



COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-000502

LAURENCE H. KANT

APPELLANT

v.

COURT OF APPEALS NO. 2011-CA-000004
APPEAL FROM FAYETTE CIRCUIT COURT
CIVIL ACTION NO. 09-CI-04070

LEXINGTON THEOLOGICAL SEMINARY

APPELLEE

BRIEF OF APPELLEE

Respectfully submitted,


Richard G. Griffith
Elizabeth S. Muyskens
STOLL KEENON OGDEN PLLC
300 West Vine Street, Suite 2100
Lexington, KY 40507-1801
Telephone: (859) 231-3000
Facsimile: (859) 253-1093
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Brief of Appellee was served upon the following by U.S. Mail, postage prepaid, on this the 11th day of June, 2013: Hon. Samuel P. Givens, Jr., Clerk of Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Kimberly N. Bunnell, Fayette Circuit Court Judge, Fayette County Courthouse, 120 North Limestone, Lexington, Kentucky 40507 and Christopher D. Miller, Esq., Arnold & Miller, PLC, 401 W. Main Street, Suite 303, Lexington, Kentucky 40507, counsel for Appellant. I further certify that counsel for Appellee did not withdraw the record on appeal when preparing this Brief.


COUNSEL FOR APPELLEE

STATEMENT CONCERNING ORAL ARGUMENT

Lexington Theological Seminary (“Seminary”) believes oral argument will assist the Court in applying the controlling constitutional principles to the record on review.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

STATEMENT CONCERNING ORAL ARGUMENT i

COUNTERSTATEMENT OF POINTS AND AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 1

 CR 76.12(4)(d)(iii) 1

i. The Seminary’s Religious Mission and Purpose..... 1

 KRS § 341.055(19) 2

ii. Kant’s Ministry at the Seminary 4

iii. The Seminary’s Financial Exigency and Spiritual Restructuring 5

iv. The Lower Courts’ Recognition of First Amendment Mandates..... 6

Kant v. Lexington Theological Seminary, 2012 Ky. App. Unpub. LEXIS 1014
 (Ky. App. July 27, 2012)..... 8

ARGUMENT 9

I. This Court Should Uphold the Court of Appeals’ Opinion 9

 U.S. Const. amend. I 9

Cantwell v. Connecticut, 310 U.S. 296 (1940) 9

Music v. United Methodist Church, 864 S.W.2d 286 (Ky. 1993) 9-10

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct.
 694 (2012) 9

DeBruin v. St. Patrick Congregation, 816 N.W.2d 878 (Wis. 2012)..... 9

Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940
 (6th Cir. 1992)..... 10

Erdman v. Chapel Hill Presbyterian Church, 286 P.3d 357 (Wash. 2012)..... 10

Klouda v. Southwestern Baptist Seminary, 543 F. Supp. 2d 594
 (N.D. Tex. 2008) 10

Henry v. Red Hill Evangelical Lutheran Church of Tustin, 201 Cal. App.
 4th 1041 (Cal. Ct. App. 2011)..... 10

II.	The Court of Appeals and Circuit Court Correctly Concluded that the Ecclesiastical Abstention Doctrine Prohibits the Judiciary from Considering Kant’s Claims Against the Seminary.....	10
	<u>Kant v. Lexington Theological Seminary</u> , 2012 Ky. App. Unpub. LEXIS 1014 (Ky. App. July 27, 2012).....	11
	<u>Wells v. Commonwealth</u> , 206 S.W.3d 332 (Ky. 2006)	12
A.	Kentucky Courts Consistently Refuse to Adjudicate Ecclesiastical Matters Such as This	12
	<u>Marsh v. Johnson</u> , 82 S.W.2d 345 (Ky. 1935).....	12-13
	<u>Music v. United Methodist Church</u> , 864 S.W.2d 286 (Ky. 1993)	12-15
	<u>Cargill v. Greater Salem Baptist Church</u> , 215 S.W.3d 63 (Ky. App. 2006)	12
	<u>Williams v. Palmer</u> , 532 N.E.2d 1061 (Ill. App. 1988)	14
B.	Other State and Federal Courts Consistently Refuse to Pass Judgment on Employment Decisions Made by Religious Institutions in Furtherance of Their Mission.....	16
	<u>Basinger v. Pilarczyk</u> , 707 N.E.2d 1149, (Ohio Ct. App. 1997).....	16
	<u>Ogle v. Church of God</u> , 2004 U.S. Dist. LEXIS 25592 (E.D. Tenn Sept. 9, 2004) <u>aff’d</u> 153 Fed. Appx. 371 .. (6th Cir. 2005).....	16-17
	<u>Powell v. Stafford</u> , 859 F. Supp. 1343 (D. Colo. 1994).....	16
	<u>Lewis v. Seventh Day Adventists Lake Region Conference</u> , 978 F.2d 940 (6th Cir. 1992).....	17
	<u>Pardue v. Center City Consortium Schools of the Archdiocese of Washington, Inc.</u> , 875 A.2d 669 (D.C. Ct. App. 2005).....	17
	<u>Pierce v. Iowa-Missouri Conf. of Seventh-Day Adventists</u> , 534 N.W.2d 425 (Iowa 1995)	17
	<u>Klouda v. Southwestern Baptist Seminary</u> , 543 F. Supp. 2d 594 (N.D. Tex. 2008)	18

-	<u>McEnroy v. St. Meinrad School of Theology</u> , 713 N.E.2d 334 (Ind. Ct. App. 1999).....	18, 21
	<u>Alicea v. New Brunswick Theological Seminary</u> , 608 A.2d 218 (N.J. 1992).....	18-19
	<u>Cochran v. St. Louis Preparatory Seminary</u> , 717 F. Supp. 1413 (E.D. Mo. 1989).....	18-19
C.	The Ecclesiastical Abstention Doctrine Bars Kant's Claims	19
	<u>Music v. United Methodist Church</u> , 864 S.W.2d 286 (Ky. 1993)	19-21
	<u>Marsh v. Johnson</u> , 82 S.W.2d 345 (Ky. 1935).....	20
	<u>McEnroy v. St. Meinrad School of Theology</u> , 713 N.E.2d 334 (Ind. Ct. App. 1999)	20
1.	Kant's claims, if allowed, would infringe on the Seminary's right to determine who will train future Church leaders.....	22
	<u>Ogle v. Church of God</u> , 2004 U.S. Dist. LEXIS 25592 (E.D. Tenn. Sept. 9, 2004) <u>aff'd</u> 153 Fed. Appx. 371 (6th Cir. 2005).....	22
	<u>Music v. United Methodist Church</u> , 864 S.W.2d 286 (Ky. 1993)	22
2.	There is no tenure contract or secular governing document	23
	<u>Music v. United Methodist Church</u> , 864 S.W.2d 286 (Ky. 1993)	23
	<u>Krotkoff v. Goucher College</u> , 585 F.2d 675 (4th Cir. 1978).....	24
	<u>Essex Cmty. College v. Adams</u> , 701 A.2d 1113 (Md. Ct. App. 1997).....	24
	<u>Graney v. Board of Regents of Univ. of Wisconsin</u> , 286 N.W.2d 138 (Wis. App. 1979).....	24

	<u>Steinmetz v. Board of Trustees of Cmty. College Dist.</u> , 385 N.E.2d 745 (Ill. App. 1978)	24
	14A C.J.S. Colleges and Universities §20 (West 2010).....	24
III.	The Court of Appeals and Circuit Court Correctly Concluded that the Ministerial Exception Prohibits the Judiciary from Considering Kant’s Claims Against the Seminary	24
	<u>Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC</u> , 132 S. Ct. 694 (2012)	24-26
	<u>Serbian Eastern Orthodox Diocese v. Milivojevich</u> , 426 U.S. 696 (1976).....	25
	<u>General Council on Finance & Admin. v. California Superior Court</u> , 439 U.S. 1369 (1978)	25
	<u>Yaggie v. Indiana-Kentucky Synod, Evangelical Lutheran Church</u> , 860 F. Supp. 1194 (W.D. Ky. 1994) <i>aff’d</i> , 1995 U.S. App. LEXIS 24653 (6th Cir. Aug. 21, 1995)	25
A.	The U.S. Supreme Court Recognized the Ministerial Exception in a Unanimous Opinion	26
	<u>Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC</u> , 132 S. Ct. 694 (2012)	26-27
	<u>Music v. United Methodist Church</u> , 864 S.W.2d 286 (Ky. 1993)	27
	<u>Marsh v. Johnson</u> , 82 S.W.2d 345 (Ky. 1935)	27
	<u>Ten Broeck Dupont, Inc. v. Brooks</u> , 283 S.W.3d 705 (Ky. 2009).....	27
	<u>School District of Abington Township v. Schempp</u> , 374 U.S. 203 (1963)	28
B.	Opinions Issued Since the U.S. Supreme Court’s Recognition of the Ministerial Exception Confirm the Applicability of the Doctrine to Kant’s Claims	29
	<u>Temple Emanuel of Newton v. Massachusetts Comm’n of Discrimination</u> , 975 N.E.2d 433 (Mass. 2012)	29
	<u>Mills v. Standing Gen. Comm’n on Christian Unity</u> , 958 N.Y.S.2d 880 (N.Y. Sup. 2013)	29-30

	<u>Erdman v. Chapel Hill Presbyterian Church</u> , 286 P.3d 357 (Wash. 2012).....	30
	<u>DeBruin v. St. Patrick Congregation</u> , 816 N.W.2d 878 (Wis. 2012).....	30
	<u>Redwing v. Catholic Bishop for the Diocese of Memphis</u> , 363 S.W.3d 436 (Tenn. 2012).....	31
	<u>Yaggie v. Indiana-Kentucky Synod, Evangelical Lutheran Church</u> , 1995 U.S. App. LEXIS 24653, *10 (6th Cir. August 21, 1995).....	31
	<u>Dias v. Archdiocese of Cincinnati</u> , 2012 U.S. Dist. LEXIS 43240 (S.D. Ohio March 29, 2012).....	31
C.	State and Federal Courts Consistently Apply the Ministerial Exception to Claims Asserted by Professors Against Religious Institutions.....	31
	<u>EEOC v. Catholic Univ.</u> , 83 F.3d 455 (D.C. Cir. 1996).....	31, 33
	<u>Klouda v. Southwestern Baptist Seminary</u> , 543 F. Supp. 2d 594 (N.D. Tex. 2008).....	31, 33
	<u>Powell v. Stafford</u> , 859 F. Supp. 1343 (D. Colo. 1994).....	32
	<u>Alicea v. New Brunswick Theological Seminary</u> , 608 A.2d 218 (N.J. 1992).....	32
	<u>DeMarco v. Holy Cross High School</u> , 4 F.3d 166 (2nd Cir. 1993).....	32
	<u>Guinan v. Roman Catholic Archdiocese of Indianapolis</u> , 42 F. Supp. 2d 849.....	32
	<u>EEOC v. First Baptist Church</u> , 1992 U.S. Dist. LEXIS 14479 (N.D. Ind. June 8, 1992).....	32
	<u>DOL v. Shenandoah Baptist Church</u> , 707 F. Supp. 1450 (W.D. Va. 1989).....	32
	<u>Geary v. Visitation of the Blessed Virgin Mary Parish School</u> , 7 F. 3d 324 (3rd Cir. 1993).....	32
	<u>Hendricks v. Marist Catholic High School</u> , 2010 U.S. Dist. LEXIS 36088 (D. Ore. April 12, 2010).....	32
	<u>EEOC v. Mississippi College</u> , 626 F.2d 477 (5th Cir. 1980).....	32

