COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

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| IN RE<br><br>ROMAN CATHOLIC DIOCESE OF EL PASO,<br><br>Relator. | §<br>§<br>§<br>§ | No. 08-19-00244-CV<br><br>AN ORIGINAL PROCEEDING<br><br>IN MANDAMUS |

**DISSENTING OPINION**

The question presented on mandamus review is whether the trial court correctly determined it could exercise subject matter jurisdiction over Olivas' employment discrimination and fraud claims against the Diocese without running afoul of the ecclesiastical abstention doctrine.

I believe it is clear that the trial court had jurisdiction over the dispute and that the merits discussion regarding Olivas' claims and the Diocese's First Amendment defense is before the court of appeals prematurely in this mandamus petition. As such, I would vote to summarily deny this petition without opinion. *See* TEX.R.APP.P. 52.8(a), (d). Because the majority does not, and because this case—as imperfect a vehicle as it is—bears on whether laws prohibiting discrimination on the basis of sex, race, disability, national original, or sexual orientation apply to religious entities, I respectfully dissent by written opinion.

### A. Mandamus Must Be Denied Because a First Amendment Defense to an Employment Discrimination Claim is Non-Jurisdictional

First, I believe that this mandamus should be summarily denied because a First Amendment religious liberty defense to an employment discrimination lawsuit does not deprive a district court of jurisdiction to resolve an antidiscrimination lawsuit brought against a religious entity by a former employee. As such, we are precluded from granting mandamus here because the trial court was free to deny, for purely procedural reasons, a plea to the jurisdiction which raised only a non-jurisdictional defense. *See Shannon v. Mem'l Drive Presbyterian Church U.S.*, 476 S.W.3d 612, 625 (Tex.App.—Houston [14th Dist.] 2015, pet. denied)(reversing plea to the jurisdiction granted on ministerial exception doctrine grounds because questions regarding the exception were not jurisdictional); *Zamora v. Tarrant Cty. Hosp. Dist.*, 510 S.W.3d 584, 589 (Tex.App.—El Paso 2016, pet. denied)(plea to the jurisdiction cannot be granted for violating a non-jurisdictional deadline); *Ward v. Lamar University*, 484 S.W.3d 440, 453 (Tex.App.—Houston [14th Dist.] 2016, no pet.)(procedural vehicle of plea to the jurisdiction used to address only jurisdictional issues; dismissals based on non-jurisdictional issues must be brought using proper procedural vehicle).

A Texas district court is a court of general jurisdiction, presumptively possessing jurisdiction over all claims unless the Legislature or a constitutional provision has provided that the district court does not have jurisdiction. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75-76 (2000). The majority is correct that Texas courts, including this Court, have treated First Amendment religious liberty defenses as imposing jurisdictional restrictions on Texas courts and thereby essentially creating an exception to the presumption of general district court jurisdiction described in *Kazi*. *See, e.g., El Pescador Church, Inc. v. Ferrero*, 594 S.W.3d 645, 654 (Tex.App.—El Paso 2019, no pet.)(raising the issue of religious liberty *sua sponte* in a direct

appeal from a final judgment under theory that First Amendment places substantive limitations on the jurisdiction of courts over religious entities in certain cases).

But this concept of the First Amendment's religion clauses stripping courts of jurisdiction in some types of civil lawsuits is not universally shared across courts; in fact, that idea has been a topic of controversy for decades. In *C.L. Westbrook, Jr. v. Penley*, the Texas Supreme Court recognized a schism among federal courts on the question of whether to treat Free Exercise Clause defenses as a threshold justiciability issue that could be raised in a pre-discovery jurisdictional challenge or as an affirmative defense to liability dealt with at the later post-discovery summary judgment stage of litigation. *See* 231 S.W.3d 389, 394 n.3 (Tex. 2007)(citing cases). The Texas Supreme Court elected to treat Free Exercise Clause claims as a threshold justiciability issue that could be raised in a plea to the jurisdiction, *see id*., thereby making the constitutional analysis into a jurisdictional hurdle that must be surmounted early on in litigation (often even prior to discovery) before a case may proceed further.

