Supreme Court of Texas

No. 22-001

IN RE EYE OF PROVIDENCE UNIVERSITY, RELATOR

An Original Proceeding in Mandamus

Against the Fifteenth Court of Appeals

Sunrise Bay, Texas

ORDER[*]

THE COURT GRANTS ORAL ARGUMENT ON THE MANDAMUS PETITION LIMITED TO THE FOLLOWING QUESTIONS PRESENTED:

1) Are First Amendment religious liberty defenses jurisdictional?

2) Did the court of appeals abuse its discretion by denying the University's laches defense in light of alleged discovery abuse?

3) Can the president of a religiously-affiliated university raise the ministerial exception as a First Amendment defense to a breach of contract suit brought by his employer?

4) Can a civil court adjudicate the breach of a morality clause in an employment contract that is based in part on "Biblical principles" without violating the First Amendment?

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[*] Texas Young Lawyers Association 2022 State Moot Court Competition Problem. Written by Kirk Cooper, SMC Committee Chair and TYLA District 14 Representative. Special thanks to Michael J. Ritter and Johnathan Stone for their helpful comments and editorial assistance.

FIFTEENTH COURT OF APPEALS

Sunrise Bay, Texas

No. 15-21-00271-CV

In re

ADAM FALSTAFF, JR.

Relator

AN ORIGINAL PROCEEDING IN MANDAMUS

*****EN BANC PROCEEDINGS*****

MAJORITY OPINION

MEDICI, C.J., joined by RICHELEU, BECKET, BORGIA, and MOORE, for the majority—

Relator Adam Falstaff, Jr., has filed this mandamus action challenging the respondent trial court's[1] refusal to dismiss real party in interest Eye of Providence University's claim against him for breach of contract. Falstaff, the former president of Eye of Providence University, contends that the University's suit against him for breaching a morality clause in his employment contract is barred by the First Amendment under the ecclesiastical abstention doctrine because (1) the doctrine's ministerial exception precludes court review of lawsuits involving a minister-church employment dispute, and Falstaff holds ministerial duties within the University's parent religious

[1] Respondent is the Honorable Sara Giddings, judge of the 915th District Court of New Shiner, Texas.

institution; and (2) adjudicating the ultimate question of a morality clause breach would require the trial court to resolve a theological controversy, and civil courts do not have jurisdiction over theological controversies.

We conditionally grant mandamus relief and order that Eye of Providence University's breach of contract suit against Falstaff be immediately dismissed.

I. BACKGROUND

A. Factual History[2]

1. The New Revelation Church and Eye of Providence University

Adam Falstaff, Jr., is the eldest son of Adam Falstaff, Sr., founder of the New Revelation Church. The Church is a non-denominational Christian religious organization based on the eclectic Biblical principles established by Falstaff, Sr. Falstaff, Sr., is a revered figure within the Church, and although he is not considered to be divine, he is generally acknowledged by the Church to have received certain divine revelations that form the core basis of the Church's beliefs.

In 1973, Falstaff, Sr., established the New Revelation Bible College. For years, the Bible college was operated directly by the Church. In 1989, as student enrollment expanded, the college was reincorporated as a separate 501(c)(3) entity named the Eye of Providence University. Although the University is a separate institution from the Church, its charter requires that at least three of 12 seats on the Board of Regents be reserved for the Church. As a practical matter, the University's board has been entirely controlled by members of the Church since 1989.

Following its reincorporation, the University expanded its curriculum beyond theological matters and adopted a conventional liberal arts-style curriculum while still retaining a school of theology and an overall religious identity. The University requires its students to adhere to an

[2] For purposes of this mandamus action, we take the following facts to be undisputed.

Honor Code based on "Biblical principles," which precludes engaging in premarital sex or other "immodest" activity and refraining from drinking alcohol at non-sporting campus events.

2. The University hires Falstaff, Jr., to revive the school

Although the University experienced a period of rapid expansion after spinning off from the Church, enrollment waned during the 1990s. In 2000, Falstaff, Sr., died, and the University's enrollment declined further as the University shifted through various interim presidents. In 2010, the University entered into a contract to make Falstaff, Sr.'s eldest son Adam Falstaff, Jr., the president of the University. Although he was the son of the Church's founder, Falstaff, Jr., then in his mid-40s, did not have a background in theology, and he had strayed from the Church for three decades before eventually returning to the faith.

The younger Adam Falstaff had been a star athlete in his youth, and he received a bachelor's degree in accounting from the University of California at Berkeley and a law degree from Harvard University. Falstaff, Jr., was known as a savvy businessman and an aggressive negotiator, and the University's Board of Regents selected Falstaff to lead the University not only based on Falstaff family name recognition, but because Falstaff was perceived to have the skills necessary to bring the University back from the brink of academic probation and expand student enrollment.