	<u>Weishuhn v. Catholic Diocese of Lansing</u> , 756 N.W.2d 483 (Mich. Ct. App. 2008).....	34-35
	<u>Welter v. Seton Hall Univ.</u> , 608 A.2d 206 (N.J. 1992).....	34
D.	The Ministerial Exception Bars Kant’s Claims.....	35
	<u>Powell v. Stafford</u> , 859 F. Supp. 1343 (D. Colo. 1994).....	37
1.	Kant has admitted he was a ministerial employee	38
	<u>Pardue v. Center City Consortium Schools of the Archdiocese of Washington, Inc.</u> , 875 A.2d 669 (D.C Ct. App. 2005)	42
	<u>Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC</u> , 132 S. Ct. 707 (2012).....	42
	<u>Henry v. Red Hill Evangelical Lutheran Church of Tustin</u> , 201 Cal. App. 4th 1041 (Cal. Ct. App. 2011)	42
	<u>EEOC v. Roman Catholic Diocese of Raleigh</u> , 213 F.3d 795 (4th Cir. 2000).....	42
	<u>Bryce v. Episcopal Church in the Diocese of Colorado</u> , 289 F.3d 648 (10th Cir. 2002).....	42
2.	The Seminary is not entitled to less First Amendment protection because it has an ecumenical faith	43
	<u>Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC</u> , 132 S. Ct. 707 (2012).....	43-44
3.	The ministerial exception is a complete defense to all claims Kant asserts against the Seminary	44
	<u>Lewis v. Seventh Day Adventists Lake Region Conference</u> , 978 F.2d 940 (6th Cir. 1992).....	45
	<u>Hutchinson v. Thomas</u> , 789 F.2d 392 (6th Cir. 1986)	45
	<u>Ogle v. Church of God</u> , 153 Fed. Appx. 371 (6th Cir. 2005)	45
	<u>Petruska v. Gannon Univ.</u> , 462 F.3d 294 (3rd Cir. 2006).....	45

<u>Klouda v. Southwestern Baptist Seminary</u> , 543 F. Supp. 2d 594 (N.D. Tex. 2008)	45
<u>Rayburn v. General Conf. of Seventh-Day Adventists</u> , 772 F.2d 1164 (4th Cir. 1985).....	45
<u>Minker v. Baltimore Annual Conf.</u> , 894 F.2d 1354 (D.C. Cir. 1990).....	45
<u>EEOC v. Catholic Univ.</u> , 83 F.3d 455 (D.C. Cir. 1996)	46
<u>Alcazar v. Corp. of the Catholic Archbishop of Seattle</u> , 627 F.3d 1288 (9th Cir. 2010).....	46
<u>Rosati v. Ohio Catholic Diocese</u> , 233 F. Supp. 2d 917 (N.D. Ohio 2002)	46
<u>Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC</u> , 132 S. Ct. 707 (2012).....	46-47
IV. Kant Improperly Encourages the Court to Address Issues Outside of the Case and Controversy Before It.....	48
<u>Nordike v. Nordike</u> , 231 S.W.3d 733 (Ky. 2007)	48
<u>Associated Indus. v. Commonwealth</u> , 912 S.W.2d 947(Ky. 1995)	48
<u>Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC</u> , 132 S. Ct. 707 (2012)	48
<u>Bank One v. Murphy</u> , 52 S.W.3d 540 (Ky. 2001)	49
<u>Shah v. American Synthetic Rubber Corp.</u> , 655 S.W.2d 489 (Ky., 1983).....	49
<u>Kant v. Lexington Theological Seminary</u> , 2012 Ky. App. Unpub. LEXIS 1014 (Ky. App. July 27, 2012).....	49
CONCLUSION	49
APPENDIX	ix

COUNTERSTATEMENT OF THE CASE¹

i. **The Seminary's Religious Mission and Purpose.**

The Seminary's Mission "is to prepare faithful leaders for the church of Jesus Christ and, thus, to strengthen the church's participation in God's mission for the world." (RA 0291 [Appx. 1]) Since its founding, the Seminary, a graduate institution originally known as the College of the Bible, has been committed to educating and preparing students for ministry in the Church of Jesus Christ. (RA 0291-93 [Appx. 1], 0297 [Appx. 2], 0404 [Appx. 3]) In other words, the Seminary exists to grow the Church by teaching Church leaders. The Seminary does not exist to teach history or any other secular subject. All of the courses and degree programs offered by the Seminary are religious and in furtherance of the Christian Church's (Disciples of Christ) commitment to Christian unity. (RA 0280 [Appx. 4]; 0295-302 [Appx. 2]) The Seminary is, and has been since its inception, an unequivocally *religious institution*² and ministry of the Christian Church (Disciples of Christ). (RA 0279-82 [Appx. 4], 0284-85 [Appx. 5])

The Seminary is funded by the Christian Church (Disciples of Christ) and its members. In order to receive money from the Disciples Mission Fund,³ for instance, the Seminary is required to enter into and remain in a covenant relationship with the Christian Church (Disciples of Christ). (RA 0427-29) Pursuant to this covenant relationship, the Seminary must, among other things, "work in partnership to support the total mission of the Christian Church (Disciples of Christ)" and "educate and train staff

¹ Pursuant to CR 76.12(4)(d)(iii), the Seminary states it does not accept Appellant's Statement of the Case.

² Laurence H. Kant ("Kant") has previously conceded the Seminary is a "religious institution." See Brief Appellant filed with Kentucky Court of Appeals p. 1. In the brief filed with this Court, Kant concedes the Seminary is "associated with the Disciples of Christ Church." See Appellant Brief p. 1.

³ The Disciples Mission Fund is a subset of the Christian Church (Disciples of Christ) that directs Church funds to the Seminary and others. More specifically, the Disciples Mission Fund receives financial support from individual Christian Churches (Disciples of Christ) and in turn distributes the funds to entities that further the Church's mission.

and volunteers in order that they might effectively interpret and promote the church's wider mission." (RA 0428) At all times material to this case, the Seminary has been in covenant relationship with the Christian Church (Disciples of Christ) and has received funds from its Mission Fund. (RA 0431-32)

This covenant relationship requires that the Seminary be held accountable to the Christian Church (Disciples of Christ) in its operation. In that regard, the Seminary is required to submit reports to the Christian Church (Disciples of Christ) for consideration at the Church's Assembly meetings on an annual basis in order to continue to receive this funding.⁴ (RA 0434-35, 0281 [Appx. 4])

The Seminary also receives funding directly from Christian Churches (Disciples of Christ), from their members and from Seminary alumni. Id. An overwhelming percentage of the individuals who give to the Seminary are affiliated with the Christian Church (Disciples of Christ). Id. The Seminary's only other significant source of funding is its endowments. Moreover, approximately 90 percent of the Seminary's endowment funds is from Christian Churches (Disciples of Christ) or their Members. Id. The record is clear - the Seminary is not a secular, educational institution. The Seminary is a religious institution supported by, and committed to supporting, the Christian Church (Disciples of Christ).⁵

⁴ The Seminary is officially connected with eleven (11) regions of the Christian Church (Disciples of Christ) and reports to these regions, as well as Churches within these regions, on a regular basis. (RA 0299 [Appx. 2])

⁵ It naturally follows from this fact that the Seminary is considered exempt from liability for Kentucky unemployment taxes because it is a religious institution. The Kentucky legislature itself created this exemption, expressly recognizing that religious institutions are not covered employers and therefore not liable for unemployment taxes. See KRS § 341.055(19). Recently, the Division Auditor for the Kentucky Unemployment Insurance Commission confirmed that the Seminary is in fact exempt from any liability for unemployment taxes because the Seminary fits within the exemption for religious institutions. (RA 0437-40) The Kentucky Unemployment Insurance Commission subsequently issued an Order Affirming the Division Auditor's decision, concluding that the Seminary is not only "operated primarily for religious

The Seminary's Bylaws⁶ evidence its covenant relationship with the Christian Church (Disciples of Christ), requiring, among other things, that at least 60% of the Seminary's Trustees be members in good standing of the Christian Church (Disciples of Christ). (RA 0415) The Bylaws also require that the General Minister of the Christian Church of Kentucky serve as an ex officio member of the Seminary's Board of Trustees with a vote. Id. The Bylaws and Articles of Incorporation also require that the Seminary's president and a majority of the Seminary's faculty be members in good standing of the Christian Church (Disciples of Christ). (RA 0415, 0279 [Appx. 4]) As an intentionally ecumenical faith, the Christian Church (Disciples of Christ) promotes interdenominational unity, welcoming and accepting faculty members of other faiths so long as they share the Seminary's commitment to training future leaders of the Christian Church (Disciples of Christ). (RA 0295 [Appx. 2], 0298-99 [Appx. 2]) The Christian Church's (Disciples of Christ) commitment to Christian unity and the Church's needs inform all of the principal decisions involving the Seminary's faculty. (RA 0291 [Appx. 1], 295-302 [Appx. 2])

The Seminary's faculty members are tasked with carrying out the Seminary's religious mission and preparing students for Christian ministry. That is, the Seminary entrusts its faculty with the spiritual formation of the future leaders of the Church of Jesus Christ. (RA 280-81 [Appx. 4], 291-93 [Appx. 1]) The Seminary's Handbooks acknowledge this fact, requiring every faculty member to be an active member in a congregation, to teach a Biblically-based curriculum and to model the ministerial role for

purposes", but also "operated, supervised, controlled, or principally supported by" the Christian Church (Disciples of Christ). Id.

⁶ As required by the Bylaws, Board of Trustees meetings are opened and closed with prayer. (RA 0415) The Bylaws also identify the Seminary's corporate seal which contains a sketch of a book inscribed "Holy Bible." Id.

the Seminary's students. Id. The Seminary evaluates faculty on religious criteria, including the faculty's ability to contribute to students' spiritual formation and teach subjects that are relevant to ministry. (RA 0458-460, 0462-466 [Appx. 6]) To the extent faculty members have concerns about the evaluation responses or any other disputes or disagreements, the Seminary requires the faculty to address these issues through its internal grievance process. (RA 0929-933, 0914)

ii. Kant's Ministry at the Seminary.

In 2000, Kant accepted a faculty position with the Seminary, expressly acknowledging in writing, and in his own words, his willingness to participate in "the *ministry* of theological education." (RA 0304 [Appx. 7], emphasis added) The fact that Kant was participating in ministry cannot be disputed and is confirmed in a letter Kant prepared at the time of his hiring. Id. By voluntarily accepting a faculty position with the Seminary, Kant expressed his commitment to preparing future Church leaders.

As a faculty member, Kant was tasked with instructing students about the Bible in a manner that was consistent with the Seminary's religious mission. (RA 0280 [Appx. 4]) Indeed, Kant was hired to strengthen or grow the Church by educating individuals consistently with the Christian faith. Kant was not hired to teach history or teach about different religions. Kant was hired to teach future leaders of the Christian Church (Disciples of Christ) consistent with the faith of the Christian Church (Disciples of Christ). The letter Kant wrote at the time of his hiring and the Seminary's Handbooks confirm this fact. (RA 0304 [Appx. 7], 0280 [Appx. 4]) In that regard, the Faculty Handbook recognizes that the faculty's "basic responsibility" is the preparation of students for Christian ministry. (RA 0900 [Appx. 8])

As a faculty member, Kant taught “Jesus in Film and Literature,” “Thinking Theologically in the Church” and courses about the New Testament. (RA 0309-10 [Appx. 9]) Kant was expected not only to prepare Church leaders through the curriculum he taught, but also by his own example. The Seminary’s Handbooks required Kant to participate actively in a congregation and model the ministerial role for the Seminary’s students, both inside and outside of the classroom. (RA 0280 [Appx. 4]) Kant recognized his ministerial obligation, admitting he participated in the Seminary’s chapel services, convocations, Senior Communion services, and ordinations. (RA 0472-73 [Appx. 9]). Kant, by his own admission, also used “Biblical writings” to help students deal with thoughts in a religiously meaningful way and encouraged students to integrate Biblical stories into their lives as pastors, making “prayer much more meaningful.” (RA 0315, 0472-73 [Appx. 9]) *Kant fails to acknowledge or address any of these admissions in his brief.*

iii. The Seminary’s Financial Exigency and Spiritual Restructuring.

