IN RE: ROMAN CATHOLIC DIOCESE OF EL PASO (2021)

Court of Appeals of Texas, El Paso.

IN RE: ROMAN CATHOLIC DIOCESE OF EL PASO, Relator.

No. 08-19-00244-CV

Decided: May 17, 2021

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

RESPONDENT: Javier Alvarez, Judge, County Court at Law No. 3, 500 E. San Antonio, Suite 1001, El Paso, Tx 79901-2419. ATTORNEY FOR RELATOR: Francis S. Ainsa Jr., Attorney at Law, 3801 N. Capital of Texas Hwy, Suite E240, PMB 653, Austin, TX 78746. ATTORNEY FOR REAL PARTY IN INTEREST: John P. Mobbs, Attorney at Law, 6350 Escondido Drive, Suite A-14, El Paso, TX 79912.

OPINION

In this mandamus proceeding we decide whether a court can hear claims arising out of the reduction of a priest's payments from the local diocese. The claims are premised on the application of Texas's statutory age discrimination law and common law fraud. Because the

application of those legal theories, under the unique facts of this case, runs head-long into church doctrine we conclude the claims are barred by ecclesiastical abstention.

I. Background

Reverend Jose A. Olivas (Olivas) became a priest in the Roman Catholic Diocese of El Paso (the Diocese) around 1980, but in 1999 his "faculty" was removed. "Faculties" are the equivalent of his license to perform duties as a priest. The Diocese removed Olivas's faculties based on a criminal complaint which has since been dismissed. Nonetheless, he has been on administrative leave ever since and the Diocese is unaware of any services that Olivas performs for it. The Diocese, however, has continued to pay Olivas while he was on administrative leave. This lawsuit arose when the Diocese reduced those payments in 2016. Following that decision, Olivas sued the Diocese, contending that the reduction in benefits was based on age discrimination, prohibited by the Texas Commission on Human Rights Act (TCHRA). See Tex.Lab.Code Ann. §§ 21.001-.556. Olivas also alleges that the Diocese was liable for fraud by making material representations concerning his compensation.

The Diocese filed a plea to the jurisdiction contending that the suit should be dismissed under the "ecclesiastical abstention" doctrine. The Diocese's rationale was that the case could not be resolved without a court or jury applying the Roman Catholic Church's canon law--something forbidden under the Free Exercise Clause to the United States Constitution. At the hearing on the motion, the Diocese sponsored two witnesses to explain that position. The first, Father Anthony Celino, has been the vicar general and chancellor for the Diocese. In both positions he assisted the Bishop in administration of the Diocese. Father Celino has a degree in "canon law" obtained from Catholic University of America. Father Celino testified that under canon law, when a priest is placed on administrative leave and his faculties are suspended, the bishop has an obligation "to give decent support to the priest." The term "decent support" arises from canon law and is determined solely at the discretion of the bishop, taking into consideration the needs of the individual priest and the resources of the Diocese. However, a priest aggrieved by that decision can ask the bishop to reconsider, and beyond that, can petition an entity called the Congregation for the Clergy.

In July 2013, Bishop Mark Seitz was appointed to oversee the Diocese. Bishop Seitz also testified at the hearing below and agreed that a priest who is carrying out his priesthood receives what canon law terms "remuneration." But a priest who is out of active ministry is not being remunerated for any service; instead, they receive "decent support" under canon law that is a form of charity. Its purpose is to make sure that the priest can take care of his basic needs.

In 2016, Bishop Seitz asked for a review all the cases regarding priests who were not in the ministry but who were receiving decent support. Following that review, he decided to reduce Olivas's support, explaining the decision this way:

I did it because I saw so many great needs in the Diocese and I only have so many funds to serve the needs, much other charitable work, as well. And I did look carefully into the situation of him and others who are in that circumstance to try to see whether a priest was capable of providing for his needs by other means than whatever I would provide and to assess what he would need beyond--beyond that, beyond what he's capable of providing for himself.1

The Bishop also testified that the Diocese has no contract of employment with Olivas, and the Diocese's obligation arises solely from canon law, as administered at his discretion. Neither the Bishop nor Father Celino believed that Olivas pursued a challenge of the Bishop's decision through the Congregation for the Clergy in Rome.