In addition to receiving a $5 million a year salary for the first five years of his tenure, Falstaff negotiated for several bonus benchmarks during the same five-year primary period, including: (1) a $10 million bonus if the University expanded student enrollment by 10%; (2) a $15 million bonus if the University successfully obtained re-accreditation during Falstaff's tenure as president; and (3) a $20 million bonus if the University's football or basketball team made it to

the NCAA or other top tier national competition quarterfinal rounds, with a $5 million bonus on top of that if the team won the entire tournament.

The employment contract contained a morality clause, which stated as follows:

> **ARTICLE III**
> **Special Conditions**
>
> [. . .]
>
> **Sec. 5, MORALITY CLAUSE**: Falstaff accepts and recognizes that the University is a Christian institution founded on Biblical principles, governed predominantly by a New Revelation Board of Regents. Falstaff also accepts and recognizes that the University views education as a critical component of a Christian society's obligation to younger generations, and that the President of the University, while not considered to be a spiritual role *per se*, must still embody Christian principles and serve as a guide to students in their educational journeys, both on a secular and religious level.
>
> The University expects Falstaff to conduct himself in accordance with Christian principles, both in order to further the University's educational mission, and to protect the University's name from tarnishment.
>
> Falstaff therefore agrees and covenants that he will not engage in conduct that:
>
> - Interferes with the University's pursuit of its educational and/or Christian objectives;
> - Brings any party to this Agreement into disrepute, scandal, contempt, or ridicule, by engaging in conduct which shocks, insults, or offends a substantial portion of the community or reflects unfavorably upon any of the parties;
> - Tarnishes the brand and/or goodwill of the University;
> - Violates any local, state, or federal laws.
>
> **Sec. 6, BREACH OF MORALITY CLAUSE.** In the event that Falstaff breaches the Morality Clause located at Article III, Section 5, Falstaff with pay to the University a penalty of $7.7 million in liquidated damages.

3. Falstaff's Tenure as President; Social Media Controversy

Falstaff proved to be an effective president during his tenure. Traditionally, the president of the University directly oversaw a broad portfolio of every issue at the University, secular and spiritual. At the beginning of his tenure, Falstaff restructured the president position. Although he

remained nominally in charge of the University's entire operations, he delegated much of the traditional day-to-day presidential portfolio to his provost, making the provost the University's chief operating officer. Falstaff also delegated any matters dealing with the University's spiritual mission to his brother Abel and his son Seth, both of whom were prominent preachers in the New Revelation Church. Falstaff retained three major areas of direct, sole control: (1) fundraising, (2) external relations and business development, and (3) overseeing the University's athletics department, specifically, the University's award-winning football program. Falstaff also collaborated closely with the provost to get the University off accreditation probation and regain full accreditation.

However, Falstaff was also a divisive figure in the University community, particularly due to his presence on social media. Although Falstaff was rarely on campus and rarely available to speak with students, Falstaff was highly active on Twitter, and even before his tenure as president, Falstaff was known for discussing politics and making provocative and sometimes inflammatory statements on Twitter. Falstaff frequently commented on pop culture issues, and he inserted himself into social media controversies in an attempt to gain attention for himself and for his pet causes. Following his elevation to the University presidency, Falstaff continued his style of social media engagement, but he identified himself as "Prez, @EPU" in his Twitter biography.

On February 15, 2020, celebrity gossip web site ZMT published pictures of Falstaff with a woman who was not his wife eating at a French restaurant in Miami on its Twitter feed with the caption: "Oo la la! Falstaff seen here on Valentine's Day with a beautiful woman who is NOT HIS WIFE." The pictures generated a minor controversy on social media, but went relatively unnoticed until Falstaff responded, sending out a Tweet to his 50,000 followers on Twitter. The tweet stated as follows:

> @ZMT is shameless Fake News. The woman I was with was an @EPU donor and nothing untoward was happening! Maybe ZMT should be less concerned with which celebrities are "getting lit" and more concerned with opening themselves up to the Fire of God!

Three days later, ZMT published an article called "Top 7 Times Adam Falstaff, Jr., Got LIT (by the Fire of God, Of Course)." The article showed photographs of, among other things:

- Falstaff exiting a Miami nightclub looking disheveled with bloodshot eyes, accompanied by a candidate for the Florida State Senate who would later come under federal indictment for bribery, along with three women in bikini tops;
- Falstaff consuming alcohol at Caesar's Palace in Las Vegas with a prominent Silicon Valley angel investor;
- Falstaff on a steamboat tour of New Orleans shirtless with his arm around a young woman holding a whiskey glass filled with what he characterized in his Instagram post as "only black water";
- Falstaff "making out" with his wife at a Pitbull concert in South Padre Island while holding two bottles of beers in his hands.