Unfortunately, a recent loss of membership in the Disciples of Christ denomination has resulted in decreased donations and a decreased demand for training at the Seminary. These religious trends, in conjunction with the profound downturn in the national economy, forced the Seminary to declare a financial exigency in 2009. (RA 0403-04 [Appx. 3]) In an attempt to survive the financial crisis, and after much prayer by its leaders, the Seminary reinvented itself, taking drastic measures to reduce expenses and restructure its curriculum to better meet the needs of the Christian Church (Disciples of Christ). (RA 276-77 [Appx. 5]) The financial exigency and corresponding restructuring⁷

⁷ Kant’s contention that the financial exigency and spiritual restructuring are distinct events and that the Seminary has changed its reason for his separation of employment is unfounded. From the outset, and when

included a tailoring of the curriculum to focus on better integrating students into congregations through a pastoral life program. *Id.* Ultimately, the Seminary was forced to eliminate all courses that did not further its commitment to pastoral life. Because the Seminary concluded Kant's employment did not further the redesign, his employment ended. The Seminary believes its restructuring compliments the current religious movements within the Christian Church (Disciples of Christ).

Despite being offered a severance package, Kant filed this lawsuit, alleging the Seminary's religious restructuring resulted in a breach of contract and breach of its implied duty of good faith. (RA 0001-07) Notably, Kant asserts a breach of contract claim despite the fact that *there is no tenure contract*. The Seminary's bylaws expressly require that any contract of employment be signed by the Seminary's president. (RA 0418) Kant has not identified or placed into the record any contract of employment signed by the Seminary's president.⁸ Kant's employment relationship with the Seminary was governed by the Seminary's religious pronouncements, including the Seminary's Employee and Faculty Handbooks.

iv. The Lower Courts' Recognition of First Amendment Mandates.

In response to the Complaint, the Seminary denied all wrongdoing and filed a Motion to Dismiss or in the Alternative a Motion for Summary Judgment, which the

announcing the financial exigency, the Seminary explained that its financial situation necessitated a spiritual restructuring. (RA 0403 [Appx. 3]) The January 14, 2009 article in the Courier Journal recognized this reality and discussed the Seminary's altered mission, noting the Seminary would "look differently, act differently and be better-positioned to serve students and congregations." *Id.* In the proposed severance agreement, the Seminary also made it clear that the reason for the separation was a "restructuring" caused by a financial exigency. (RA 0195) The record clearly establishes that the Seminary has consistently explained that Kant lost his position as part of a restructuring that was necessitated by a financial exigency.

⁸ Kant did, however, put a letter signed by the Seminary's President at the time into the record. The letter simply welcomes Kant as a tenured faculty member. (RA 0684) The letter does not identify any of the terms of Kant's employment at the Seminary and Kant has never encouraged any court in this case to interpret this letter.

Seminary thereafter renewed approximately one year later.⁹ (RA 0020-21, 0247-48) The Circuit Court granted the Seminary's renewed Motion for Summary Judgment and dismissed all of Kant's claims, correctly concluding that federal constitutional mandates forbid the judiciary from entangling itself in this matter.

More specifically, the Circuit Court correctly concluded that the First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, prohibits the judiciary from deciding ecclesiastical matters such as this. Kant seeks to challenge through his claims the Seminary's ability to decide for itself who will teach future Church leaders, a decisional right protected by the First Amendment's Right of Free Exercise. The First Amendment's corresponding Establishment Clause prohibits the judiciary from evaluating employment decisions made by the Seminary and in furtherance of the Seminary's religious mission. A judicial consideration of Kant's claims would necessarily require a court to delve into, and ultimately assess, the Seminary's religious mission and related spiritual restructuring. Fundamentally, the Seminary has a constitutional right to decide for itself, without governmental or judicial intervention or scrutiny, who is best suited to teach future Church leaders.

A corollary to this broad, constitutional prohibition is the "ministerial exception," which similarly prohibits both state and federal courts from considering claims arising from the employment relationship between a religious institution and its ministerial employees. Because Kant admits the Seminary is a religious institution, and the record

⁹ The Seminary filed its initial Motion to Dismiss or in the Alternative Motion for Summary Judgment with its Answer on September 22, 2009. (RA 0020-21) The Circuit Court thereafter heard oral arguments on December 11, 2009. When denying the Seminary's September 22, 2009 Motion, the Circuit Court noted that it wished to receive additional information about Kant's status as a ministerial employee and, in effect, invited the Seminary to submit a renewed motion at a later date. The Seminary supplemented the record and filed its renewed Motion to Dismiss or in the Alternative Motion for Summary Judgment on July 7, 2010. (RA 0247-48) For simplicity, and unless otherwise noted, the Seminary will hereinafter refer to the aforementioned Motions collectively as its Motion for Summary Judgment.

unequivocally establishes he was a ministerial employee, the Circuit Court correctly granted summary judgment in favor of the Seminary, recognizing and applying the First Amendment and the corresponding ministerial exception to the facts and circumstances of this dispute.¹⁰ The Kentucky Court of Appeals thereafter correctly affirmed the Circuit Court's order, refusing to pass judgment on the Seminary's religious decisions.

In that regard, the Kentucky Court of Appeals correctly concluded that it could not delve into Kant's claims without "entangle[ing] itself with how the Disciples of Christ Church can structure and reorganize LTS." See Kant v. Lexington Theological Seminary, 2012 Ky. App. Unpub. LEXIS 1014, *20 (Ky. App. July 27, 2012). The Appellate Court also correctly concluded that the judiciary cannot "evaluate and condone who the Church selects to train the future leaders of the Christian faith attending there" and that, by teaching religion at a Christian seminary, Kant brought himself within the scope of the ministerial exception. Id. at *29-33.

As discussed in detail below, this Court should uphold the Circuit Court's grant of summary judgment in favor of the Seminary, and the Appellate Court's opinion affirming, on either ground or both grounds – the general protections set forth in the First Amendment or the more specific ministerial exception. Pursuant to both, and as applied to the record on appeal, the judiciary should not involve itself in this dispute.

¹⁰ In the Introduction to his brief, Kant alleges the Circuit Court granted summary judgment in favor of the Seminary based only on the ministerial exception. This contention is a misstatement of the record. In fact, the trial court heard arguments from both parties with respect to the ecclesiastical abstention doctrine and expressly concluded this lawsuit "involved an ecclesiastical matter." (VR No. 2: 11/12/10; 10:31:40-45)

ARGUMENT

I. This Court Should Uphold the Court of Appeals' Opinion.

The First Amendment prohibits the “establishment of religion,” guarantees the “free exercise thereof” and is applicable to the States through the Fourteenth Amendment. U.S. Const. amend. I; Cantwell v. Connecticut, 310 U.S. 296, 305 (1940). Courts consistently apply these principles as the basis for refraining from inquiring into ecclesiastical matters. Music v. United Methodist Church, 864 S.W.2d 286, 287 (Ky. 1993). The general prohibition against judicial examination of religious matters is commonly referred to as the ecclesiastical abstention doctrine. In addition to this general constitutional limit, courts recognize a more specific bar – the “ministerial exception” – in the employment context. Under either the ecclesiastical abstention doctrine or the ministerial exception, the judiciary is prohibited from considering Kant’s claims against the Seminary.

Although Kant acknowledges these constitutional mandates, he principally argues that they do not apply to this case because he is asserting a breach of contract claim that can be decided by applying neutral principles and he is not an ordained minister of the Christian Church (Disciples of Christ). Kant, however, cannot avoid the rule set forth by the U.S. Supreme Court in Hosanna-Tabor with artful pleading. Fundamentally, Kant’s breach of contract claim challenges the Seminary’s right to decide who will train future leaders of the Church. Irrespective of what Kant’s claim is called, the U.S. Supreme Court has recognized that the judiciary is prohibited from involving itself in such internal affairs of religious institutions. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012); DeBruin v. St. Patrick Congregation, 816 N.W.2d 878, 889 (Wis. 2012). Further, this Court and other Kentucky courts expressly recognize that

they may not consider breach of contract claims of this sort. See e.g., Music v. United Methodist Church, 864 S.W.2d 286 (Ky. 1993); Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940 (6th Cir. 1992); Erdman v. Chapel Hill Presbyterian Church, 286 P.3d 357 (Wash. 2012); DeBruin, 816 N.W.2d 878. Indeed, this Court recognized in Music, 864 S.W.2d 286, that the First Amendment does not permit it, under the rubric of neutral principles, to interpret the religious pronouncements that form the basis of Kant's claims.

Courts also recognize that these constitutional protections are not limited to ordained clergy. Thus, the Seminary does not lose its constitutional protections because it hired a non-ordained member of another faith to train future Church leaders. See e.g., Klouda v. Southwestern Baptist Seminary, 543 F. Supp. 2d 594 (N.D. Tex. 2008); Henry v. Red Hill Evangelical Lutheran Church of Tustin, 201 Cal. App. 4th 1041 (Cal. Ct. App. 2011). As discussed in detail below, Kant and the Seminary both believed that Kant's personal beliefs permitted him to participate in the Seminary's ministry. In choosing to work at the Seminary, Kant committed himself to the Seminary's religious mission. The First Amendment protects the Seminary's right to determine who will fill its faculty positions, a quintessentially religious matter in light of the Seminary's commitment to furthering and supporting the Christian Church (Disciples of Christ). Because the Kentucky Court of Appeals correctly affirmed the decision of the Circuit Court, this Court should uphold the Appellate Court's opinion.

II. The Court of Appeals and Circuit Court Correctly Concluded that the Ecclesiastical Abstention Doctrine Prohibits the Judiciary from Considering Kant's Claims Against the Seminary.

Kant alleges in his brief that “two of the Court of Appeals judges found the ecclesiastical matters rule does not apply to this case.” See Appellant’s Brief p. 16. Kant then alleges that “the issue is therefore settled that the rule does not apply to bar subject matter jurisdiction for the Circuit Court to hear Kant’s breach of contract claim” because the Seminary “did not file its own Motion for Discretionary Review.”¹¹ Id. Kant is mistaken on both accounts.

Judge Moore authored the Appellate Court opinion, with Judge Acree authoring a concurrence. In his concurring opinion, Judge Acree states that Judge Moore’s opinion “becomes the majority with my concurrence.” Kant v. Lexington Theological Seminary, 2012 Ky. App. Unpub. LEXIS 1014, *34 (Acree, J. concurring). Importantly, Judge Acree authored a concurrence. He did not author an opinion concurring in part and dissenting in part. The majority opinion clearly and expressly recognizes that the ecclesiastical abstention doctrine bars Kant’s claims against the Seminary. Thus, two of the three members of the panel concluded that the Seminary’s “decisions regarding restructuring its programming including decisions to eliminate tenured positions, are governed by the ecclesiastical matters rule. The Circuit Court did not err in finding that its jurisdiction was precluded.” Id. at *20.

Further, Kant’s argument to this Court is even more puzzling given the fact that, in his motion for discretionary review, Kant recognized that two of the three members of the appellate court panel concluded that the ecclesiastical abstention doctrine barred his claims. Specifically, in his motion for discretionary review, Kant presented the following “Question of Law:”

¹¹ While Kant makes this “argument,” he does not appear to take it seriously, dedicating only three (3) sentences to it and failing to provide any supporting authority.

- Did the Trial Court and Court of Appeals err in finding that the ecclesiastical abstention doctrine prohibited the Court's subject matter jurisdiction over this matter?

See Appellant's Motion for Discretionary Review p. 6. The Seminary responded to the "Question of Law" identified by Kant in its response. See Seminary's Response to Appellant's Motion for Discretionary Review pp. 4-7. Because Kant identified the ecclesiastical abstention doctrine as an issue or "Question of Law" in his motion for discretionary review, the issue is appropriately before this Court.¹² See Wells v. Commonwealth, 206 S.W.3d 332, 335 (Ky. 2006).