Olivas did not testify at the hearing. But through cross-examination of Father Celino, Olivas established that the Diocese has reported Olivas's monthly payments to the Internal Revenue Service through a W-2, which categorizes Olivas as an employee, and effects a withholding of federal income tax. Father Celino agreed that this was in error, as the payments should have been reported through a Form 1099 once Olivas's salary was converted from remuneration to decent support. The letter which the Diocese sent to Olivas informing him of the reduction also referred to the on-going payments as a “payroll check.” Olivas also challenged Bishop Seitz's claim that he looked into Olivas's personal situation, at least to the extent that the Bishop never personally spoke to Olivas prior to reducing the amount of the payments. Correspondence from the Diocese did attest, however, that it had requested a copy of Olivas's most recent income tax filings prior to the reduction in payments.

Following the hearing, the trial court denied the Diocese's motion, which it now challenges in this mandamus.

II. Standard of Review

To obtain mandamus relief, a relator must show that a trial court has (1) clearly abused its discretion, and (2) the relator has no adequate remedy by appeal. Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992).

We have previously written that “[m]andamus review is generally unavailable to challenge incidental district court rulings, such as the denial of a plea to the jurisdiction, because there is an adequate remedy by appeal.” In re Tex. Mut. Ins. Co., 510 S.W.3d 552, 556 (Tex.App.--El Paso 2016, orig. proceeding). However, if the action sufficiently implicates First Amendment concerns, the remedy of appeal may be

inadequate. See In re St. Thomas High School, 495 S.W.3d 500, 514 (Tex.App.--Houston [14th Dist.] 2016, orig. proceeding) (religious school claiming violation of its First Amendment religious rights could not adequately challenge denial of plea to the jurisdiction by appeal). Or, as in In re Tex. Mut. Ins. Co., we have granted mandamus relief when the trial court lacked subject matter jurisdiction. 510 S.W.3d at 559.

A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law, or if it clearly fails to analyze or apply the law correctly. Walker, 827 S.W.2d at 840; In re ReadyOne Industries, Inc., 394 S.W.3d 697, 700 (Tex.App.--El Paso 2012, orig. proceeding). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985). Courts also explain the standard this way: the question is whether the trial court acted without reference to any guiding rules and principles. Id. Germane here, those guiding rules and principles are found in the developed body of Texas law found under the descriptor "ecclesiastical abstention."

III. Ecclesiastical Abstention

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. The First Amendment governs conduct of the several states by virtue of the 14th Amendment. See Cantwell v. State of Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Government action can burden the free exercise of religion by encroaching on a church's ability to manage its internal affairs. See, e.g., Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952); C.L. Westbrook, Jr. v. Penley, 231 S.W.3d 389, 397 (Tex. 2007) ("Churches have a fundamental 'right to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' It is a core tenet of First Amendment jurisprudence that, in resolving civil claims, courts must be careful not to intrude upon internal matters of church governance[.]") (internal citations omitted). Specifically, civil courts cannot inquire 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[.]" Serbian E. Orthodox Diocese for U. S. of Am. and Canada v. Milivojevich, 426 U.S. 696, 713-14, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976), quoting Watson v. Jones, 80 U.S. 679, 733, 13 Wall. 679, 20 L.Ed. 666 (1871). We follow this limitation in Texas under a doctrine referred to as ecclesiastical abstention. Masterson v. Diocese of N.W. Texas, 422 S.W.3d 594, 601 (Tex. 2013); Episcopal Diocese of Ft. Worth v. Episcopal Church, 422 S.W.3d 646, 650 (Tex. 2013).

While the First Amendment "severely circumscribes" the role that civil courts may play in resolving church-related ecclesiastical disputes, Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969), it does not necessarily bar all claims that may touch upon religious conduct. Westbrook, 231 S.W.3d at 396. Courts also have an obligation to resolve disputes and "cannot delegate their judicial prerogative where jurisdiction exists." Masterson, 422 S.W.3d at 606 (courts must "fulfill their constitutional obligation to exercise jurisdiction where it exists, yet refrain from exercising jurisdiction where it does not exist."). Churches and their congregations "exist and function within the civil community," and therefore they are "amenable to rules governing property rights, torts, and criminal conduct." Williams v. Gleason, 26 S.W.3d 54, 59 (Tex.App.--Houston [14th Dist.] 2000, pet. denied).