In the wake of *Westbrook*, Texas courts largely held that First Amendment religious liberty defenses, if proven as a matter of law, prevented a trial court from asserting subject-matter jurisdiction over a religious entity defendant. *See In re St. Thomas High School*, 495 S.W.3d 500, 506 (Tex.App.—Houston [14th Dist.] 2016, orig. proceeding). However, an intervening U.S. Supreme Court decision has made clear that Texas' approach in "jurisdictionalizing" Free Exercise Clause defenses under *Westbrook* is inconsistent with the First Amendment, at least in the realm of employment discrimination law.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, the U.S. Supreme Court, like the Texas Supreme Court in *Westbrook*, noted that a conflict had arisen in the federal circuits over whether the ministerial exception, a First

Amendment religious liberty defense, "is a jurisdictional bar or a defense on the merits." *See* 565 U.S. 171, 195 n.4 (2012). The U.S. Supreme Court resolved the split by holding that the exception operates on the merits as an affirmative defense to an otherwise cognizable claim, not as a jurisdictional bar, because "the issue presented by the exception is whether the allegations the plaintiff makes entitle him to relief, not whether the court has power to hear the case." (internal citation and quotation marks omitted).

*Westbrook* and *Hosanna-Tabor* both speak to the issue of whether the First Amendment acts as a substantive restraint on jurisdiction in religious liberty cases. *Westbrook* says yes. *Hosanna-Tabor* say no, at least in employment discrimination cases. When the Texas Supreme Court and the U.S. Supreme Court both speak on an issue of federal constitutional law, the opinion of the U.S. Supreme Court controls. *See Howelett v. Rose*, 496 U.S. 356, 366 n.14 (1990)(holding that a U.S. Supreme Court decision controls over state court decision in which any "title, right, privilege, or immunity is specially set up or claimed under the Constitution").[1]

As per the holding in *Hosanna-Tabor*, the trial court had jurisdiction over Olivas' employment discrimination claim. *Accord Shannon*, 476 S.W.3d at 625 (finding that Texas courts have jurisdiction over employment discrimination claims). Given that the trial court had jurisdiction over Olivas' claims, we cannot grant a writ of mandamus compelling a trial court to grant a plea to the jurisdiction based on a non-jurisdictional defense, as such a writ would be

[1] The majority states that footnote 4 of *Hosanna-Tabor*--which characterizes the ministerial exception as non-jurisdictional--does not bind this Court because that footnote only resolves a circuit split over whether the defense should be raised in a motion under FED.R.CIV.P. 12(b)(1) or 12(b)(6), and the footnote does not actually address a federal constitutional issue. However, my reading of *Hosanna-Tabor* finds no reference to the Federal Rules of Civil Procedure at all, either in footnote 4 or in the body of the opinion. *See* 565 U.S. 171 at n.4. Instead, I find footnote 4 only discusses the issue of whether the ministerial exception defense, which arises under the First Amendment, is jurisdictional. Likewise, each case cited in footnote 4 contains a parenthetical explanation of whether the circuit court held that the ministerial exception was jurisdictional or not. I conclude the Court in *Hosanna-Tabor* was not interpreting the Federal Rules of Civil Procedure, but rather was expounding on the nature of a constitutional defense arising under the First Amendment, the nature of which is reserved for final resolution by the United States Supreme Court.

compelling a trial court to do something it is not authorized to do. *See id.* (trial court cannot grant plea to the jurisdiction based solely on a ministerial exception defense because that defense is non-jurisdictional); *El Pescador Church*, 594 S.W.3d at 655 (courts must fulfill their constitutional obligation to exercise jurisdiction where jurisdiction exists). Because the trial court's decision was procedurally proper, I conclude that mandamus relief is unavailable to the Diocese, and that the petition may be denied on that reason alone.