A. Kentucky Courts Consistently Refuse to Adjudicate Ecclesiastical Matters Such as This.

Kentucky state courts have historically and expressly recognized the importance of separation of church and state, "consistently declar[ing] that the *secular courts have no jurisdiction over ecclesiastic controversies and will not interfere with religious judicature or with any decision of a church tribunal relating to its internal affairs, as in matters of discipline or excision, or of purely ecclesiastical cognizance.*" Marsh v. Johnson, 82 S.W.2d 345, 346 (Ky. 1935)¹³ (emphasis added). Indeed, the decision of the religious institution "is not only supreme, but is wholly without the sphere of legal or secular judicial inquiry." Id. That is, Kentucky courts recognize that ecclesiastical matters, including issues of faith and internal governance, are governed by ecclesiastical rule and custom, not by rulings from civil courts. Music v. United Methodist Church, 864 S.W.2d

¹² In the brief he filed with this Court, Kant recognizes the issue is before this Court by stating that he appeals "on the grounds that (1) the ecclesiastical doctrine does not apply to this case." See Appellant Brief p. i.

¹³ Amicus curiae Anti-Defamation League ("ADL") refers to four old opinions from other states but fails to acknowledge Kentucky court opinions like Marsh v. Johnson, 82 S.W.2d 345 (Ky. 1935). Indeed, over seventy-five (75) years ago, this Court unequivocally recognized that the First Amendment prohibits it from entertaining breach of contract claims asserted by ministerial employees against religious institutions when those claims challenge the religious institution's decision regarding who will carry out its mission.

286, 287 (Ky. 1993); Cargill v. Greater Salem Baptist Church, 215 S.W.3d 63, 67-68 (Ky. App. 2006) (“civil courts cannot make any determination about ecclesiastical questions”). This Court has historically and expressly refrained from considering employment matters involving religious institutions, recognizing that an inquiry into ecclesiastical matters is forbidden by the Constitution. Music, 864 S.W.2d 287.

By way of example, in Marsh v. Johnson, a former pastor sued after being discharged before the expiration of his employment contract. Marsh, 82 S.W.2d 345. Kentucky’s highest court refused to consider the matter, concluding that it must be dismissed because the “vital principle of separation of church and state” prohibited the court from involving itself in the internal affairs of the religious institution. The court did not question or evaluate the religious institution’s decision or the terms of the employment contract. Rather, the court simply noted that it could not consider the matter and that the parties were bound by the decision of the church. Id. at 346.

Similarly, in Music, the plaintiff brought suit against his former employer, a religious institution, alleging the institution violated the terms of his “employment contract” by failing to follow the procedures in its “Employee Manual.” Music, 864 S.W.2d at 287. The plaintiff argued that the court should hear the dispute because it was a “simple contract case” that only required an interpretation of the “secular dictates” in the institution’s Employee Manual. Id. The Kentucky Supreme Court rejected the plaintiff’s arguments and refused to hear the dispute because the plaintiff’s employment with the religious institution necessarily involved ecclesiastical matters. Id. at 290. The Court recognized that judicial inquiry into the plaintiff’s separation of employment was prohibited by the First Amendment. Id.

It is important to note that the Kentucky Supreme Court not only expressly recognized that the First Amendment prohibited its involvement in the religious institution's internal affairs, but also that the First Amendment prohibited it from determining whether the plaintiff was removed from his position in accordance with the religious institution's procedures. Id. In that regard, the Music court noted that "[w]hether or not the Conference followed required procedure in appointing plaintiff is not for a civil court to decide." Id. at 289 citing Williams v. Palmer, 532 N.E.2d 1061 (Ill. App. 1988). The Kentucky Supreme Court ultimately directed the trial court to dismiss the action for lack of subject matter jurisdiction because the U.S. Constitution prohibited it from interpreting the Employee Manual, from considering whether the religious institution followed its own procedures and from evaluating the religious institution's employment decision.

In this matter, the Court of Appeals and Circuit Court correctly recognized that a similar result is mandated because the judiciary cannot evaluate the Seminary's policies and employment decisions without entangling itself with the Seminary's religion and religious acts. Kant effectively concedes this fundamental truth by urging the Court to interpret the Seminary's Handbooks,¹⁴ the same type of document the Kentucky Supreme Court refused to interpret in Music.

¹⁴ Because there is no tenure contract, when Kant urges the Court to interpret his "tenure contract," he presumably is asking the Court, contrary to Music, to interpret the Seminary's Handbooks. The Faculty Handbook, pursuant to its express terms, is "issued as a part of a Policy Handbook which contains the *Employee Handbook, Faculty Handbook, Student Handbook* and *Appendices*." (RA 0901 [Appx. 8]) Further evidence the Faculty Handbook is not to be read in isolation is the fact that it expressly refers the faculty to the Seminary's other policies and handbooks for guidance, including the Student Handbook for grading policies and the Employee Handbook for a listing of holidays. (RA 0901 [Appx. 8], 1100) Thus, Kant's contention the entire Employee Handbook is superseded by the Faculty Handbook is inconsistent with the text of the Faculty Handbook itself. The handbooks themselves make it clear that the Faculty Handbook does not, and was not intended to, replace or supersede the Employee Handbook in its entirety.

The Seminary created its Employee Handbook, Faculty Handbook and other religious pronouncements for the purpose of governing its internal affairs, including its relationship with the individuals charged with carrying out its religious mission. The documents themselves expressly recognize the Seminary's spiritual purpose and are replete with religious references. (RA 0375-0401, 0898-1122 [Appx. 8]) In fact, the Faculty Handbook expressly proclaims that the Seminary's policies must "be conceived and implemented in a way that reflects God's gracious and steadfast love made known through Jesus Christ." (RA 0901 [Appx. 8]) An analysis of the Seminary's Handbooks is per se ecclesiastical because the provisions must be read in light of the Seminary's religious beliefs.

Moreover, and as discussed in detail below, Kant urges this Court to make a religious assessment when asking the Court to determine his rights under the Seminary's Handbooks. Fundamentally, Kant is asking the Court to delve into the Seminary's internal affairs, including its religious mission and doctrine, and evaluate not only the Seminary's Handbooks, which must be interpreted in accordance with the Seminary's religious beliefs, but also the Seminary's decision as to who is best suited to further the Church's mission – clearly ecclesiastical matters. Pursuant to constitutional constraints this Court acknowledged in Music, Kant's claims may not be adjudicated in this secular forum.

Instead, the Faculty Handbook is a supplement to, and should be read in conjunction with, the Employee Handbook and, for that matter, the Seminary's other handbooks. (RA 0756 [Appx. 4], 0901 [Appx. 8])

B. Other State and Federal Courts Consistently Refuse to Pass Judgment on Employment Decisions Made by Religious Institutions in Furtherance of Their Mission.

Courts in other jurisdictions similarly recognize that the First Amendment prohibits the judiciary from involving itself in matters such as this. Fundamentally, “examination of the conditions of employment at a church-operated school involves a significant risk of government-religion entanglement and gives rise to a clear violation of the First Amendment.” Basinger v. Pilarczyk, 707 N.E.2d 1149, 1150 (Ohio Ct. App. 1997) (citations omitted). Courts may not “probe into a religious body’s selection and retention of . . . its ministers, . . . the chief instrument by which the church seeks to fulfill its purpose.” Ogle v. Church of God, 2004 U.S. Dist. LEXIS 25592, *22 (E.D. Tenn. Sept. 9, 2004) aff’d, 153 Fed. Appx. 371 (6th Cir. 2005). Any such inquiry directly conflicts with First Amendment protections.

Importantly, this matter does not involve a church-run preschool, grade school or even a university. This matter involves a seminary. Seminaries typically are, and the Seminary in this instance inarguably is, dedicated to training future church leaders. The church’s interest in controlling its message is at its apex when it is training the individuals who will one day lead and shape the direction of the church. See Powell v. Stafford, 859 F. Supp. 1343, 1347 (D. Colo. 1994) (There is no teaching position more closely tied to a school’s religious character than that of a theology professor). Here, the Seminary’s mission and covenant with the Christian Church (Disciples of Christ) illustrate the intimate relationship between a denominational Seminary and its sponsoring church. As discussed in detail below, this uniquely close relationship is why no court, when faced with a similar situation, has, to the best of our knowledge, concluded that it is

proper to second-guess a seminary's faculty decision. Neither has a court required a seminary to retain a faculty member who it does not believe will further its religious mission.

When faced with claims similar or identical to the claims Kant asserts against the Seminary, courts consistently recognize their inability to consider the merits of the claims and dismiss the matters. See e.g., Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940 (6th Cir. 1992) (First Amendment prohibits court from considering breach of contract claim against religious institution even when former employee alleged the religious institution misapplied its own procedures and laws); Ogle v. Church of God, 2004 U.S. Dist. LEXIS 25592, *22 (E.D. Tenn. Sept. 9, 2004) aff'd, 153 Fed. Appx. 371 (6th Cir. 2005) (appellate court affirmed district court's dismissal of breach of implied contract claim and claim for tortious interference with business relationships); Pardue v. Center City Consortium Schools of the Archdiocese of Washington, Inc., 875 A.2d 669, 678 (D.C. Ct. App. 2005) (appellate court affirmed dismissal of implied breach of contract claim against religious institution because inquiry into institution's motivations is prohibited by the First Amendment); Pierce v. Iowa-Missouri Conf. of Seventh-Day Adventists, 534 N.W.2d 425, 427-28 (Iowa 1995) (breach of contract claim dismissed because it sought to interfere with religious institution's employment decisions, a "prime ecclesiastical concern").

Importantly, Kant has not identified a single opinion in which a court concluded it had authority to hear a professor's challenge to a seminary's employment decision.¹⁵ Stated another way, and as far as we are aware, *every court asked to evaluate an*

¹⁵ In addition to failing to identify a single court opinion in which a court has entertained a professor's claims against a seminary, Kant fails to address in his brief all but one of the opinions in which courts have refused to entertain professor's claims against seminaries.

*employment decision made by a seminary that involved one of its professors has refused to do so, citing First Amendment mandates.*¹⁶ See Klouda v. Southwestern Baptist Theological Seminary, 543 F. Supp. 2d 594 (N.D. Tex. 2008) (court dismissed breach of contract claim asserted by professor against seminary); McEnroy v. St. Meinrad School of Theology, 713 N.E.2d 334, 336-37 (Ind. Ct. App. 1999) (court dismissed breach of contract and breach of implied duty of good faith claims asserted by professor against seminary); Alicea v. New Brunswick Theological Seminary, 608 A.2d 218 (N.J. 1992) (court dismissed breach of employment promise claim asserted by professor against seminary); Cochran v. St. Louis Preparatory Seminary, 717 F. Supp. 1413 (E.D. Mo. 1989) (court dismissed age discrimination claim asserted by professor against seminary).

In Klouda, the court dismissed the non-ordained professor's suit on First Amendment grounds, noting that the First Amendment prevents judicial inquiry of disputes between religious institutions and ministerial employees. Klouda, 543 F. Supp. 2d at 611. The court reached this conclusion notwithstanding the fact that the plaintiff was a tenure-track professor. Id. at 596-97. The McEnroy court similarly dismissed the seminary professor's suit, noting that the First Amendment requires courts to refrain from interfering in ecclesiastical matters. McEnroy, 713 N.E.2d at 336-37. Again, the court reached this conclusion notwithstanding the fact that the plaintiff was a tenured professor. Id. at 337. The Alicea court dismissed the seminary professor's suit, noting that the state cannot impose restrictions on a religious institution's decisions regarding those who will

¹⁶ Without citing a single authority, amicus curiae AAUP alleges that the Kentucky Court of Appeals opinion "abandoned settled precedent." See AAUP Brief p. 4. In addition to making this unfounded claim, AAUP proceeds to ignore every case involving a seminary and a professor, presumably because the court found for the seminary in each instance.

perform its ministerial functions. Alicea, 608 A.2d at 222. The Cochran court similarly recognized that judicial inquiry into the seminary's action would violate rights guaranteed by the religion clauses. Cochran, 717 F. Supp. 1413. The Seminary is entitled to the same First Amendment protection here.