Following the publication of the ZMT article, the Chancellor convened an emergency meeting of the Board of Regents and summoned Falstaff to attend. When confronted with the article, Falstaff responded that he did not see what the issue was, since most of those pictures had been taken with prominent university donors following football victories in various locales, and "even monks have danced in celebration." When the Chancellor told Falstaff that his actions in consuming alcohol would have resulted in his suspension or expulsion under the Student Code of Conduct if he were a student and not the university president, Falstaff responded, "perhaps it's time

we update that Code of Conduct. I distinctly remember that our religion sanctions alcohol and wine."

When the Chancellor accused Falstaff of being flippant about Christian values, Falstaff became irate and stated that he did "not need a lecture in morality," reminding the Board that he was a Falstaff and stating that as the eldest son of the founder of the Church, he understood the theology of the Church better than anyone else in the room. He then cited a Bible verse, Matthew 10:16, and told the Board of Regents that when men venture into hostile territory, they must be "as cunning as serpents but as innocent as doves." Falstaff stated that he was following that Biblical injunction, telling the board that "we are running a multimillionaire-dollar university and not some kumbaya summer camp" and insisting that the donors he needed to court were not "schoolboys" but "strong, powerful men" who expected to be "wined and dined." He also pointed out that his father was an advocate of prosperity gospel theology and had taught his followers the power of an abundance mindset, and he asserted that each of those meetings featured in the ZMT article had resulted in substantial donations to the University, which showed that God approved of Falstaff's actions.

The Board of Regents voted 7-5 to issue Falstaff a private reprimand.

4. ZMT Article Stirs Controversy

On June 1, 2020, Falstaff became embroiled in another social media controversy. As part of a high-profile campaign that coincided with LGBTQ Pride Month, the clothing company Hanes posted an advertisement on Twitter featuring various athletes in Hanes T-shirts and undergarments against a rainbow backdrop with the tagline: "We Support You." Falstaff retweeted the advertisement, denouncing the ad both as "prurient" and as "shameless woke virtue signaling." Again, the social media controversy remained minor until ZMT picked up on the tweet, publishing

a short article on their web site under the headline "Eye of Providence President Adam Falstaff Declares War on Underwear." The article was retweeted more than 4,000 times, and another social media firestorm ensued.

Three days later, the Hanes T-shirt company Twitter account, continuing with its LGBTQ Pride Month theme, announced its tagless T-shirt campaign with a post captioned: "We don't like labels." A Twitter user named @Ex305PoolBoy publicly commented on the post: "neither does Adam Falstaff." The ZMT official Twitter account responded to the tweet, leading to the following public exchange:

ZMT Celebrity Gossip and More (@zmt)

Hey @Ex305PoolBoy, do you have anything to back that up? Or are you just saying that?

Miami's Most Wanted (@ex305poolboy)

@zmt I know who he is. Dude is the fakest hypocrite ever. He talks about how everyone's immoral but if he wants to see immoral he should look in the mirror.

ZMT Celebrity Gossip and More (@zmt)

What do you mean? @Ex305PoolBoy

Miami's Most Wanted (@ex305poolboy)

@zmt I mean that somebody with his body count shouldn't exactly be casting the first stone about other people's

sex lives. His wife, too. Someone should ask them what they do for fun in Miami.

A ZMT reporter directly messaged the @Ex305PoolBoy account, but the owner declined to cooperate further, saying he had behaved poorly "in the heat of the moment" and that he did not wish to hurt the Falstaffs. The anonymous account also deleted the public comments made on the Hanes advertisement, but ZMT ultimately published screenshots of the exchange on its own Twitter feed.

ZMT reporters ultimately linked the @Ex305PoolBoy Twitter account to Steve Giannis, director of the University's Aquatic Center and former personal assistant to Falstaff. Giannis refused to comment to ZMT, but interviews with former friends and coworkers established that Giannis was often seen at fundraising events with Adam Falstaff across the country, particularly at University sporting events, black-tie fundraisers, and afterparties at upscale bars and nightclubs. One coworker told ZMT that he also witnessed Giannis walking along Miami Beach hand-in-hand with Falstaff's wife, Eve, on several occasions when Falstaff was elsewhere. Based on these reports, ZMT published an article featuring Giannis' official University ID photo entitled: "Adam, Eve, and Steve??? Pool Boy Delights Falstaff Wife, Shows Husband the Nightlife"

Ten days later, the national TV news program 60 Minutes aired a 12-minute segment centered around Giannis and the controversy. Giannis told the media that he had met the Falstaffs in 2009, while he was employed as a pool attendant at the Fountainbleu Hotel in Miami Beach, Florida. At the time, Giannis was 21 years old, Eve Falstaff was 35 years, and Adam Falstaff, Jr., was 42 years old. Giannis struck up an unlikely friendship with Falstaff based on their shared collegiate swimming backgrounds and on Giannis' desire to open a string of gyms throughout South Florida. Shortly thereafter, Falstaff hired Giannis as his personal assistant. Giannis told 60

Minutes that he had a longstanding affair with Falstaff's wife for many years with the knowledge and approval of Falstaff. Giannis also stated that whenever the Falstaff travelled to Miami, he arranged for Adam Falstaff to have a "good time" at various nightclubs. He also stated that he was looking for a publisher to print his memoir, since the Falstaffs had informed him that they would blackball him professionally if he ever "turned against" them.