As the Texas Supreme Court has noted, the "differences between ecclesiastical and non-ecclesiastical issues will not always be distinct" because many disputes "require courts to analyze church documents and organizational structures to some degree." Masterson, 422 S.W.3d at 606; see also Tran v. Fiorenza, 934 S.W.2d 740, 743 (Tex.App.--Houston [1st Dist.] 1996, no pet.) ("The difficulty comes in determining whether a particular dispute is 'ecclesiastical' or simply a civil law controversy in which church officials happen to be involved."). In so deciding, "courts must look to the substance and effect of a plaintiff's complaint to determine its ecclesiastical implication, not its emblemata." Id. at 743, citing Green v. United Pentecostal Church Int'l, 899 S.W.2d 28, 30 (Tex.App.--Austin 1995, writ denied); see also Mouton v. Christian Faith Missionary Baptist Church, 498 S.W.3d 143, 149-50 (Tex.App.--Houston [1st Dist.] 2016, no pet.) (sustaining challenge to jurisdiction because appellants' claims were "inextricably intertwined with inherently ecclesiastical matters"); Williams, 26 S.W.3d at 59 ("Whether this suit is ecclesiastical, or concerns property rights, torts, or criminal conduct, is determined by first examining the substance and effect of the [plaintiffs'] petition--without considering what they use as claims--to determine its ecclesiastical implication."); see also In re Episcopal Sch. of Dallas, Inc., 556 S.W.3d 347, 356 (Tex.App.--Dallas 2017, orig. proceeding [mand. denied]) ("the key inquiry is whether a judicial resolution will encroach on the institution's governance and affairs").

One way to distinguish between ecclesiastical from non-ecclesiastical claims is whether the dispute can be resolved on neutral principles of law that will not collide with church doctrine. Masterson, 422 S.W.3d at 606; Episcopal Diocese of Ft. Worth, 422 S.W.3d at 650. For instance, in a church property dispute, the supreme court held that where there are no issues of doctrinal controversy involved, a court is constitutionally able to adjudicate a dispute using neutral principles of law. Jones v. Wolf, 443 U.S. 595, 602-03, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979). But "[i]f the conflict cannot be resolved solely by the application of neutral principles of law, we must defer to the decision made by the highest authority of the church from which the question or controversy arises." Dean v. Alford, 994 S.W.2d 392, 395 (Tex.App.--Fort Worth 1999, no pet.). Stated otherwise, if a court will be called upon to interpret or rely on religious precepts or ecclesiastical doctrine,

then the First Amendment bars civil adjudication, but if neutral principles of law, standing alone, resolve the dispute, then the court may adjudicate the dispute. Rodarte v. Apostolic Assembly of the Faith in Christ Jesus, No. H-10-4181, 2012 WL 12893656, at *3 (S.D. Tex. Feb. 29, 2012), citing Jones, 443 U.S. at 604-06, 99 S.Ct. 3020.[2]

IV. Discussion

The Diocese contends in this mandamus that a civil court cannot adjudicate whether Bishop Seitz exercised his discretion to reduce Olivas's payment of decent support in a reasonable manner without inextricably involving itself in the governance of the Catholic Church. We agree and conclude that for both of the asserted claims in this case, that the fact finder would have to judge the stated rationale of Bishop Seitz's reduction of payments which is grounded under the church's canon law. But before addressing the merits, we first dispense with Olivas's argument that the record presents fact questions which make this case unsuitable for disposition by mandamus.

A. The Record is Sufficient to Decide the Issue

The Diocese raised the ecclesiastical abstention issue through a plea to the jurisdiction. That plea may challenge the sufficiency of the pleadings, or it might also include jurisdictional evidence which thereby places into issue the existence of jurisdictional facts. Texas Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 225-26 (Tex. 2004). As here, when a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties. Id. Our governing standard “mirrors that of a summary judgment” where the reviewing court takes as true all evidence favorable to the non-movant, indulging every reasonable inference and resolving any doubts in the non-movant's favor. Id. But if there is no fact question on the jurisdictional issue, the trial court should rule on the plea to the jurisdiction as a matter of law. City of El Paso v. Heinrich, 284 S.W.3d 366, 378 (Tex. 2009).