C. The Ecclesiastical Abstention Doctrine Bars Kant's Claims.

The ecclesiastical abstention doctrine, rooted in the First Amendment's Free Exercise and Establishment Clauses, prevents this Court from passing on Kant's claims against the Seminary. Fundamentally, Kant's claims impermissibly challenge the Seminary's employment decision with respect to a faculty member, an individual charged with carrying out the Seminary's religious mission. The Seminary's decision as to who is best to further its mission, and ultimately further the mission of the Church of Jesus Christ through the training of future Church leaders, is unequivocally ecclesiastical and a matter of internal affairs. Such matters of internal structure and governance are not within the purview of the courts. Music v. United Methodist Church, 864 S.W.2d 286 (Ky. 1993).

Kant's claims also inappropriately seek an assessment of the Seminary's religious restructuring and policies. Kant's employment ended because a financial exigency required the Seminary to restructure. (RA 0304 [Appx. 7]) Kant argues his separation of employment was not ecclesiastical because it was premised on the Seminary's financial exigency and not the Seminary's spiritual restructuring. As the Seminary has consistently explained, and as the record establishes, the financial exigency and restructuring never has been, and cannot be, considered independently. The financial exigency *caused* the spiritual restructuring. In other words, the financial exigency forced the Seminary to

restructure and eliminate positions that did not compliment its new congregation-based, pastoral life model for learning. Kant has never argued, and could not credibly argue, that the restructuring was a secular decision. To the contrary, religious criteria, including the needs of the Christian Church (Disciples of Christ), were at the center of the Seminary's reinvented focus and of its determination of which positions supported that focus.

This Court may not properly evaluate the needs of the Christian Church (Disciples of Christ), the Seminary's assessment of those needs and the Seminary's related spiritual restructuring. This Court also may not properly evaluate the policies the Seminary created to govern its relationship with those who will train future church leaders. See Music, 864 S.W.2d at 287-88. To the extent Kant was unhappy with the Seminary's internal decision, or believed that it was in any way unfair or in violation of the Seminary's policies, Kant could have challenged the decision through the Seminary's grievance procedures.

The Seminary's grievance procedures are consistent with its faith and set forth in Appendix B to the Faculty Handbook. (RA 0929-933) Additionally, the Seminary has a specific process by which faculty may appeal a tenure termination. (RA 0914) Kant never filed a grievance or initiated any of the stated procedures for challenging the Seminary's employment decision. Kentucky's Highest Court has held that a person assuming a relationship with a religious institution, like the Seminary, "impliedly, if not expressly, voluntarily covenants to conform to its canons and rules and to submit to its authority and discipline." Marsh v. Johnson, 82 S.W.2d 345, 346 (Ky. 1935). By voluntarily accepting

employment at the Seminary, Kant agreed to conform to the Seminary's rules and utilize its grievance procedures in the event of a dispute.¹⁷

Instead of acknowledging the Seminary's grievance process and the other court opinions requiring judicial abstention when employment decisions at seminaries are involved, Kant tries to convince this Court to evaluate the Seminary's spiritual restructuring by generally alleging his claims may be addressed by considering only the grounds for dismissal of a tenured faculty member that are set forth in the Faculty Handbook. See Appellant's Brief p. 6. While there are limited instances when a court may be able to apply secular or "neutral principles" to a dispute involving a religious institution, this is not one of them. As this Court recognized in Music, "the 'neutral principles' exception to the usual rule of deference applies only to cases involving disputes of church property." Music, 864 S.W.2d at 288. Indeed, the "'neutral principles' doctrine should not be extended to religious controversies in the areas of church government, or order and discipline." Id. Courts cannot apply the neutral principles doctrine to disputes involving employment decisions, including decisions as to who is best suited to train future Church leaders.¹⁸

¹⁷ Amicus curiae AAUP suggests a parade of horrors if the alleged "contract" is not judicially enforceable and Kant is required to resolve his dispute through the Seminary's grievance process, claiming the long-term interests of educational institutions themselves will be undermined. It is worth noting that well over a decade ago an Indiana court refused to enforce a tenure contract against a seminary. See McEnroy v. St. Meinrad School of Theology, 713 N.E.2d 334 (Ind. Ct. App. 1999). The seminary involved in that litigation is alive and well today, with none of the AAUP's "horrors" coming to fruition.

¹⁸ Out-of-state amicus curiae Anti-Defamation League ("ADL") and AAUP argue for application of neutral principles without acknowledging the fact that this Court has already concluded that this doctrine applies only to property disputes. See Music, 864 S.W.2d at 288. This dispute involves a personnel decision.

1. Kant's claims, if allowed, would infringe on the Seminary's right to determine who will train future Church leaders.

Irrespective of the labels Kant puts on his causes of action, Kant is challenging an employment decision.¹⁹ That is, Kant is asking this Court to order the Seminary to retain an individual whose training and background are not suited to support its spiritual redesign.²⁰ Kant cannot secularize his claims against the Seminary by referring to it as a breach of contract claim. *Indeed, courts "look to the substance and effect of the plaintiffs' complaint, not its emblemata. Howsoever a suit may be labeled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated."* Ogle v. Church of God, 2004 U.S. Dist. LEXIS 25592 *18-19 (E.D. Tenn. Sept. 9, 2004) aff'd 153 Fed. Appx. 371 (6th Cir. 2005).

Specifically, *Kant is challenging the Seminary's decision to end his employment* though the decision was based on the fact that the courses he taught did not comport with the Seminary's religious restructuring. Employment decisions involving the Seminary's faculty, individuals charged with teaching the next generation of church leaders, do not fall within the neutral principles exception to the general ecclesiastical abstention doctrine. See Music v. United Methodist Church, 864 S.W.2d 286, 288 (Ky. 1993). Indeed, the Seminary has a constitutional right to select who will carry out its religious mission and a corresponding right to address related disputes through its internal grievance procedures. These matters are by their very nature ecclesiastical.

¹⁹ Kant does not allege the Seminary owes him money for services rendered or owed him anything at the time of his separation of employment. Rather, Kant challenges the fact of his *separation* of employment.

²⁰ Amicus curiae AAUP claims it is unfair to allow the Seminary to end Kant's employment. Amicus curiae AAUP fails to address whether it is fair or constitutionally sound to require the Seminary to retain someone whose training and background, in the Seminary's view, are not suited to support the Seminary's redesign and prospective emphasis on pastoral care.

2. There is no tenure contract or secular governing document.

Moreover, there is no “contract” to which the neutral principles test could be applied.²¹ Indeed, the only document Kant alleges this Court should interpret is the Seminary’s Faculty Handbook. As explained above, this Court cannot interpret the Seminary’s Faculty Handbook because it, among other things, must be interpreted in a way that is consistent with God’s steadfast love.²² (RA 0901 [Appx. 8]) The First Amendment not only prohibits the Court from weighing-in on religious institutions’ decisions regarding the selection or retention of individuals called to carry out their religious missions, but also from interpreting religious documents. Music v. United Methodist Church, 864 S.W.2d 286, 287-88 (Ky. 1993). Because Kant’s claims require this Court to unconstitutionally determine who can carry out the Seminary’s religious mission, this Court should uphold the Kentucky Court of Appeals’ opinion affirming the Circuit Court’s dismissal of this matter.

Further, Kant’s contention that the Court can interpret a portion of the Faculty Handbook²³ in isolation is inaccurate. The Faculty Handbook is part of a larger set of

²¹ As explained above, the Seminary’s bylaws provide that any and all employment contracts must be signed in writing by the President. (RA 0418) Kant has not identified any tenure contract signed by the Seminary’s President.

²² Kant repeatedly argues that the Court should rule in his favor because the Seminary does not argue that he violated any provision of the “tenure contract” to justify his termination. See Appellant’s Brief p. i. Respectfully, this argument misses the point in so many ways. Because the Seminary’s Motion to Dismiss raised fundamental constitutional principles, the Circuit Court never addressed the merits of Kant’s claims. Determining whether a faculty member engaged in conduct the Seminary considers detrimental clearly requires an ecclesiastical inquiry. Further, Kant has never challenged the fact of the Seminary’s restructuring or the Seminary’s claim that his employment did not further the redesign. Kant had approximately one year to take discovery on either of these points and did not do so. The Seminary obviously believes and has consistently maintained that it had to undergo the reinvention in order to remain open and serve the Church.

²³ While the lower courts correctly recognized that they could not constitutionally consider the merits of Kant’s claims, it should be noted that the Seminary’s Employee Handbook expressly provides that employees “may be terminated due to a decrease or change in staffing requirements and/or *financial exigencies*.” (RA 0385, emphasis added) Kant does not dispute the fact that the Seminary experienced a financial exigency. Moreover, even if, for the sake of argument, the Seminary’s governing documents had not authorized Kant’s separation of employment, courts consistently interpret tenure policies to contain an

policies and procedures. Additionally, the provisions Kant points to involve the Seminary's personnel decisions, are not secular and cannot be interpreted without wading into ecclesiastical matters. Kant's contention is unsupported by the record and inconsistent with First Amendment mandates. This Court simply should not accept Kant's invitation not only to scrutinize the Seminary's employment decision and religious pronouncements, but also to punish the Seminary for concluding Kant did not serve its reinvented spiritual focus. It is axiomatic that the First Amendment prohibits the judiciary from selecting the individuals best suited to train future Church leaders.

III. The Court of Appeals and Circuit Court Correctly Concluded that the Ministerial Exception Prohibits the Judiciary from Considering Kant's Claims Against the Seminary.

In addition to recognizing the general prohibition against judicial examination of ecclesiastical matters, the United States Supreme Court has recognized a more specific bar – the “ministerial exception” – in the employment context. As discussed in detail below, in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012), the United State Supreme Court unanimously concluded that *the First Amendment prohibits the judiciary from interfering with a religious institution's decision to terminate the employment of any of its ministerial employees*. That is, a religious institution's decision to accept or retain a ministerial employee is a matter of

implied right of termination in the event of a financial exigency. See e.g., Krotkoff v. Goucher College, 585 F.2d 675, 679 (4th Cir. 1978); Essex Cmty. College v. Adams, 701 A.2d 1113 (Md. Ct. App. 1997); Graney v. Board of Regents of Univ. of Wisconsin, 286 N.W.2d 138 (Wis. App. 1979); Steinmetz v. Board of Trustees of Cmty. College Dist., 385 N.E.2d 745 (Ill. App. 1978). Kant does not address this line of authority in his brief. This authority is consistent with the national academic community's understanding of tenure “which protects a teacher from dismissal *except for* serious misconduct, incompetence, *financial exigency*, or change in institutional programs.” 14A C.J.S. Colleges and Universities § 20 (West 2010) (italics added)

“internal governance” that courts are constitutionally prohibited from reviewing.²⁴ *Id.* at 706. Courts must refuse to consider a ministerial employment dispute “because such interference would excessively inhibit religious liberty.” Yaggie v. Indiana-Kentucky Synod, Evangelical Lutheran Church, 860 F. Supp. 1194, 1198 (W.D. Ky. 1994) aff’d 1995 U.S. App. LEXIS 24653, *9-10 (6th Cir. Aug. 21, 1995). The mandate against judicial involvement in the employment decisions of religious institutions applies to Kant’s claims.

Importantly, and as discussed in detail below, this constitutional mandate is not limited to or dependent on ordination and, thus, the ministerial exception does not require courts to conclude an individual was a minister of a particular faith in order for the doctrine to apply. Hosanna-Tabor, 132 S. Ct. at 707. Kant and amicus curiae foster confusion this point by repeatedly, and incorrectly, asserting that the lower court incorrectly concluded he was a “minister” at the Seminary. Kant and amicus curiae clearly misunderstand the lower court’s opinion. Courts do not ordain ministers. Only a faith can select and ordain its ministers. The relevant inquiry for the courts is whether the individual served as a ministerial employee while employed by the religious institution. Ministerial employees are those tasked with furthering the religious institution’s mission.