5. Board of Regents Moves to Terminate Falstaff's Contract

Following the publication of the Giannis article, the Chancellor once again called an emergency meeting of the Board of Regents. When confronted with the article, Falstaff first asserted that Giannis was attempting to blackmail him and his wife after a proposed business deal between them had fallen apart. He admitted that he knew his wife had a relationship with Giannis. Falstaff also admitted that he had extramarital relationship with other women, but he insisted that every interaction he had was consensual. Falstaff admitted that to an outsider it may look like he and his wife had "strayed" from their marriage, but he stated that he and his wife did not "have affairs," stating that he and his wife loved one another and were "emotionally exclusive" and "in a committed polyamorous marriage." He further stated that he did not think his private life was relevant to his duties as president of the University, and that he would not be answering any more of the Board's questions with respect "to the details."

When told that the Bible disapproved of non-monogamous relationships, Falstaff responded that his actions were consistent with Biblical values because the Book of Deuteronomy permitted polygamy, the Bible recognized that great men like King David were in polygamous relationships with many wives, and that King Solomon was said to have more than 700 wives and concubines. He then shifted the discussion to his performance record, pointing to the fact that under his tenure, the University had broken fundraising records and that he had gotten the

University off accreditation probation, which entitled him to a $15 million bonus, of which the University had only paid $7 million. The minutes from the Board of Regents meeting indicate that after Falstaff's comments, the Board adjourned the meeting without taking any further action.

At this point, the parties diverge on the facts. It is undisputed that Falstaff entered into apparent settlement negotiations directly with the Chancellor. Falstaff contends the negotiations bore fruit and that a series of emails between him and the Chancellor establish that Falstaff would be paid $2 million to settle all claims between Falstaff and the University in exchange for Falstaff's voluntary resignation. The University, on the other hand, contends that only the Board of Regents and not the Chancellor could ratify a settlement agreement, and that in any event, the emails between the Chancellor did not establish the existence of a contract.

On June 29, 2020, the Board of Regents voted 12-0 to invoke the morality clause and terminate Falstaff's employment agreement for "breach of the morality clause, to wit: exhibiting un-Biblical behavior, engaging in sexual immorality, and tarnishing the University's reputation."

B. Procedural History

On August 1, 2020, the University sued Falstaff for breach of contract, asserting that his violation of the morality clause had tarnished the University's brand and triggered a $7.7 million liquidated penalty. The University's pleadings stated, in relevant part:

> **COUNT ONE: BREACH OF CONTRACT**
>
> . . . FALSTAFF engaged in conduct that brought the University in disrepute, created negative media attention, and obstructed the University in pursuit of its educational goals. His actions constituted a breach of Article III, Section 5 of the Employment Agreement. Under Article III, Section 6 of the Employment Agreement, the University is entitled to a liquidated damages penalty of $7.7 million.

On August 15, 2020, Falstaff countersued the University for $15.4 million, contending that he and the Chancellor had reached an enforceable contract through a series of emails that absolved

Falstaff of any liability under the original employment contract and acknowledged his back-owed bonuses.

Falstaff later dropped his counterclaim against the University. Then, on March 1, 2021, Falstaff filed a plea to the jurisdiction, contending that the University's suit against him was barred by the ecclesiastical abstention doctrine because (1) the dispute between him and the University implicated the ministerial exception because he served in a key religious position and retained technical control of the University's religious activities, and (2) the trial court could not resolve the question of whether the morality clause was breached without impermissibly attempting to interpret Biblical doctrines.

The trial court denied the plea to the jurisdiction on May 14, 2021. This mandamus petition challenging the trial court's plea to the jurisdiction ruling followed on July 2, 2021. The motion was accompanied by a Rule 52.10 motion for emergency relief. We granted the motion and stayed all trial court proceedings pending resolution of this mandamus action.

II. DISCUSSION

A. Mandamus Availability?

We first address the question of whether mandamus is the appropriate vehicle to view this dispute. A writ of mandamus is an extraordinary remedy available to review a trial court's actions when (1) the trial court has abused its discretion in making a ruling and (2) the relator has no adequate remedy by appeal. The wrongful denial of a plea to the jurisdiction is remediable via mandamus because there is no adequate remedy by appeal. Furthermore, the Texas Supreme Court has interpreted the ecclesiastical abstention doctrine as being jurisdictional. *See In re Diocese of Lubbock,* 624 S.W.3d 506, 512 n. 1 (Tex. 2021) (original proceeding) (citing *Watson v. Jones*, 80

U.S. 679, 733 (1871)). Thus, this issue is cognizable via a plea to the jurisdiction, and mandamus review is appropriate.