Bishop Seitz and Father Celino both characterized Olivas's payments as decent support. To be sure, when the Diocese reported the sums to taxing authorities, it did so as it would for any regular employee by filing a W-2 (for regular wages) rather than a Form 1099 (used to report “miscellaneous income” or “non-employee compensation”).[3] So if the dispute here was whether Olivas was an employee or not, we would agree that there is a fact issue. But the heart of the issue is not that--rather it is how the amount of the payments to Olivas were to be determined.

The uncontroverted evidence at the hearing established that Olivas lost his credentials to perform services for the Diocese in 1999 and has been on administrative leave since that time. Moreover, a priest who has lost his credentials and is placed on administrative leave is limited

to payments of decent support as determined by the Bishop. In turn, the Bishop looks to canon law to guide his discretion in setting that amount. So whether the payment is called a salary, wage, non-employee compensation, or charity, its amount is determined by the Bishop applying canon law. And this suit arises from a dispute over the amount of the payment. Accordingly, there is no material fact issue regarding the factual matters that control the outcome of this mandamus.

B. Courts Must Abstain from Hearing the TCHRA Claim

Olivas urged below and now on appeal that this case can be decided on neutral principles of law, namely that a jury need only decide if age was a motivating factor in the Bishop's decision. But in applying the accepted decisional process for age discrimination claims, the fact finder would necessarily have to re-weigh Bishop Seitz's application of canon law, which makes its decision inextricably intertwined with church doctrine and the Diocese's internal affairs.

TCHRA prohibits an employer from discriminating "against an individual in connection with compensation or the terms, conditions, or privileges of employment" based on among other things, age. Tex.Lab.Code Ann. § 21.051.[4] Age discrimination is limited to those age 40 or over. Id. § 21.101. A plaintiff must generally show that the discriminatory motive was "a motivating factor" for the claimed unlawful employment practice. Quantum Chem. Corp. v. Toennies, 47 S.W.3d 473, 480 (Tex. 2001). To prove his case, Olivas would either have to present direct evidence of age discrimination or make out a prima facie case under the McDonnell Douglas [5] rubric. Under either of those ways, the fact finder would arrive back at how canon law should be applied to determine Olivas's payments.

"Direct evidence is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." Williams-Pyro, Inc. v. Barbour, 408 S.W.3d 467, 478 (Tex.App.--El Paso 2013, pet. denied). Direct evidence of discrimination is usually hard to come by in employment discrimination cases, and here, Bishop Seitz testified as to his rationale in reducing the payment which does not suggest any direct evidence of age discrimination. But even if Olivas somehow raised direct evidence of age animus, that would only shift the burden of persuasion to the Diocese to show that it would have taken the same action regardless of the discriminatory motive. See Jespersen v. Sweetwater Ranch Apartments, 390 S.W.3d 644, 653 (Tex.App.--Dallas 2012, no pet.) citing Price Waterhouse v. Hopkins, 490 U.S. 228, 252-53, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). And to make that showing, the Diocese would have to show that under canon law, a proper exercise of discretion would allow Bishop Seitz to reduce the payments as he did. That would in turn require the fact finder to evaluate the application of canon law to the facts of this case.

The more common TCHRA case relies on McDonnell Douglas' shifting burdens for a circumstantial case. Under that analysis, Olivas would claim a presumption of discrimination by establishing a prima facie case of discrimination. To do so, he would need show that he (1) is a member of a protected class; (2) was qualified for his position; (3) suffered an adverse employment action; and (4) in a disparate treatment case, show that he was treated less favorably than members of the opposing class. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); AutoZone, Inc. v. Reyes, 272 S.W.3d 588, 592 (Tex. 2008) (per curiam). If he did so, the burden would shift to the Diocese to advance a legitimate a non-discriminatory reason for the reduction in benefits. See, e.g., Reeves, 530 U.S. at 142, 120 S.Ct. 2097 (describing generally shifting burdens). And if the Diocese meets that burden, Olivas must raise a genuine issue of material fact that the stated reason was a pretext for discrimination. See id. at 142-43, 120 S.Ct. 2097; Toennies, 47 S.W.3d at 477. He might do so by attempting to show “that the employer's proffered explanation is unworthy of credence.” See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Here, that would mean fundamentally questioning the canon law concept of decent support. Or Olivas could examine the circumstances of all the persons whose benefits were reduced to look for a comparator (i.e. a priest whose facilities were revoked and was on administrative leave but was under age 40). See AutoZone, Inc., 272 S.W.3d at 594 (analyzing whether discipline meted out to younger employees was comparable for showing pretext). Here, that would mean possibly re-looking at the Bishop's exercise of discretion for every priest whose decent support was re-evaluated. Or Olivas might simply challenge whether the Bishop correctly applied the “decent support” canon to him. See Reeves, 530 U.S. at 142-43, 120 S.Ct. 2097 (plaintiff demonstrated pretext by showing the company was incorrect in its rationale used to support discharge). So, however Olivas might attempt to show pretext, he would put the fact finder in the posture of reassessing Bishop Seitz's discretion exercised under canon law.