### B. Employment Discrimination Laws Like TCHRA Can Be Constitutionally Enforced Against Religious Entity Employers Unless the Plaintiff-Employee is a "Minister"

Second, to the extent I am incorrect and the merits of a First Amendment religious liberty defense may be raised via plea to the jurisdiction, I believe that employment discrimination laws such as the age discrimination provision of Texas Commission on Human Rights Act (TCHRA), TEX.LAB.CODE ANN. § 21.051, may be constitutionally enforced against religious entity employers, provided that the employee bringing the claim is not one of the defendant's "ministers."

The First Amendment circumscribes the role civil courts may play in resolving certain disputes involving churches, under the theory that certain government action can burden the free exercise of religion if it impermissibly encroaches on a church's ability to manage its internal affairs. *El Pescador Church*, 594 S.W.3d at 654. The question here is whether subjecting the Diocese to a potential age discrimination lawsuit under the TCHRA would unconstitutionally encroach on the Church's ability to manage its own internal affairs. The Diocese takes the position that it is immune from any age discrimination lawsuit because the imposition of civil liability would interfere with Seitz's discretion under canon law to set the Diocese's financial priorities. I disagree.

The majority rightly recognizes that Roman Catholic canon law vests Seitz as the Church's regional bishop with the discretion to both set an amount of "decent support" for Olivas and to

balance various interests in crafting Diocese's budget, including charitable spending. The majority emphasizes that charity is a core tenet of many religions, including Catholicism, and it opines that applying the familiar *McDonnell Douglas* framework to the Seitz's decision would have a chilling effect on the Church's ability to engage in charity as part of its religious practice. To illustrate the chilling effect, the majority posits a hypothetical situation in which a 41-year-old able-bodied man and unwed pregnant teen seek charity from the Diocese, but the Bishop's decision regarding who gets charity is clouded by fear of an age discrimination lawsuit because the able-bodied man requesting charity is over 40. The majority then asks if the Bishop's decision would be chilled by the threat of a lawsuit, why should our analysis be any different here simply because the charitable supplicant is an employee by status?

The critical difference between those scenarios is that TCHRA does not impose age discrimination liability on acts of charity. It prohibits employers from engaging in acts of discrimination against employees based on their membership in a protected class. The Legislature has imposed a neutral civil law of general applicability to combat a democratically-recognized societal ill, and the Diocese is generally not above complying with neutral civil laws of general applicability. *See Employment Division v. Smith*, 494 U.S. 872, 873 (1990).

A facially neutral law of general applicability may nevertheless be unconstitutional under some circumstances if it has the effect of burdening religious practice, but in determining whether the application of generally-applicable employment discrimination laws unduly burdens the free exercise of religion by interfering with a religious authority's ability to balance organizational resources, we need not reinvent the wheel. The U.S. Supreme Court already calibrated that First Amendment balance in *Hosana-Tabor*. The Court recognized that while laws of general applicability could apply to religious entities under *Smith*, the First Amendment does carve out an

exception from antidiscrimination laws when a religious entity is sued by its own "minister" in an employment dispute because the legal dispute involves the selection of a church's key personnel. *Hosana-Tabor*, 565 U.S. at 189-90 (recognizing *Smith*'s continued validity but distinguishing *Smith* by holding the ministerial exception is constitutional because it prevents the courts from effectively imposing a minister on a religious organization and thereby interfering with internal church governance).