The dissent argues that footnote 4 of *Hosanna-Tabor v. E.E.O.C.* establishes that ecclesiastical abstention is not a jurisdictional defense, but a defense on the merits, meaning that the trial court properly denied the plea to the jurisdiction because the defense should have been raised at the summary judgment stage instead of through a plea to the jurisdiction. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 n. 4 (2012). We disagree.

Although *Hosanna-Tabor* establishes that the ministerial doctrine is not jurisdictional for purposes of federal procedural law, this Court is free to provide First Amendment protection beyond that given under federal law. *See In re Diocese of Lubbock*, 624 S.W.3d at 512 n. 1. The trial court could not have summarily denied the plea to the jurisdiction for purely procedural reasons because a plea to the jurisdiction is the appropriate motion by which an ecclesiastical abstention defense—a jurisdictional defense—should be raised.

B. Laches

We next turn to the defensive issue of laches. A court of appeals may deny a mandamus petition without regard to the merits based on laches if a delay in filing the petition prejudices the rights of the real party in interest. *See In re Am. Airlines, Inc.*, 634 S.W.3d 38, 41-43 (Tex. 2021)(orig. proceeding).

Here, the delay of seven weeks is not so long as to trigger laches. This case involved weighty First Amendment concerns, and counsel's attestation in his mandamus petition that the seven-week period between the plea denial and the mandamus filing was necessary to conduct legal research was reasonable under the circumstances.

The dissent speculates that Falstaff filed this mandamus action as a pretext to obtain emergency relief under Rule 52.10 and thereby prevent the University's scheduled third-party deposition of Giannis. The record does not support the dissent's rank speculation as to Falstaff's motives, and in any event, the delay is not so onerous as to prejudice the University's rights.

Laches does not prevent this Court from addressing the merits of this mandamus petition.

C. Merits

1. Is Falstaff a minister?

Having dealt with the procedural matters, we now turn our attention to the merits of the First Amendment issues. Falstaff first maintains that this dispute is beyond the purview of civil courts because he had a key ministerial role within the University, and the First Amendment requires courts to abstain from adjudicating employment disputes involving a religious organization and its minister. We agree.

The Free Exercise Clause of the First Amendment to the United States Constitution has been interpreted as circumscribing a civil court's jurisdiction, preventing the courts from inquiring into matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of moral required of them." *El Pescador Church, Inc. v. Ferrero*, 594 S.W.3d 645, 654 (Tex.App.—El Paso 2019, no pet.) (citing *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 713-14 (1976)). The First Amendment embraces a "ministerial exception" that prevents the courts from adjudicating employment disputes between religious organizations and their ministers. *Hosanna-Tabor*, 565 U.S. at 188-90. Simply giving an employee the title of "minister" is not enough to justify the exception; courts must consider multiple factors in determining whether an employee constitutes a "minister" under *Hosanna-Tabor*. *Our Lady of Guadalupe School v. Morrissey-*

Berru, 140 S.Ct. 2049, 2063-64 (2020). "What matters, at bottom, is what an employee does." *Id*. at 2064.

Here, Falstaff qualifies as a minister under *Hosanna-Tabor* and *Our Lady of Guadalupe School*. Falstaff is the head of a religiously identified university, and although Falstaff delegated much of his authority to subordinates, he ultimately remained responsible for all University operations, secular or spiritual. Furthermore, even though the Church is nominally separate from the University, the University reserves seats for Church members, the University board is de facto controlled by the Church, and Falstaff, Jr., holds a special position within the University's parent Church as the son of the Church's founder. Finally, Falstaff signed an employment contract acknowledging the religious nature of his work.

The dissent contends that we must conduct a more searching review of the record to determine whether Falstaff does, in fact, serve a ministerial role for the University comparable to that of a priest or a rabbi. We disagree. The United States Supreme Court has rejected a clergy-only approach to the ministerial exception and held that educational workers employed by a church-run school can qualify as ministers even when the work they typically do is secular in nature. As the Court stated:

> The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.
>
> *Our Lady of Guadalupe Sch.*, 140 S.Ct. at 2055.

The dissent also argues that the ministerial exception does not apply to this case because the exception is a defense raised by church defendants who are sued by their former ministers, not minister defendants who are being sued by their church employers. We disagree. Although the

doctrine has so far only been applied defensively in church-defendant lawsuits, nothing in the Supreme Court's jurisprudence prevents the ministerial exception from being expanded to the facts at hand, particularly given that defendant Falstaff is claiming he had ministerial responsibilities with the University and the breach of a morality clause touches on the University's ability to redress misconduct based on the violation of Biblical principles.