²⁴ Kant generally cites Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) for the proposition that religious institutions are “only protected from civil court scrutiny when it would require the court to interpret and apply religious doctrine or ecclesiastical law.” See Appellant Brief p. 18. In fact, the Court in Milivojevich recognized that ecclesiastical decisions “are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of ‘fundamental fairness’ or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.” *Id.* at 714-15. Ultimately, the U.S. Supreme Court concluded that the state supreme court’s consideration of the dispute regarding control of a religious institution and its property contravened the mandates in the First and Fourteenth Amendments. Kant’s reliance on General Council on Finance & Admin. v. California Superior Court, 439 U.S. 1369 (1978) is similarly misplaced. The General Council opinion involves the Court’s jurisdiction over alleged violations of securities laws by a retirement homes and hospitals allegedly an alter ego of the United Methodist Church, what the Court considers a purely secular dispute between third parties. In Hosanna-Tabor, the same Court made it clear that personnel decisions at religious institutions are matters of “internal governance,” not disputes between third parties. Hosanna-Tabor, 132 S. Ct. at 706.

Hosanna-Tabor, 132 S. Ct. at 712. The record establishes Kant was a ministerial employee.

A. The U.S. Supreme Court Recognized the Ministerial Exception in a Unanimous Opinion.

In January of 2012, the United States Supreme Court unanimously and unequivocally recognized the ministerial exception, concluding that the First Amendment bars the government from interfering with a religious institution's decision to terminate the employment of any of its ministerial employees. Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012). In Hosanna-Tabor, the Court recognized that the First Amendment's Free Exercise and Establishment Clauses²⁵ prohibit the government from playing any role in filling ecclesiastical positions at religious institutions. Id. at 703. In that regard, the Court issued a mandate against government, including judicial, involvement in the employment decisions of religious institutions.²⁶

²⁵ The U.S. Supreme Court recognizes that, in this instance, the Free Exercise and Establishment Clauses are in harmony. Hosanna-Tabor, 132 S. Ct. at 702. That is, the nation's highest court recognizes that the two Clauses "exert conflicting pressures" in certain situations, but that this is not the case with respect to the ministerial exception. Id. Indeed, "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers." Id. Further, amicus curiae ADL's general claim that there is "is no meaningful distinction between providing these organizations monetary benefits and cloaking them with blanket immunity" is not instructive in light of the fact that the U.S. Supreme Court has expressly recognized that, with respect to the ministerial exception, as opposed to situations where religious institutions are receiving federal funding, the Religion Clauses are in harmony. Further, the Seminary is not seeking and has never sought "blanket immunity." To the contrary, the Seminary petitioned the Circuit Court in a separate proceeding for a release of its restrictions on certain endowment funds during the financial exigency. (RA 0207-09)

²⁶ Though Kant has never argued that the counterpart to the First Amendment's Establishment Clause set forth in the Kentucky Constitution provides any different protection, amicus curiae ADL argues that Kentucky's Establishment Clause provides broader protection and imposes a greater prohibition than does its federal counterpart. In support of this argument, ADL cites two opinions that consider the state's ability to make monetary payments or subsidies to private religious schools for the purpose of covering the cost of transporting children to these institutions. The ADL then, without any supporting authority from Kentucky or otherwise, claims that there is "no meaningful distinction" between the state's provision of the aforementioned monetary benefits and this Court's decision not to involve itself in the Seminary's internal affairs. This is simply not true. This Court has repeatedly recognized that the Establishment Clause prohibits it from interfering with a religious institution's internal affairs, just like the Establishment Clause

Although the majority of the Justices did not adopt a formula for determining when an employee is a minister for purposes of the ministerial exception, the Justices unanimously concluded that an individual teaching secular subjects and forty-five minutes of religion each day to kindergarten and fourth grade students at a religiously-affiliated school qualified as a “minister” under the exception. *Id.* at *38-39. Because the complaining party was a ministerial employee asserting employment claims against her former employer, a religious school, the Court inquired no further and dismissed the suit. The same result is required here.

The United States Supreme Court expressly recognizes that *application of the ministerial exception is not limited to ordained ministers*. In Hosanna-Tabor, the Court analyzed the circumstances surrounding a grade-school teacher’s employment to determine whether she was a ministerial employee for purposes of the ministerial exception. The Court concluded the teacher in Hosanna-Tabor was a ministerial employee based on the following: the school extended the teacher a “call” to teach and gave her a ministerial title; the teacher completed eight college-level, religious courses before receiving the call; the teacher was required to perform her job according to God’s Word and convey the Church’s message and mission; the school evaluated the teacher on religious criteria; before filing suit, the teacher admitted she was part of a teaching ministry; about twice a year, the teacher led chapel services at the school; and the teacher taught religion to students approximately forty-five minutes a day. *Id.* at 707-09.

prohibits it from financially supporting or funding religions. See Music v. United Methodist Church, 864 S.W.2d 286 (Ky. 1993); Marsh v. Johnson, 82 S.W.2d 345 (Ky. 1935). Moreover, to the extent the Kentucky Constitution has been interpreted as imposing a greater prohibition against state involvement in religious affairs, this bodes well for the Seminary, providing even more of a reason why this Court cannot get involved. Regardless, this Court may not consider arguments regarding the Kentucky Constitution because it is “without authority to review issues not raised in or decided by the trial court.” Ten Broeck Dupont, Inc. v. Brooks, 283 S.W.3d 705, 734 (Ky. 2009).

When these same considerations are applied to Kant's employment at the Seminary, Kant plainly was a ministerial employee for purposes of the ministerial exception: the Seminary extended, and Kant accepted, a call to teach and participate in, to use his words, "the ministry;" the Seminary gave Kant a ministerial title – Associate Professor of the History of Religion;²⁷ Kant received a Masters in Theological Studies degree in New Testament and Christian Origins before receiving the call; Kant was required to prepare students for Christian ministry in accordance with the Seminary's religious mission; Kant was expected to teach Biblically-based curricula and model the ministerial role for the Seminary's students; the Seminary evaluated Kant on religious criteria; before filing suit, Kant admitted he was part of a teaching ministry and was participating fully in the Seminary's "spiritual life;"²⁸ Kant participated in chapel services, Communion services and ordinations, reading scripture and giving prayers, devotions and at least one sermon; and Kant exclusively taught religious courses. (RA 0304 [Appx. 7], 0002, 0450-56, 0280-81 [Appx. 4], 0295-302 [Appx. 2], 0900 [Appx. 8], 0916 [Appx. 8], 0458-60 [Appx. 6], 0472-75 [Appx. 9], 0311 [Appx. 9]) According to

²⁷ Without any supporting authority, amica curiae Griffin declares that history of religion professors and religious studies professors teach "about religion" and *do not teach theology*. (Griffin's general citation to the concurring opinion in School District of Abington Township v. Schempp, 374 U.S. 203 (1963) does not provide support for this contention. Further, the Schempp court recognized that the study of the history of religion does not violate the First Amendment "when presented objectively as part of a secular program of education." Id. at 225. Kant has admitted that the Seminary is not a secular program of education. Further, the Seminary exists not to "objectively" educate, but to train future Church leaders.) Because the Seminary gave Kant a similar title, amica curiae pronounces that he was not a ministerial employee *without even acknowledging the reason for the Seminary's existence*. Curiously, and in another portion of her brief, **Griffin admits that Kant taught theology while at the Seminary**. Clearly, history of religion and religious studies professors serve different roles at different institutions. The Seminary's religious studies and history of religion professors not only taught theology, but also trained future Church leaders.

²⁸ It is specious for amica curiae Griffin, without any citation to the record or acknowledgement of the Seminary's mission, to conclude that Kant taught "academic and non-ministerial classes." The Seminary inarguably hired Kant to train future Church leaders. Further, the Faculty Handbook upon which Kant and amica curiae so heavily rely makes it clear that Kant was required to model the ministry to his students. (RA 0280 [Appx. 4]) Kant recognized this obligation and, when accepting the position, acknowledged that he was hired as part of a ministry. (RA 0304 [Appx. 7]) Kant was not hired for secular, academic purposes and the Seminary is not a secular, academic institution.

the analysis set out by the United States Supreme Court, these undisputed facts establish Kant was a ministerial employee and, as such, his claims against the Seminary are barred.

B. Opinions Issued Since the U.S. Supreme Court's Recognition of the Ministerial Exception Confirm the Applicability of the Doctrine to Kant's Claims.

Since the U.S. Supreme Court's issuance of the Hosanna-Tabor opinion last year, dozens of state and federal courts have affirmed the application of the ministerial exception to situations such as this. By way of example, in Temple Emanuel of Newton v. Massachusetts Comm'n of Discrimination, 975 N.E.2d 433 (Mass. 2012), the Massachusetts Supreme Court applied the ministerial exception to a teacher's claims against a religious school.²⁹ The court recognized that "it would infringe the free exercise of religion or cause excessive entanglement between the State and a religious group if a court were to order a religious group to hire or retain a religious teacher that the religious group did not want to employ, or to order damages for refusing to do so." The court applied the ministerial exception even though the teacher was not a rabbi, was not called to be a rabbi, and did not hold herself out as a rabbi. Id. at 443. The record simply revealed that the teacher "taught religious subjects at a school that functioned solely as a religious school." Id. As such, the ministerial exception applied and the U.S. Constitution required dismissal.

In Mills v. Standing Gen. Comm'n on Christian Unity, 958 N.Y.S.2d 880 (N.Y. Sup. 2013), the Supreme Court of New York applied the ministerial exception to an associate general secretary of an agency of the church. Although the secretary argued that he performed primarily secular duties, the court recognized that the ministerial exception

²⁹ The teacher lost her job when the religious school restructured to better meet the needs of the temple. Id. at 434.

applied because his job duties “reflected a role in conveying the Church’s message and carrying out its mission.” Id. at 887. The court dismissed the suit in its entirety.

In Erdman v. Chapel Hill Presbyterian Church, 286 P.3d 357 (Wash. 2012), the Supreme Court of Washington applied the ministerial exception to tort claims asserted by a church executive. The court recognized that the First Amendment prohibited it from considering the plaintiff’s negligent retention and negligent supervision claims because the claims challenged the church’s ability to select and control its own ministers. The court also recognized that neutral principles of law may not be applied to the tort claims because the claims questioned the church’s ability to hire and retain its ministers. Id. at 368.

In DeBruin v. St. Patrick Congregation, 816 N.W.2d 878 (Wis. 2012), the Wisconsin Supreme Court applied the ministerial exception to a breach of contract claim asserted by a church director. When dismissing the suit, the Court recognized that the First Amendment protects a religious institution’s decisions regarding the hiring and firing of ministerial employees, regardless of the motivation behind those decisions and even if the decisions are arbitrary. Id. at 887. The court also recognized that “it does not matter whether she seeks damages based on a contract theory or a statutory theory. In either case, the State is effectively enjoined by the First Amendment from interfering with the religious institution’s right to choose its own ministers.” Id. at 889. Because the church director’s suit challenged the church’s employment decision, the court dismissed the matter.

In his brief, Kant ignores³⁰ all of the opinions discussed above. In fact, Kant does not cite a single opinion issued after Hosanna-Tabor that supports his position.

C. State and Federal Courts Consistently Apply the Ministerial Exception to Claims Asserted by Professors Against Religious Institutions.

Even before the Hosanna-Tabor opinion, courts consistently applied the ministerial exception to all types of religious institutions, including religiously-affiliated educational institutions. See e.g., EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996) (university constitutes religious institution for purposes of ministerial exception); Klouda v. Southwestern Baptist Theological Seminary, 543 F. Supp. 2d 594 (N.D. Tex. 2008) (seminary constitutes religious institution for purposes of ministerial exception). Kant concedes the Seminary is a religious institution. See Brief Appellant filed with Kentucky Court of Appeals p. 1.