An analog from the Texas Supreme Court also shows the risk to the Diocese in this case. In Westbrook v. Penley, a pastor served a dual role as both a professional counselor and pastor. A congregant, Penley, disclosed her involvement in an inappropriate relationship during a professional counseling session with Westbrook. Because Westbrook believed that church doctrine required it of him, he directed the congregation by letter to shun Penley for engaging in a “biblically inappropriate” relationship. 231 S.W.3d at 393. Penley then sued pastor for among other things, professional negligence in revealing the substance of her discussion in the counseling session. Id. Ultimately, the court held that the negligence claim had to be dismissed. “While it might be theoretically true that a court could decide whether Westbrook breached a secular duty of confidentiality without having to resolve a theological question, that doesn't answer whether its doing so would unconstitutionally impede the church's authority to manage its own affairs.” Id. at 397. This was so because “[a]ny civil liability that might attach for Westbrook's violation of a secular duty of confidentiality in this context would in effect impose a fine for his decision to follow

the religious disciplinary procedures that his role as pastor required and have a concomitant chilling effect on churches' autonomy to manage their own affairs." Id. at 402.

The same can be said here. As Bishop Seitz testified, his decision was an exercise of Diocesan charity, and charity is a bedrock principle of any religion.[6] The Diocese chooses to give some of that charity in the form of decent support to those priests who no longer perform their normal functions. It also no doubt allocates other resources to other worthy causes. Any application of the direct or circumstantial evidence constructs under TCHRA would require the fact finder to second-guess the Diocese's election as to how to distribute its charitable giving. And ultimately, Olivas seeks to impose on that charitable decision process TCHRA's prohibition of age discrimination. In doing so, he would effectively impose the will of the Texas legislature to alter canon law.[7] Because the decisional process in this case strikes at the core of the Diocese's internal governance (its allocation of charitable giving) and turns on the application of canon law, the court below should have abstained from this dispute. See Watson v. Jones, 80 U.S. (13 Wall.) 679, 727, 20 L.Ed. 666 (1871) ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."); Masterson, 422 S.W.3d at 605-06 (Courts do not have jurisdiction to decide questions of an ecclesiastical or inherently religious nature, so as to those questions they must defer to decisions of appropriate ecclesiastical decision makers); El Pescador Church, Inc. v. Ferrero, 594 S.W.3d 645, 658 (Tex.App.--El Paso 2019, no pet.) (concluding that conversion claim asserted against the pastor, his wife, and church elder would be inextricably intertwined with ecclesiastical issues).

C. The Court Must Abstain from Hearing the Fraud Claim

Olivas's last amended petition also contains a fraud claim based on this factual assertion: "Defendant represented to Plaintiff that he would receive compensation, to include salary, allowance and benefits, commensurate with the schedule of pay for the clergy of the Diocese throughout his service and retirement." This claim suffers from the same problem as the TCHRA claim.

Courts of course can hear cases involving church litigants if neutral principles of law alone will control the outcome of the dispute. For instance, Olivas points us to Shannon v. Mem'l Drive Presbyterian Church U.S., 476 S.W.3d 612 (Tex.App.--Houston [14th Dist.] 2015, pet. denied). In that case, a church had an acrimonious falling out with an employee, but they parted ways with a separation agreement containing a non-disparagement clause. Id. at 623. When the plaintiff employee's new employer called to check references, church employees stated that they could not "think of a circumstance" under which the church would rehire the employee, and that the employee would have difficulties performing her new job. The court of appeals concluded that a breach of contract, libel and slander suit could go

forward because they "can be analyzed under a neutral definition in purely secular terms." Id. at 624. As the court framed the question, "We are asked to decide whether ecclesiastical immunity can shield a church from contractual liability when the subject contract does not implicate church doctrine." Id. at 618; see also Rodarte, 2012 WL 12893656, at *1 (court could hear claimed breach of employment and severance agreements when no questions of religious or ecclesiastical doctrine were at issue).[8] The Bishop here testified that the Diocese has no employment contract with Olivas. And even as to the fraud claim, the case implicates church doctrine.