As an intuitive matter, the protection must go both ways so as to avoid entanglement between church and state and to avoid a situation where only one party is bound to an agreement, but not the other. Although the University is entitled to use the exception as an immunity shield related to its decision to fire an employee with ministerial duties, it is not entitled to file an affirmative suit against that same type of employee to obtain affirmative relief. We believe the ministerial exception places the entire category of employer-employee disputes involving ministers beyond the purview of civil courts.

2. If Falstaff is not a minister, does the substance of this contract dispute nevertheless involve resolution of religious principles such that the First Amendment prevents the courts from becoming involved?

Even if Falstaff cannot avail himself of the ministerial exception, the suit against him is still barred under broader First Amendment principles of ecclesiastical abstention because it is so intertwined with notions of Christian morality as to be non-justiciable.

Ordinarily, contract disputes that can be resolved on neutral principles of law do not implicate the ecclesiastical abstention doctrine simply because one or more parties may be religious entities. *See, e.g., Shannon v. Mem'l Drive Presbyterian Church U.S.*, 476 S.W.3d 612, 622-25 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (employee's claim against church for breach of settlement agreement did not implicate ecclesiastical abstention because the contract did

not require interpretation of religious doctrine). However, if, in order to resolve a legal claim, a court must delve into matters of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them[,]" the trial court must abstain. *Id.* at 622 (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714 (1976)).

Here, there is no way for a jury to resolve the breach of morality clause action without wading into a theological controversy, specifically, what conduct violates "Biblical principles." *See In re Diocese of Lubbock*, 624 S.W.3d at 514-19 (defamation claims not cognizable because they touched on internal church discipline). The conduct at issue in this lawsuit touches upon issues of sexuality and the marriage relationship, both of which implicate fundamental religious beliefs. Determining whether Falstaff has lived up to the University's standards regarding sexuality and marriage purity is not a determination this or any other Texas civil court may make.

Repleading cannot save the University's case. *See State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007) (if plaintiff mispleaded claim, court of appeals should provide opportunity to cure unless lack of jurisdiction is clearly established). Although the morality clause does reference some secular grounds that could form the basis of a breach of contract, we cannot read those provisions in isolation, but must read them in the context of the morality clause as a whole. Because the morality clause is written such that the question of Biblical morality sets the tone and pervades the entire question of whether breach has occurred, the University cannot replead its claim to avoid passing on a religious question. The breach of contract case against Falstaff must be dismissed.

III. CONCLUSION

The University's breach of contract claim against Falstaff touches on both a minister-church relationship and on questions of adherence to Biblical moral standards. Neither type of

dispute is justiciable in a Texas court. The trial court abused its discretion by failing to grant Falstaff's plea to the jurisdiction. We conditionally grant mandamus relief and order the trial court to grant the plea to the jurisdiction. The writ will issue only if the trial court fails to act within a reasonable period of time.

FIFTEENTH COURT OF APPEALS

Sunrise Bay, Texas

No. 15-21-00271-CV

In re

ADAM FALSTAFF, JR.

Relator

AN ORIGINAL PROCEEDING IN MANDAMUS

*****EN BANC PROCEEDINGS*****

DISSENTING OPINION

ATWOOD, J., joined by DWORKIN, DAWKINS, and HARRIS, dissenting—

In any other case involving a breach of contract as between an employer and an executive in which an employment condition is unambiguously set out in a material covenant, the district court's jurisdiction would be clearly established, and this mandamus petition would be summarily denied without opinion. But in order to defend an overbroad reading of religious liberty principles, the majority here creates bad law by allowing a university executive who violated a contract provision to escape liability for breach simply because he cloaks himself in religion, calls himself a minister, and points to references made to the Bible in passing.

Members of his own Church have described Adam Falwell, Jr., as a hypocrite of the highest order. Adam Falstaff, Jr.'s hard-partying conduct is not what the Founding Fathers intended to protect when they adopted the First Amendment's Free Exercise Clause. The University's brand has arguably been tarnished, Falstaff's conduct would arguably offend even a completely secular jury, and his status as the president of a religious university should not prevent this case from going to a jury. The trial court had jurisdiction and did not err by denying the plea to the jurisdiction and retaining this case on its docket. Because the majority disagrees, I must dissent.

I. BACKGROUND

The majority selectively omits certain crucial parts of the record. We include them here for additional context.

After the University and Falstaff sued each other, litigation continued on a regular course until the University noticed the deposition of Steve Giannis. At that point, Falstaff non-suited his claim against the University, leaving only the University's claim for liquidated damages from breach of the morality clause pending.