Furthermore, when analyzing the employment relationship between religious institutions and professors or teachers of theology, courts regularly conclude professors and theology teachers are ministerial employees for purposes of the ministerial exception. See e.g., EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996) (suit dismissed because the professor was a ministerial employee); Klouda v. Southwestern Baptist Theological Seminary, 543 F. Supp. 2d 594 (N.D. Tex. 2008) (suit dismissed because the professor

³⁰ All of the amicus curiae briefs filed on Kant's behalf ignore these opinions as well. Instead, as post-Hosanna-Tabor authority, amicus curiae ADL cites Redwing v. Catholic Bishop for the Diocese of Memphis, 363 S.W.3d 436 (Tenn. 2012). The Redwing court was faced with a dispute involving acts of civil liability for child sex abuse. Id. at 441. Courts understandably recognize that First Amendment protections may give way to some degree when criminal activity and the public health and welfare are involved. Yaggie v. Indiana-Kentucky Synod, Evangelical Lutheran Church, 1995 U.S. App. LEXIS 24653, *10 (6th Cir. Aug. 21, 1995). This Court is not faced with considering alleged responsibility for any criminal act and Kant has never alleged the public health or welfare is involved. The only other post Hosanna-Tabor authority cited by amicus curiae involves a computer teacher at a Catholic school who was not permitted to teach religion courses. See Dias v. Archdiocese of Cincinnati, 2012 U.S. Dist. LEXIS 43240 (S.D. Ohio March 29, 2012). Kant was not a computer teacher; Kant taught religion courses.

was a ministerial employee, teaching post-secondary courses and charged with preparing students for ministry); Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994) (suit dismissed because theology teacher was a ministerial employee); Alicea v. New Brunswick Theological Seminary, 608 A.2d 218 (N.J. 1992) (suit dismissed because the professor was a ministerial employee, charged with preparing students for leadership in the church).³¹ Because the Seminary does not offer any secular courses³² or degree programs, the Seminary obviously hires faculty exclusively for, and entrusts the faculty with, the training of future leaders of the Church of Jesus Christ. (RA 0280 [Appx. 4]) Indeed, there cannot be a more ministerial position than a Seminary professor preparing future leaders of the Christian Church (Disciples of Christ) in accordance with the Church's mission for the world. See Powell, 859 F. Supp. at 1347 (there is no teaching position more closely tied to a school's religious character than that of a theology professor).

³¹ Despite the obvious relevance of these opinions, each of which involves a professor at a religious, post-secondary institution, Kant ignores these opinions and references instead cases involving persons teaching secular subjects at grade schools in support of the argument he is not a ministerial employee. By way of example, Kant cites and relies upon the following: DeMarco v. Holy Cross High School, 4 F.3d 166 (2nd Cir. 1993) (high school math teacher); Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849 (fifth grade teacher of secular courses including math, social studies and spelling); EEOC v. First Baptist Church, 1992 U.S. Dist. LEXIS 14479 (N.D. Ind. June 8, 1992) (teachers at elementary school); DOL v. Shenandoah Baptist Church, 707 F. Supp. 1450 (W.D. Va. 1989) (teachers at a preschool and elementary school); and Geary v. Visitation of the Blessed Virgin Mary Parish School, 7 F.3d 324 (3rd Cir. 1993) (teacher at elementary school). The Seminary is a graduate ecclesiastical institution that does not offer any secular courses or secular degree programs. (RA 0280) Further, the United States Supreme Court issued Hosanna-Tabor after issuance of the aforementioned opinions cited by Kant, concluding that a grade-school teacher of secular subjects is a ministerial employee for purposes of the ministerial exception. Opinions cited by amicus curiae suffer from the same infirmities. See Hendricks v. Marist Catholic High School, 2010 U.S. Dist. LEXIS 36088 (D. Ore. April 12, 2010) (teacher at high school); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980) (teacher of psychology). Moreover, in these opinions the courts simply permit discovery with respect to the constitutional questions or enforce an agency's investigative subpoena. Id.

³² Kant admits he was a religion professor teaching Biblical and New Testament courses. (RA 0307-10 [Appx. 9]) Kant does not allege he taught, or that the Seminary even offered, secular courses such as math or spelling. Despite the fact that Kant recognizes the Seminary did not (and does not) offer secular courses, amica curiae Griffin asserts, without any basis in fact or the record, that Kant taught secular courses.

Courts regularly conclude professors are ministerial employees for purposes of the ministerial exception. By way of example, in Catholic Univ., a former faculty member brought suit against Catholic University, alleging, among other things, that the institution's denial of her application for tenure was discriminatory. EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996). The appellate court ultimately dismissed the case, concluding that the professor was a ministerial employee because the role performed by the faculty was "vital to the spiritual and pastoral mission of the Catholic Church." Id. at 464. In reaching this conclusion, the court noted that the institution's "stated mission is to foster and teach sacred doctrine and the disciplines related to it" and that the University's faculty was the instrument used by the Catholic Church for the teaching of its doctrines and disciplines. Id. at 463-64.

The analysis in Klouda v. Southwestern Baptist Theological Seminary, 543 F. Supp. 2d 594 (N.D. Tex. 2008) is similarly instructive. There, the court recognized that the plaintiff taught post-secondary courses with ecclesiastical goals and was charged with helping prepare students for ministry. Id. at 602. The court concluded that the former faculty member was a ministerial employee and granted summary judgment in favor of the seminary, noting that the seminary "must be free to decide for itself matters of church governance, such as the identities of those who will be permitted to teach courses in preparation of students for church ministry." Id. The court recognized that any claim challenging a religious institution's employment decision with respect to one of its ministerial employees "prevent[s] court review of the employment decision without further questions." Id. at 611. In this instance, the trial court's grant of summary

judgment should be affirmed because the record unequivocally establishes Kant was a ministerial employee whose primary duty was teaching religion at the Seminary.

Kant primarily relies upon Weishuhn v. Catholic Diocese of Lansing, 756 N.W.2d 483 (Mich. Ct. App. 2008) when arguing he is not a ministerial employee. Kant contends Weishuhn stands for the proposition that the ministerial exception does not apply to theology teachers unless “such teaching was primarily religious.” See Appellant’s Brief p. 25. Respectfully, Kant’s reliance on Weishuhn is difficult to understand because Kant admits he was a theology teacher and that his teaching was primarily religious.³³ See Appellant’s Brief p. 1. (RA 666-67) Further, *it is undisputed that Kant was expected to impart to students, through curriculum and by example, teachings of the Bible consistent with the Christian faith.* (RA 0280-81 [Appx. 4], 295-302 [Appx. 2]) The Seminary’s Catalog acknowledges that its faculty “understand ministry to be a divine calling” and will prepare students for this divine calling through theological, pastoral and spiritual formation. (RA 0297 [Appx. 2]) Even more fundamentally, the Seminary’s Faculty Handbook mandates the “basic responsibility of the faculty” shall be to “prepare faithful leaders for the Church of Jesus Christ.”³⁴ (RA 0900 [Appx. 8]) As a faculty member, Kant was expected to pursue “the truth,” “serve as [a] model for ministry,” “participate in Seminary worship services and convocations” and hold “[a]ctive membership in a congregation.” (RA 0904, 0916, 0918-19 [Appx. 8]) The record

³³ Because Kant admits he taught religious courses, including theology, his reliance on Welter v. Seton Hall Univ., 608 A.2d 206 (N.J. 1992) is misplaced. The Welter court concluded that individuals teaching computer science were not ministerial employees. Kant did not teach computer science.

³⁴ Without any citation to the record, Kant alleges that his “primary responsibility was not to prepare students for the Seminary’s religious mission.” This claim is not only unsupported, but contrary to the express terms of the Faculty Handbook, a document Kant had knowledge of during his employment with the Seminary. If Kant did not want to satisfy his “basic responsibility” as a faculty member or for whatever reason felt that his faith prevented him from satisfying it, Kant did not have to accept or continue employment at the Seminary.

establishes Kant was aware of, and attempted to satisfy, these ecclesiastical obligations. (RA 0468 [Appx. 7]) Thus, according to Weishuhn, Kant was a ministerial employee.³⁵

D. The Ministerial Exception Bars Kant's Claims.

Kant admits the Seminary is a religious institution³⁶ and the record establishes he is a ministerial employee. Because the Seminary does not offer any secular courses or degree programs,³⁷ the Seminary undeniably hires faculty exclusively for, and entrusts the faculty with, the training of future leaders of the Church of Jesus Christ. (RA 0280 [Appx. 4]) In that regard, the Seminary expects its faculty to impart to students, through curriculum and by example, teachings of the Bible consistent with the Christian faith. (RA 0280-81 [Appx. 4], 0295-99 [Appx. 2]) The Seminary's Catalog Overview expressly states that its faculty "understand ministry to be a divine calling" and will work to prepare students for this divine calling through theological, pastoral and spiritual formation. (RA 0297 [Appx. 2]) Even more fundamentally, the Seminary's Faculty Handbook mandates the "basic responsibility of the faculty" shall be to uphold the Seminary's religious Mission and "prepare faithful leaders for the Church of Jesus Christ." (RA 0900 [Appx. 8]) The Faculty Handbook further elaborates on the faculty's academic responsibilities, requiring the faculty always to pursue "the truth" and stating that "Christian theology should always direct thought and life toward God, the Source of

³⁵ Significantly, the court in Weishuhn recognized that the ministerial exception bars common-law claims as well as statutory claims. Weishuhn at 488-89.

³⁶ Because Kant admits the Seminary is a religious institution, it was inappropriate for the dissent to consider this issue on appeal. Both parties recognize that the Seminary is a religious institution and, thus, the Seminary's status as a religious institution is not before the Court for consideration.

³⁷ The degrees available to Seminary students include the Master of Divinity, Doctor of Ministry and Master of Arts in Pastoral Care. (RA 0280 [Appx. 4]) Courses offered by the Seminary include, but are not limited to, Introduction to the New Testament, New Testament Exegesis: Epistles, Pastoral Case in Times of Transition, Tending the Body of Christ and Sermon Prep as a Spiritual Practice. (RA 0442-444)

truth, the Judge of human thoughts and the Ultimate End of all theological inquiry.” (RA 0904 [Appx. 8])

Pursuant to the Seminary’s express policies, its faculty members are also expected to model the ministerial role for its students, both inside and outside the classroom. In that regard, faculty members are expected to “serve as models for ministry,” “participate in Seminary worship services and convocations” and hold “[a]ctive membership in a congregation.” (RA 0916, 0918-19 [Appx. 8]) The record establishes Kant was aware of, and tried to satisfy, these ecclesiastical obligations. (RA 0468, letter from Kant stating “I look forward to teaching five courses this academic year and *to participating fully* in the professional, social, and *spiritual life* of the LTS community,” emphasis added [Appx. 7])

Because the Seminary entrusts the faculty with the spiritual formation of its students, the Seminary’s employment decisions with respect to its faculty are based on religious criteria. (RA 0280 [Appx. 4]) Obviously recognizing this, Kant informed the Seminary of his religious education when applying for employment, indicating he received a Masters in Theological Studies degree in *New Testament and Christian Origins* from Harvard Divinity School as well as a M.A. and Ph.D. from the Department of Religious Studies at Yale University with a comprehensive examination in ancient Christianity. (RA 0450-56)

Kant utilized his Christian education to teach courses at the Seminary that, prior to the Seminary’s spiritual restructuring, were part of the core curriculum for the Master of Divinity Program. (RA 0280 [Appx. 4]) The courses Kant taught included “War and Peace in Biblical Tradition,” “New Testament Greek,” “Biblical Hebrew” and “Jesus in

Film in Literature,” a course in which Kant showed “Jesus films” including “The Gospel according to St. Matthew” and “The Last Temptation of Christ.”³⁸ (RA 0307-10 [Appx. 9]) In his brief to this Court, Kant admits he taught “theology” and “New Testament” courses.³⁹ See Appellant’s Brief p. 1. The Seminary required Kant to teach in keeping with its Mission Statement. (RA 0900 Appx. 8]) Obviously, then, Kant was responsible for developing and presenting the curriculum to future leaders of the Christian Church (Disciples of Christ), which demonstrates he was in fact a ministerial employee. See Klouda, 543 F. Supp. 2d at 602. The Seminary has consistently said that Kant played an important role in preparing students for ministry. In a 2006 letter, the Seminary’s Dean wrote that she wanted Kant to “continue to do the important cultural analysis that is needed in the *preparation of our students for ministry* in a global context.”⁴⁰ (RA 0682-83) (emphasis added) There is no teaching position more closely tied to a school’s religious character than that of a theology professor. Powell v. Stafford, 859 F. Supp. 1343, 1347 (D. Colo. 1994).