First, the factual allegation itself ties the level of promised compensation to that "commensurate with the schedule of pay for the clergy" in the Diocese. But as Father Celino and Bishop Seitz explained, the payments to a priest who lacks facilities and is on administrative leave is that level set by the Bishop as decent support. In his fraud claim, Olivas would still have to establish the applicable "schedule of pay" for priests who lack facilities and who are on administrative leave. Under our record, that amount is set as "decent support" under canon law, and under the discretion of the Bishop. So the fraud claim returns the fact finder to canon law.

D. The Diocese Has No Adequate Remedy by Appeal

Even if the trial court abused its discretion, we do not issue mandamus relief unless a movant also shows that they have no adequate remedy by appeal. Walker, 827 S.W.2d at 840. This second requirement "has no comprehensive definition" but requires a "careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts." In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004). Less favored are incidental, interlocutory trial court rulings. Id. More suitable candidates for mandamus relief include "significant rulings in exceptional cases [that] may be essential to preserve important substantive and procedural rights[.]" Id.

Several courts have held that the improper denial of a plea to the jurisdiction based on ecclesiastical abstention denies the movant an adequate remedy by appeal. Prior cases have framed this issue two ways. Some courts focus on the impairment of the First Amendment rights of religious institutions. Tilton v. Marshall, 925 S.W.2d 672, 682 (Tex. 1996) (granting mandamus relief to dismiss intentional infliction of emotional distress claim because the trial itself and not merely the imposition of an adverse judgment, would violate relator's constitutional rights); In re Prince of Peace Christian Sch., No. 05-20-00680-CV, 2020 WL 5651656, at *4 (Tex.App.--Dallas Sept. 23, 2020, orig. proceeding) (mem. op., not designated for publication) (granting mandamus to preclude suit challenging the expulsion of students from a religiously affiliated private school); In re Godwin, 293 S.W.3d 742, 747 (Tex.App.--San Antonio 2009, orig. proceeding [mand. denied]) (granting mandamus in intentional infliction of emotional distress, fraud, and defamation suit arising from internal church

disputes, noting "appeal is often inadequate to protect the rights of religious organizations when there are important issues relating to the constitutional protections afforded by the First Amendment").

Other courts view the issue from a jurisdictional perspective, reasoning that if a trial court lacks subject matter jurisdiction, then the adequate remedy by appeal element is met. See In re Torres, No. 07-19-00220-CV, 2019 WL 3437758, at *1 (Tex.App.--Amarillo July 30, 2019, orig. proceeding) (mem. op., not designated for publication) (granting mandamus in church governance dispute); In re First Christian Methodist Evangelistic Church, No. 05-18-01533-CV, 2019 WL 4126604, at *2 (Tex.App.--Dallas Aug. 30, 2019, orig. proceeding) (mem. op., not designated for publication) (granting mandamus relief for suit based on dismissal of senior pastor); In re Episcopal Sch. of Dallas, Inc., 556 S.W.3d 347, 352 (Tex.App.--Dallas 2017, orig. proceeding [mand. denied]) (mandamus granted to preclude suit over expelling student from faith based private school). And the Texas Supreme Court has previously held that "[l]ack of jurisdiction may be raised by a plea to the jurisdiction when religious-liberty grounds form the basis of the jurisdictional challenge." Westbrook, 231 S.W.3d at 394.[9]

Finally, some courts have noted both rationales in finding a lack of adequate remedy by appeal. See In re Alief Vietnamese All. Church, 576 S.W.3d 421, 428 (Tex.App.--Houston [1st Dist.] 2019, orig. proceeding) (granting mandamus relief in defamation suit against pastor and church citing both grounds for lack of an adequate remedy by appeal); In re St. Thomas High Sch., 495 S.W.3d 500, 514 (Tex.App.--Houston [14th Dist.] 2016, orig. proceeding) (granting mandamus to preclude suit challenging expulsion of student from religious school).