Following an unsuccessful attempt at mediation, Falstaff then filed a bevy of motions, including, as is relevant here, (1) a plea to the jurisdiction based on First Amendment *and* (2) a motion to quash the deposition of Giannis. The trial court denied both the plea to the jurisdiction and the motion to quash on May 14, 2021.

Falstaff then filed a mandamus action challenging the *motion to quash* that same day. He moved for emergency relief, and this Court issued an administrative stay pending further review of Falstaff's mandamus application. Two weeks later, the panel denied both the mandamus petition and the motion for emergency relief by summary opinion. *See In re Falstaff*, No. 15-21-00200-CV (Tex.App.—Sunrise Bay May 28, 2021, orig. proceeding) (mem. op.) (summary denial). The

denial of this mandamus action allowed the University's deposition of Giannis to move forward. Giannis' deposition was scheduled for Monday, July 5, 2021.

On Friday, July 2, 2021, at 4:51 p.m., Falstaff filed a *second* mandamus petition challenging the trial court's denial of the plea to the jurisdiction related to the ecclesiastical abstention issues. He again moved for emergency relief under Rule 52.10. The emergency panel issued an administrative stay pending further action, and the original panel assigned to this matter extended that stay to expire only once this mandamus action has been resolved. Following assignment to the original panel, this Court voted to hear the mandamus matter en banc.

That second mandamus action is the instant proceeding.

II. DISCUSSION

A. Jurisdiction

I first address jurisdiction. The majority holds that an ecclesiastical abstention or ministerial exception defense is a jurisdictional defense that can be raised at the plea to the jurisdiction stage and consequently corrected on mandamus review. I disagree.

In *Hosanna-Tabor*, which was decided in 2012, the United States Supreme Court resolved a dispute among the federal circuits over whether the ministerial exception doctrine was a threshold jurisdictional defense or a merits defense to be raised in a motion for summary judgment, unequivocally holding that "the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, — U.S. -, 132 S.Ct. 694, 709 n. 4 (2012) (cleaned up). In light of *Hosanna-Tabor*, the Houston Fourteenth Court of Appeals held that the ecclesiastical abstention doctrine was not a jurisdictional defense, but a defense on the merits. *Shannon v. Memorial Drive Presbyterian Church U.S.*, 476 S.W.3d 612, 625 (Tex.App.—Houston [14th Dist.] 2015, no pet.)(finding that

trial court erred by granting plea to the jurisdiction on ministerial exception grounds because the defense is not jurisdictional). We agree with our sister court in Houston that the ministerial exception doctrine is a non-jurisdictional defense that cannot be raised in a plea to the jurisdiction. *Id*.

We recognized that the Texas Supreme Court appears to have recently reaffirmed the ministerial exception doctrine as being a jurisdictional defense. *See In re Diocese of Lubbock,* 624 S.W.3d at 512 n. 1. But as between the Texas Supreme Court's holding that the defense is jurisdictional, and a U.S. Supreme Court holding that it is not jurisdictional, the U.S. Supreme Court's decision controls under the Supremacy Clause, since *Hosanna-Tabor* interprets the outer contours of the First Amendment's ability to create a constitutional privilege that strips state courts of jurisdiction, and the U.S. Supreme Court has held that the First Amendment does not strip courts of jurisdiction over these claims. *See In re Roman Catholic Diocese of El Paso*, 626 S.W.3d 36, 51-52 (Tex.App.—El Paso 2021, orig. proceeding) (Rodriguez, C.J., dissenting). Indeed, a district court is a court of general jurisdiction, and it has no discretion to abstain from addressing a case that falls within its jurisdictional limits. *Id*. at 52. The trial court could have properly denied the plea to the jurisdiction based on the fact that Falstaff improperly raised a non-jurisdictional defense via a jurisdictional motion.

B. Laches

I also strongly disagree with the majority's decision not to deny this mandamus petition under the doctrine of laches. The timing of Falstaff's mandamus action is highly suspicious. Falstaff did not immediately challenge the plea to the jurisdiction ruling, but instead waited more than five weeks until receiving an adverse discovery ruling before filing this mandamus petition and a request to stay all proceedings in the trial court. Furthermore, this mandamus action after a

three-judge panel, of which I was part, summarily rejected another mandamus application brought by Falstaff attempting to quash the notice of deposition against Giannis. Falstaff never adequately explains his delay. In a response to the University's reply, Falstaff states: "any delay between the plea to the jurisdiction order and the filing of this mandamus action was necessitated by the complexity of the legal issues presented."