Notably, the *Hosana-Tabor* Court did not say that religious entities are insulated from any and all discrimination suits. And when the Court revisited the ministerial exception issue in *Our Lady of Guadalupe School v. Morrisey-Berru*, the Court again did not say that religious entities are exempt from employment discrimination suits *in toto;* instead, the question was whether the employee—a teacher—was actually serving in a ministerial role. *See* 140 S.Ct. 2049, 2064-65 (2020). Indeed, in the wake of *Hosanna-Tabor*, other courts have recognized that the minister v. non-minister distinction is the dispositive constitutional question and held that the First Amendment does not prevent courts from adjudicating whether a religious organization's stated religious reason for an adverse employment action against a *non-ministerial* employee is, in fact, pretext for illegal discrimination. *See, e.g., Garrick v. Moody Bible Institute*, 494 F.Supp.3d 570, 577 (N.D. Ill. 2020)(holding that the First Amendment permits a court to determine whether a religious organization employer actually terminated an employee on the basis of the organization's religious beliefs or merely invoked its religious beliefs as "a cover to discriminate against" the employee on a protected basis under antidiscrimination law; the focus is on whether the religious organization employer's stated ecclesiastical reason for termination was "honest" and not on whether the decision was "correct" as a matter of religious precept).

I recognize that the U.S. Supreme Court has exempted religious entities from some types of employment discrimination lawsuits. But I am not prepared to endorse the idea that the *McDonnell Douglas* framework cannot ever be applied against a religious organization if the religious organization simply recasts the employment relationship as being an act of charity on the employer's part or otherwise maintains that the imposition of tort liability would burden church operations or internal church governance in the abstract.

In *Kelly v. St. Luke Community United Methodist Church*, the Dallas Court of Appeals apparently did exactly that, explicitly foregoing a *Hosanna-Tabor* minister v. non-minister analysis with respect to age and sex discrimination claims brought by a woman whose title was "Director of Operations" for a church and who was fired while on medical leave after apparently having a personality conflict-type run-in with the church's pastor. *See* No. 05-16-01171-CV, 2018 WL 654907, at *7-8 (Tex.App.—Dallas Feb. 1, 2018, pet. denied)(mem. op., not designated for publication)(employee fired and replaced by a new employee after she confronted senior pastor about his treatment of her and his "tone"). The Dallas Court concluded that while the ministerial exception recognized by *Hosanna-Tabor* was a subset of the broader ecclesiastical abstention doctrine, the church's decision to fire the administrator was insulated from review under the broader ecclesiastical abstention doctrine because although the employment discrimination claims did not involve a theological controversy and could be resolved using secular principles, "the application of those principles to impose civil liability [on the church] . . . would impinge upon the church's ability to manage its internal affairs." *See id.*

I would not follow the holding in *Kelly* because I believe it to be incorrect. This holding stretches the ecclesiastical abstention doctrine beyond its limit by eliminating the requirement that a dispute actually be ecclesiastical in nature for abstention to apply. *See El Pescador Church*, 594

S.W.3d at 655 (recognizing a distinction between true ecclesiastical controversies requiring abstention and civil law controversy in which church officials happen to be involved that can be resolved using a neutral principles methodology). The ecclesiastical abstention doctrine does not prevent courts from imposing liability on religious entities simply because they are religious. *See id.* (recognizing that the doctrine "does not shield all suits simply because a parishioner or church is a party-litigant"; that "churches and their congregations 'exist and function within the civil community'" and are therefore "amenable to rules governing property rights, torts, and criminal conduct"; *id.* at 655 (*citing Williams v. Gleason*, 26 S.W.3d 54 (Tex.App.—Houston [14th Dist.] 2000, pet. denied)), and that the law may regulate religious practices that threaten the public's health, safety, or general welfare). On the contrary, courts *cannot* abstain from resolving civil cases involving religious entity litigants unless the case (1) requires the court to impermissibly wade into matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them[,]" *see id.* at 654 (*citing Serbian E. Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 713-14 (1976)), or (2) involves government employment regulations that would have the effect of forcing an organization to retain an unwanted minister. *See Hosanna-Tabor*, 565 U.S. at 188.