Olivas contests this prong of the mandamus standard but cites no case where a clear violation of the ecclesiastical abstention doctrine has not resulted in the granting of mandamus relief. And the cases from other contexts that he cites are less than compelling given the chilling effect on First Amendment rights at stake here. Balancing the prudential concerns, we see little benefit in requiring the Diocese to proceed through trial, and then pursue an appeal to vindicate its doctrinal right to compensate priests on administrative leave in accordance with canon law. Accordingly, we conclude that the Diocese lacks an adequate remedy by appeal and conditionally grant the mandamus directing the trial court to sustain the plea to the jurisdiction and dismiss the suit below.

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, 132 S.Ct. 694, 181 L.Ed.2d 650 (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 Howlett v. Rose, 496 U.S. 356, 366 n.14, 110 S.Ct. 2430, 110 L.Ed.2d 332 (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 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, 110 S.Ct. 1595, 108 L.Ed.2d 876 (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 Hosanna-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. Hosanna-Tabor, 565 U.S. at 189-90, 132 S.Ct. 694 (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 Hosanna-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 ––– U.S. ––––, 140 S.Ct. 2049, 2064-65, 207 L.Ed.2d 870 (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, 96 S.Ct. 2372, 49 L.Ed.2d 151 (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, 132 S.Ct. 694.

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.

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., 620 S.W.3d 73, 75 (Mo. 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.

FOOTNOTES

1. Olivas's payment was reduced from a total of $1,350 a month to $775, consisting of monthly payments of $400 as salary, $100 for living allowance, $175 for an auto allowance, and $100 for social security.

2. A subset of the ecclesiastical abstention doctrine focuses on the selection or retention of key employees and is referred to as the "ministerial exception." See Our Lady of Guadalupe Sch. v. Morrissey-Berru, ––– U.S. ––––, 140 S.Ct. 2049, 2055, 207 L.Ed.2d 870 (2020) (describing that exception as "governing the employment relationship between a religious institution and certain key employees."). "Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." Id. at 2060. So, the critical question under that doctrine is whether the person at issue is "key" to a religious institutions purpose. See Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 180, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012) (the point of the dispute was whether a kindergarten and fourth grade teacher at a private religious school were "ministers" as covered by the doctrine); Our Lady of Guadalupe, 140 S.Ct. at 2055 (whether teachers at religious schools qualified as key employees). Because the Diocese here contends that Olivas is not permitted to perform any of the services of a priest, he is anything but a key employee, and this particular branch of the ecclesiastical abstention doctrine would not apply.Even under the ministerial exception, the Court warned that in deciding whether a particular person falls into the exception, "courts must take care to avoid 'resolving underlying controversies over religious doctrine.' " Id. at 2049, n.10, quoting Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969). Moreover, the ministerial exception, at least in Texas, is separate from, and different than, ecclesiastical abstention. The doctrine is often cited back to Patton v. Jones, 212 S.W.3d 541, 548 (Tex.App.--Austin 2006, pet. denied) which notes that the "ministerial exception" precludes courts from reviewing the employment decision regardless of whether the claims are ecclesiastical in nature. In that way, it is different from ecclesiastical abstention, where courts must decide if a dispute requires them to apply ecclesiastical doctrine or neutral law principles. One of our sister courts has concluded that the ecclesiastical abstention doctrine is not precluded by the "ministerial exception," and the court would have to consider the applicability of both. Kelly v. St. Luke Community United Methodist Church, No. 05-16-01171-CV, 2018 WL 654907, at *7 (Tex.App.--Dallas Feb. 1, 2018, pet. denied) (mem. op., not designated for publication).

3. An employer would use "Form W-2, Wage and Tax Statement" to report wages, tips, and other compensation paid to an employee. See Internal Revenue Service, Form 1099 MISC & Independent Contractors, https://www.irs.gov/faqs/small-business-self-employed-other-business/form-1099-misc-independent-contractors/form-1099-misc-independent-contractors (last visited March 15, 2021). An employer would use a "Form 1099-MISC, Miscellaneous Income" or "Form 1099-NEC, Nonemployee Compensation" to report payments made in the

course of a trade or business to a person who's not an employee or to an unincorporated business, payments of $10 or more in gross royalties, or $600 or more in rents or compensation. Id.