However, this excuse is not enough to adequately explain the delay. The record shows that it is obvious that this mandamus petition was a pretextual Hail Mary attempt to prevent Giannis' testimony. Apart from the affair, Giannis told 60 Minutes about the following:

- Giannis and Falstaff entered into an agreement by which Falstaff would sell certain university land to Giannis' gym franchise company at 50% of the land's fair market value, which would potentially open up the University's ability to pursue additional fiduciary breach claims against Falstaff;
- Giannis told 60 Minutes: "Let me put it this way. My buddies used to call Adam 'Frosty the Snowman' because every time he visited Miami, it snowed in South Beach, if you know what I mean," alluding to cocaine use.
- Giannis said Falstaff bragged about not being a true New Revelation Church believer and duping the Board of Regents into believing that he was a faithful follower when really, Falstaff regularly told donors he was agnostic, the Board of Regents were a bunch of "religious nuts," and he regularly bypassed regent directives in order to bring the University "out of the dark ages."

These statements raise the prospect of the University being able to rest its morality clause breach case on other grounds. They also open up the possibility that the University could bring

other types of claims against Falstaff, including claims for breach of fiduciary duty and fraud in the inducement.

In short, the Court should deny the mandamus petition on laches grounds, as this petition filed on the eve of deposition was clearly an attempt to prevent the leakage of more damaging information. Falstaff lacks clean hands, and mandamus is governed by quasi-equitable principles. The Court should not further reward his gamesmanship and bad behavior.

C. Ministerial Exception

The majority also errs by applying the ministerial exception to defeat a decision on the merits. This case turns the ministerial doctrine on its head. The doctrine was originally developed to prevent the government from taking action that would force a religious organization to retain an unwanted minister, similar to what happened in England. Here, we do not have a situation in which the lawsuit forces the University to retain Falstaff in its employ, especially now that he has dropped his counterclaims. Likewise, there is nothing to indicate Falstaff's religious rights have been violated.

Instead, we have a situation in which a litigant is seeking to vindicate its contract rights. Because there is no risk of the University having its religious rights violated by retaining an unwanted employee, there are no First Amendment concerns here by allowing the University to sue Falstaff for breach of contract. *See Shannon v. Mem'l Drive Presbyterian Church U.S.*, 476 S.W.3d at 622-25.

Furthermore, the Founding Fathers would have understood the exception to apply only to clergy. And although the U.S. Supreme Court has expanded the definition to include types of employees that would not be traditionally considered to be "clergy," a majority of the U.S. Supreme Court rejected the view that total deference to a religious organization's definition of

"minister" is required; this Court must still conduct some sort of analysis to see if the duties Falstaff performed were in fact ministerial.

The plea to the jurisdiction record clearly establishes that Falstaff had no religious duties at the University whatsoever. On the contrary, while he retained nominal control of all aspects of University operations, Falstaff self-limited his role at the University to fundraising, external relations, academic accreditation, and the athletics department, delegating other duties—secular or otherwise—to either the University provost or to other officials. When a university official lacks actual religious duties, he cannot be considered to be a minister. *See DeWeese-Boyd v. Gordon Coll.*, 163 N.E.3d 1000, 1017 (Mass. 2021), *pet. for cert docketed* No. 21-145 (Aug. 2, 2021)., (concluding that a social work professor at a religious institution who had no religious responsibilities was not a minister for purposes of the ministerial exception).

D. Neutral Law of Contract

Finally, the majority tries to pigeonhole this case into the ecclesiastical abstention doctrine by attempting to reframe this case as being about sexuality and the limits imposed on it by religion. This narrow framing does not capture the entirety of this dispute. Although the prefatory language in the morality clause does reference "Christian principles" as a basis for termination, the remainder of the morality clause as a whole is no different from the type of morality clauses included in standard contracts given to corporate executives, professional athletes, and performance artists. *See* Caroline Epstein, Note, *Morals Clauses: Past, Present and Future*, 5 N.Y.U. J. INTELL. PROP. & ENT. L. 72 (2015). Contrary to its nomenclature in contract law, the purpose of a morality clause is not to ensure the person charged lives up to a certain moral code; it is to prevent a contracting party's brand from being tarnished by publicly embarrassing behavior committed by the other contracting party. *Id.*

Setting aside the unconventional nature of Falstaff's relationship with his wife and the fact that Falstaff placed his wife's paramour on the University's payroll, the University had ample other grounds based on brand tarnishment and the possible violation of local, state, or federal laws. Falstaff frequently engaged in social media controversy and "trolling," which attracted negative media attention to the University. Falstaff engaged in drunken public behavior and possible drug use, and he engaged in questionable conduct that, even though it was consensual, would expose him to the risk of blackmail.

Even if the University's initial pleadings did reference the portion of the morality clause dealing with Biblical standards, the University should be permitted to replead the claims so as to omit references to Christian morality, since the remainder of the morality clause sets a viable, secular basis for civil court resolution.

III. CONCLUSION

This case is a straightforward contract dispute needlessly complicated by a man who would use religion to defend against accountability for his own wrongful conduct. The majority has erred by not allowing the University's claims to move forward. Because I believe a jury should decide whether Falstaff actually breached his obligations under the morality clause, I respectfully dissent.