Federal courts have recognized that there is nothing inherently ecclesiastical about a religious organization's employment decisions dealing with non-ministerial employees. *See Garrick*, 494 F.Supp.3d at 577-78 (rejecting argument that permitting non-minister's employment discrimination suit against Bible institute would *per se* interfere with institute's right to religious autonomy and holding that claims were subject to abstention only when they were "inextricably related" to institute's religious beliefs). And nothing about the holding in *Kelly* suggests that the conflict over the firing of the church administrator had anything to do with church doctrine or

would require the court to resolve a matter of theology. To endorse *Kelly* and hold that imposing any liability on a church for violating an employment discrimination statute—even as to a non-ministerial employee—would *per se* impinge on church autonomy under the ecclesiastical abstention doctrine would mean that churches as a practical matter would be wholesale exempt from antidiscrimination laws applicable to secular employers without even having to establish an ecclesiastical nexus.

Instead, I find *Garrick*'s logic persuasive. Since the Diocese is not *per se* above answering an employment discrimination suit involving a non-ministerial employee, and since *Garrick* recognizes that a fact finder could determine whether Seitz's stated religious reason for reducing Olivas' compensation was a pretext for age discrimination without having to resolve a theological controversy,[2] in my view, the operative merits question in determining whether ecclesiastical abstention is required post-*Hosanna-Tabor* is the question of whether Olivas is a minister. If he is, the age discrimination statute cannot be enforced against the Diocese under the First Amendment. If he is not a minister and is merely a regular employee, the statute can be enforced under *Smith* and the regular burden-shifting *McDonnell Douglas*-type framework applies. *See Garrick*, 494 F.Supp.3d at 577.

[2] Notably, Seitz never actually testified that answering an age discrimination suit would force the Diocese to violate its religious beliefs. Seitz testified that the factors he considered in reducing Olivas' payments included:

. . . [t]he fact that I believed that he was a man in good health, from what I learned, that he was capable of supporting himself to some degree. And that was basically the criterion upon which I based the decision to reduce it, again, considering the other needs of the church and the limited resources available.

Seitz also testified that he believed that previous criminal allegations made against Olivas which did not result in charges were nevertheless credible.

While these reasons could support a showing that the Diocese had legitimate non-discriminatory reasons to engage in the actions it did against Olivas, there is no indication on this record that making the Diocese answer an age discrimination suit brought by a non-ministerial employee would *per se* cause the civil courts to wade into matters of theological controversy or otherwise force the Church to violate its own tenets. As such, I believe it is appropriate for this dispute to be resolved at the summary judgment stage as is done in federal court.

### C. The Trial Court Did Not Abuse Its Discretion By Denying the Plea to the Jurisdiction Because Olivas Does Not Serve in a Ministerial Role

Having established that TCHRA may be enforced against the Diocese as to non-ministerial employees, to the extent the ministerial exception defense is treated jurisdictionally, I believe mandamus should be denied because the trial court's decision denying the plea to the jurisdiction was not erroneous; the Diocese is not immune from Olivas' age discrimination and fraud claims under the First Amendment.

The question of who constitutes a minister for purposes of the ministerial exception is unsettled. "Simply giving an employee the title of 'minister' is not enough to justify the exception." *Our Lady of Guadalupe School*, 140 S.Ct. at 2063. In determining whether the ministerial exception applies,"[w]hat matters, at bottom, is what an employee does." *Id*. at 2064. The exception includes any "employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id*. at 2063.

*Under these circumstances, has the Diocese shown that Olivas is a minister?*

In *Our Lady of Guadalupe School*, the U.S. Supreme Court held that two religious school teachers were "ministers" under the record facts because although they lacked a formal title, they performed ministerial-type ecclesiastical services for the organization's benefit. *See id*. at 2063-64, 2066-68. The facts of this case present the inverse situation. As a priest, Olivas would appear to fit squarely within the commonly understood definition of a minister. *See id.* at 2073 (Sotomayor, J., dissenting)(recognizing that at its core the ecclesiastical abstention doctrine is meant to protect decisions regarding clergy selection and that "a religious entity's ability to choose its faith leaders--rabbis, priests, nuns, imams, ministers, to name a few--should be free from government interference"). However, the wrinkle in this case is that while Olivas retains the title

of priest, he is by the Church's own assessment a priest in name only. Seitz admitted that Olivas does not and cannot perform any ministerial duties for the Diocese due to Olivas' suspension of faculties. Seitz also unequivocally stated that he would never place Olivas back into active service as a priest. It is undisputed that Olivas does not hold a leadership role in the Diocese. It is undisputed that Olivas does not and cannot conduct worship services or important religious ceremonies or rituals. And the Diocese does not other contend that Olivas continues to serve as a messenger or teacher of the Catholic faith.