4. However, Section 21.051 "does not apply to the employment of an individual of a particular religion by a religious corporation, association, or society to perform work connected with the performance of religious activities by the corporation, association, or society." Tex.Lab.Code Ann. § 21.109(b). As this provision was not raised below, we express no opinion to how it might apply, if at all, in this case.

5. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). By adopting TCHRA, the Legislature "intended to correlate state law with federal law in employment discrimination cases." Ysleta Indep. Sch. Dist. v. Monarrez, 177 S.W.3d 915, 917 (Tex. 2005) quoting Wal-Mart Stores, Inc. v. Canchola, 121 S.W.3d 735, 739 (Tex. 2003). "Therefore, we look to federal law to interpret the Act's provisions." AutoZone, Inc. v. Reyes, 272 S.W.3d 588, 592 (Tex. 2008) (per curiam).

6. For both the Christian and Jewish religions, "charity is the central word. It is enjoined, not as a good thing, or a wise thing, or as a kindly thing only, but as a fundamental part of the religion itself." Ex parte Dart, 172 Cal. 47, 155 P. 63, 66 (1916). It no doubt would take little effort to find similar statements about other world religions as well.

7. If two persons approached the Bishop seeking a charitable hand-out--one a 41-year-old able bodied man, and the other an unwed pregnant teen, would anyone seriously argue that the Bishop should be guided by the fear of an age discrimination lawsuit in deciding who between the two is the most deserving of the limited charitable resources of the church. Why should the result be any different if one of the supplicants is an employee by status, but a recipient of only what the church determines it can afford, considering its other charitable priorities.

8. Olivas also relies on Lacy v. Bassett, 132 S.W.3d 119, 124-25 (Tex.App.--Houston [14th Dist.] 2004, no pet.). The issue there was whether a congregation member could require the church, which was formed as a non-profit corporation under Texas law, to disclose books and records as required by the Texas Non-Profit Corporation Act. The court concluded the case was not precluded by the ecclesiastical abstention doctrine, even though the church claimed its financial records are a matter of internal ecclesiastical governance, and that the bishop decides when disclosure is appropriate. The court disagreed, emphasizing that the suit did not involve "any religious doctrine or precept," or require the court to intervene in the "administration of the Church's clergy," or address "matters traditionally held to involve religious doctrine." Id. at 125. As explained above, those concerns are raised in this case.

9. The United States Supreme Court, resolving a circuit split on the interpretation of Federal Rule of Civil Procedure 12(b)(1) and (6), concluded that the ministerial exception did not raise a jurisdictional bar, but was instead an affirmative defense that should be resolved as would other affirmative defenses. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 195 n.4, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). Because that holding deals with how federal courts apply Federal Rule of Civil Procedure 12(b)(1), (6), and is not premised on federal constitutional law, it does not bind a Texas court. Unless the Texas Supreme Court revisits its holding in Westbrook v. Penley, that "[l]ack of jurisdiction may be raised by a plea to the jurisdiction when religious-liberty grounds form the basis of the jurisdictional challenge[,]" we are bound by that rule. 231 S.W.3d at 394. Moreover, characterizing the Diocese's position as an affirmative defense has ramifications. The denial of a plea to the jurisdiction might be heard on mandamus. See, e.g., In re S.W. Bell Tel. Co., L.P., 235 S.W.3d 619, 624 (Tex. 2007) (orig. proceeding) (plea based on exclusive jurisdiction of the PUC); In re Episcopal Sch. of Dallas, Inc., 556 S.W.3d 347, 352 (Tex.App.--Dallas 2017, orig. proceeding) ("Mandamus is thus proper when a trial court acts without subject matter jurisdiction."). But if a religious institution must assert ecclesiastical abstention only as an affirmative defense, it is relegated to potentially trying the matter to final verdict, and only then vindicating its constitutional protection on appeal. The religious entity might also pursue a summary judgment on the affirmative defense, but if the summary judgment is denied, there is likely no immediate recourse. See In re State Farm Lloyds, No. 13-16-00049-CV, 2016 WL 902864, at *2 (Tex.App.--Corpus Christi Mar. 9, 2016, orig. proceeding) (mem. op., not designated for publication) (noting that mandamus is generally unavailable when a trial court denies summary judgment and collecting cases so holding).

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, 132 S.Ct. 694, 181 L.Ed.2d 650. 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.

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.

JEFF ALLEY, Justice