. Mendoza and the District at least four times (once during the initial home visit, once by telephone call to Ms. Maldonado, and twice by letters from HSLDA) that they were educating their children at home. Mr. Mendoza knew quite well that the McIntyre children were not "truant" from EPISD. Moreover, Mr. Mendoza admitted to Laura McIntyre that he knew she had not broken any law—***after*** filing criminal complaints swearing under oath that she and Michael ***had*** broken the law. And when asked point blank if he filed criminal charges knowing there was no criminal conduct, Mr. Mendoza refused to answer. Finally, lacking the basis for any allegation of actual criminal conduct, Mr. Mendoza simply made up the "crime" of failure to meet non-existent home school verification requirements.

Any of these facts alone would create face issue as to whether Mr. Mendoza acted in good faith. Taken together, they constitute nearly overwhelming evidence of bad faith. In the presence of a fact issue concerning good faith, the district court properly denied the plea and motion concerning official immunity.

7. Appellants forfeited their complaint about the district court's evidentiary rulings through inadequate briefing.

The District and Mr. Mendoza contend that the trial court erred in overruling almost 100 objections they made to Laura McIntyre's affidavits. The Texas Rules of

Appellate Procedure require that a brief contain a clear and concise argument for each contention, along "with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1 (West Supp. 2012). But the District and Mr. Mendoza fail to—

- cite any particular objections they contend were improperly overruled,
- cite a single legal authority in support of their argument, or
- identify any objection that the trial court overruled which led to entry of an incorrect judgment. *See* TEX. R. APP. P. 44.1(a) (West 2003).

The District and Mr. Mendoza asserted more than 90 objections to Laura McIntyre's affidavits. Yet they do not identify a single specific objection they contend was improperly overruled. Instead, they globally assert the trial court ruled erroneously—apparently contending the trial court made more than 90 incorrect evidentiary rulings. Apparently, this court is expected to cull through each individual objection, review the affidavits and research the governing legal authority, and issue new rulings on all the objections. But Rule 38.1 exists to prevent just this sort of abdication of briefing responsibility. And to respond, the McIntyres would have to address all of the 90+ objections—without any idea which of those objections the District and Mr. Mendoza contend actually should have been sustained and would have made a difference.

The District and Mr. Mendoza bore the burden to present and argue this issue properly—a burden they failed to meet even under the most accommodating view of briefing rules. This court has held that a party's "conclusory statements, unsupported by citation to proper authority" constitute inadequate briefing. *Tex. Mut. Ins. Co. v. Sara Child Care Ctr., Inc.*, 324 S.W.3d 305, 319 (Tex. App.—El Paso 2010, pet. denied); *see*

also Five Star Int'l Holdings, Inc. v. Thomson, Inc., 324 S.W.3d 160, 170 (Tex. App.—El Paso 2010, pet. denied). Under established precedent, then, the District and Mr. Mendoza forfeited any error arising from the trial court's evidentiary rulings.

8. The McIntyres concede their failure to provide proper TRFRA notice.

Based on the District's arguments, the McIntyres concede their failure to provide sufficient notice under the TRFRA and agree reversal and rendition on that single claim is appropriate.

Conclusion

The trial court properly denied the various pleas and motions, and its rulings should be affirmed.

Respectfully submitted,

Charles "Chad" Baruch
Texas Bar Number 01864300

THE LAW OFFICE OF CHAD BARUCH
3201 Main Street
Rowlett, Texas 75088
Telephone: (972) 412-7192
Facsimile: (972) 412-4028

Lead Counsel on Appeal for Appellees

Steven C. James
Texas Bar Number 10551500
521 Texas Avenue
El Paso, Texas 79901
Telephone: (915) 543-3234
Facsimile: (915) 543-3237

Counsel for Appellees Michael and Laura McIntyre

Tom Sanders
Post Office Box 1860
Sugar Land, Texas 77487
Telephone: (281) 242-9700
Facsimile: (281) 242-8340

Counsel for Appellees K.M., L.M., C.M., M.M., and L.M.

Certificate of Service

The undersigned certifies that two true and correct copies of this instrument were served this 18th day of May, 2012, by United States mail, upon the following counsel of record for appellants:

S. Anthony Safi
Mounce, Green, Myers, Safy, Paxson & Galatzan
Post Office Box 1977
El Paso, Texas 79999-1977

Charles "Chad" Baruch