Under these unusual circumstances, I would agree with the majority that Olivas is unequivocally not a minister for purposes of *Hosanna-Tabor* and *Our Lady of Guadalupe Church*. Olivas does not serve a ministerial role for the Diocese, meaning that the trial court could apply the TCHRA age discrimination statute without violating the First Amendment. *Garrick*, 494 F.Supp.3d at 577. Thus, even if the First Amendment issue is jurisdictional, the trial court could properly assert jurisdiction here and allow the case to move forward for a merits determination because Olivas, a non-ministerial employee, may bring an employment jurisdiction lawsuit against the Diocese without violating the First Amendment.

**CONCLUSION**

I wish to be careful in how I draw the lines here, because a troubling question arises under a sweeping standard like the one advanced by the Diocese where any civil regulation that could potentially burden internal church governance is prohibited: how much conduct could a religious entity put outside the reach of the State's civil authority under the First Amendment? Could the Church insulate itself from civil tort claims arising out of sexual abuse by one of its priests by saying that the matter involves a matter of internal church discipline? *See John Doe 122 v. Marianist Province of the U.S.*, No. SC 98307, slip op. at 8-11, 620 S.W.3d 73, -- (Mo. Apr. 6,

2021) (partially upholding summary judgment granted in favor of Catholic school on negligence claim arising out of employment of Marianist brother who sexually abused a male high school student during counseling sessions on First Amendment grounds, reasoning that courts could not adjudicate negligence claim without second-guessing the Church's selection and discipline of its ministers as per *Hosanna-Tabor*). Could a church even exempt itself from civil liability for human trafficking of its own members by saying the plaintiffs it allegedly trafficked were the church's "ministers?" *See Headley v. Church of Scientology Int'l*, No. CV 09-3987 DSF (MANx), 2010 WL 3184389, at *4-6 (C.D. Cal. Aug. 5, 2010), *aff'd on other grounds* 687 F.3d 1173, 1179-81 (9th Cir. 2012)(finding that a member of Scientology's Sea Org who alleged she was the victim of forced labor human trafficking could not bring a lawsuit under the Trafficking Victims Protection Act because the Church considered her to be a minister serving in a key position in the organization and the First Amendment insulates a religious organization from civil court review of how it treats its ministers).

Thankfully, those big questions are not before the Court—only the relatively routine issue of an employment discrimination dispute. Compliance with employment law burdens all employers, secular or religious. In *Hosanna-Tabor* and *Our Lady of Guadalupe Church,* the United States Supreme Court held that the burden of compliance becomes constitutionally intolerable under the First Amendment once it affects a religious entity's ability to select its own ministers. Even under this standard, the inquiry is fraught. The Supreme Court has held that so long as a religious entity employer calls its employee a minister, the religious employer can replace older workers with younger workers and fire employees for seeking breast cancer treatment when secular employees could not. *See Our Lady of Guadalupe*, 140 S.Ct. at 2058-60.

Olivas may not be the most sympathetic face for this issue, and it may be that proving an age discrimination claim on the merits will be a challenge. But neither the merits of Olivas' claim nor the merits of the Diocese's First Amendment religious liberty defense are ripe for discussion at the plea to the jurisdiction stage of litigation. For this reason, and because I do not believe religious entities are wholly above answering employment discrimination lawsuits or otherwise complying with civil law, I respectfully dissent.

May 17, 2021

YVONNE T. RODRIGUEZ, Chief Justice

Before Rodriguez, C.J., Palafox, and Alley, JJ.