Religious criteria not only played a role in Kant’s hiring and job responsibilities, but also in how the Seminary evaluated his performance. That is, the Seminary evaluated Kant’s performance based on religious criteria. Specifically, the Seminary customarily, at the end of each semester, requested that all students complete an evaluation about each professor, including Kant. The evaluations were reviewed by the Dean, who would then

³⁸ Kant’s comment that courses about religion are taught at private secular universities and colleges is irrelevant. See Appellant’s Brief p. 4. Kant admits the Seminary is not a private secular university or college.

³⁹ Curiously, amica curiae Griffin argues that Kant was not a ministerial employee because he taught “about religion” rather than “of religion.” Amica curiae then cites her own publication for the proposition that “[t]heology . . . [is] teaching of religion.” Kant admits that he taught theology. See Appellant’s Brief p. 1. Thus, pursuant to Kant’s admission and amica curiae’s “logic,” Kant was a ministerial employee.

⁴⁰ The Seminary repeatedly told Kant in writing that he was preparing students for Christian ministry. If he ever thought this was inconsistent with his own personal faith, he could have resigned.

provide the faculty member with constructive criticism based on the students' remarks. Most notable about this system is that fact that the evaluations expressly asked students to consider whether the course helped them "think theologically" or "appreciate the particularity of ministry in my denomination and location" and whether the course contributed to the individual's theological, pastoral and spiritual formation. (RA 0458-60 [Appx. 6])

The course evaluations were specifically designed to, and did in fact, elicit comments about the students' spiritual growth under Kant's direction. In evaluations about Kant's courses and his ability as a faculty member, some of the students responded as follows: "Made me appreciate by beliefs in Christ," "Furthered & expanded how Christ is viewed in Gospels," "Helped me relate Jesus to real life" and "Gave me tools to see different aspects of Jesus/Christ."⁴¹ (RA 0463-64 [Appx. 6]) Accordingly, the undisputed record reveals Kant taught religious courses and was evaluated based on religious criteria at a religious institution. Kant was a ministerial employee.

1. Kant has admitted he was a ministerial employee.

In addition to teaching theological courses at an institution in a covenant relationship with the Christian Church (Disciples of Christ), and prior to filing this lawsuit, Kant repeatedly admitted he worked in a ministerial capacity at the Seminary. Most strikingly, in a letter to the Seminary's then-president, Kant accepted employment

⁴¹ It is noteworthy that Kant uses a student complaint about one of his courses in an effort to support his position he was not a ministerial employee. See Appellant's Brief p. 10. That is, when one student was asked whether Kant's course helped him/her "think theologically," the student responded "[t]here was little conversation on theo[logy]." (RA 0458 [Appx. 6]) In making this argument, Kant misses the point and actually highlights his shortcomings as perceived by this particular student. For purposes of this litigation, it cannot be disputed Kant was required to train ministers of the Christian Church (Disciples of Christ) in accordance with the Seminary's mission and in a way that, pursuant to the express terms of the evaluation, encouraged students to think theologically. To the extent Kant argues, or even suggests, he did not fulfill these requirements, he is effectively admitting he did not satisfactorily perform the tasks for which he was hired.

with the Seminary by stating he looked forward to working “*in the ministry* of theological education.”⁴² (RA 0304 [Appx. 7]) In subsequent correspondence, Kant wrote he looked forward to “participating fully in the professional, social and *spiritual life* of the LTS community.” (RA 0468, emphasis added [Appx 7])

In a Self-Evaluation, Kant explained that his courses make “spiritual exploration, theological reflection, and prayer much more meaningful” and transform the “theological perspectives of students.” (RA 0315-17 [Appx. 9]) In the context of another course, Kant explained his attempts to guide students (future pastors) “in intelligently using biblical writings to deal with difficult emotions and thoughts in a religiously meaningful way.” (RA 0472-75 [Appx. 9]) When defining his teaching interests, Kant stated that “[m]y roots and interests start with scripture.”⁴³ (RA 0313 [Appx. 9]) In another Self-Evaluation, Kant not only references the Christian courses he taught at the Seminary, but also his participation in two ordinations –giving the sermon at one and serving as a scripture reader at another.⁴⁴ (RA 0311 [Appx. 9])

In addition to submitting Self-Evaluations, and as a faculty member, Kant submitted information about himself for inclusion in the Seminary’s Faculty Annual Reports, each time detailing his contributions to the Seminary over the preceding year. Kant’s autobiographical submissions are telling for purposes of the ministerial analysis

⁴² Any contention by Kant that the Seminary never told him he was a ministerial employee is specious. In his acceptance letter, Kant acknowledged his employment required participation in the Seminary’s ministry. (RA 0304 [Appx. 7]) Moreover, the Seminary’s Faculty Handbook makes it clear Kant, as a faculty member, was tasked with preparing leaders of the Church of Jesus Christ. (RA 0900 [Appx. 8]) Further, no court has ever concluded that whether a religious institution told an employee he or she was a ministerial employee is relevant to the application of the ministerial exception.

⁴³ Kant taught courses about both the Old and New Testaments, which are, of course, the foundations of the Christian Church’s (Disciples of Christ) faith.

⁴⁴ Again, without any acknowledgment of the record before this Court, amica curiae Griffin concludes Kant did not perform religious functions for the Seminary. While at the Seminary, Kant gave at least one sermon at an ordination. (RA 0311 [Appx. 9]) This is plainly the performance of a religious function, as is the training of future Church leaders.

and again unequivocally establish he served a ministerial role at the Seminary. There, Kant touts his participation in chapel services, convocations, Senior Communion and various other religious services sponsored by the Seminary. (RA 0472-75 [Appx. 9]) Kant also expressly admits reading scripture at the Seminary's chapel services, the Senior Communion service and the Service of Communion and Light as well as writing the Lenten devotion and giving prayer at a luncheon sponsored by the Seminary. (RA 0493-522) Indeed, Kant not only participated in the Seminary's chapel services, but organized the Seminary's chapel services and gave the Sermon at this service on at least one occasion. Id. Consistent with Kant's own admissions and pre-lawsuit perception of his role at the Seminary, Kant was employed as a ministerial employee who was tasked with educating future Church leaders.

In his Brief, and in an attempt to escape this truth, Kant generally refers to several documents, alleges the documents say "nothing about ministry" and, therefore, concludes he was not a ministerial employee.⁴⁵ While all of the documents may not literally contain the word "ministry," they clearly establish Kant was tasked with, and in fact participated in, the Seminary's ministry. The salient portion of each document Kant refers to is set forth below:

- a. Letter from Seminary's then-president acknowledges Kant encouraged his students to do "critical theological reflections" and notes Kant's participation in chapel; (RA 0684)
- b. Letters setting forth Kant's salary identify him as a Professor of Religious Studies; (RA 0686)
- c. Article in Seminary's newsletter identifies Kant as academically prepared to teach the Bible and a Biblical Scholar of early Christianity; (RA 0694)

⁴⁵ Kant also claims these documents demonstrate he was not a minister of the Christian Church (Disciples of Christ). See Appellant Brief p. 3-4. The Seminary does not contend, nor has it ever contended, he was an ordained minister of the Christian Church (Disciples of Christ). As discussed in detail below, Kant's point that he was not an ordained minister is irrelevant for purposes of the ministerial exception.

- d. Letter from Seminary's then-dean states Kant has explained how his own faith is not a barrier to the students' own theological development; (RA 0695)
- e. Memorandum states Kant is committed to "preparing leaders for our faith tradition" (RA 0696)
- f. Letter from Seminary's then-dean states that Kant is on the Seminary's team and has broadened the scope of the students' learning; (RA 0697) and
- g. Letter from Seminary's then-dean acknowledges Kant provides an important analysis "*needed in the preparation of our students for ministry*" (RA 0682-83, emphasis added)

Accordingly, even the documents Kant alleges support his position in fact establish Kant was training leaders for ministry in the Christian Church (Disciples of Christ).

Since filing the lawsuit, Kant has admitted the Seminary is a religious institution, his primary duty was teaching and *he incorporated faith into his teaching.* (RA 666) Despite his own admissions and the fact the record reveals his employment with the Seminary required the teaching of religious courses, prayer, scripture reading and participation in chapel services, Kant tries to persuade this Court that he was not a ministerial employee because of two facts: he is not an ordained minister of the Christian Church (Disciples of Christ) and he is Jewish.⁴⁶ Kant makes these arguments despite admitting that he was a member of the team⁴⁷ charged with carrying out the Seminary's religious mission. See Appellant's Brief p. 1. As a matter of law, this is insufficient as

⁴⁶ There is nothing in the record to support an argument that, at the time of Kant's hiring, the Seminary or Kant believed that his personal convictions kept him from furthering the Seminary's religious mission.

⁴⁷ Kant seems to think the fact that the Dean at the time referred to Kant as a "utility player" somehow removes him from the scope of the ministerial exception. The Dean explains his use of that phrase as follows: "This is a seminary with a small faculty and such institutions need professors with broad backgrounds, not people with narrow specialties. Your cooperation and openness and ability to teach across the spectrum helped us through a difficult period and provided a good model to our students on how to think theologically on all subjects." (RA 0161) The pertinence of this portion of the record to Kant's argument is unclear. Kant was employed to teach students (through curriculum and by example) in a way that furthered the mission of the Church. Kant was on the Seminary's team.

evidenced by the fact Kant does not cite a single case stating, or even suggesting, the ministerial exception is limited to ordained ministers espousing the faith.⁴⁸

The Court in Hosanna-Tabor made it clear that all facts and circumstances - - not isolated facts - - must be considered in determining whether the ministerial exception applies. Id. at 707. The Court also made it clear the ministerial exception is not limited to the head of a congregation. Id. Importantly, courts recognize that the ministerial exception applies even when the ministerial employee is of a different faith than that of the religious institution. By way of example, in Henry v. Red Hill Evangelical Lutheran Church of Tustin, 201 Cal. App. 4th 1041 (Cal. Ct. App. 2011), a California appellate court concluded that a Catholic teacher was a ministerial employee when teaching at a Lutheran school. The court concluded she was a ministerial employee (and refused to involve itself in the matter) even though the teacher claimed she did not introduce themes specific to Lutheran doctrine or teachings. Id. at 1046-47. See also EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 803 (4th Cir. 2000) (ministerial exception applied even though occupants of music ministry position were not required to be Catholic); Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 651-59 (10th Cir. 2002) (First Amendment prohibited youth minister's claims even though she was neither an ordained minister nor a member of the Episcopal Church). Accordingly, the contention Kant is of a different faith is insufficient to establish error by the Circuit Court and the Kentucky Court of Appeals.

⁴⁸ In fact, many of the cases Kant cites support the conclusion that ordination, or the lack thereof, is irrelevant, including Pardue v. Center City Consortium Schools of the Archdiocese of Washington, Inc., 875 A.2d 669, 678 (D.C. Ct. App. 2005) (non-ordained principal at Catholic school is ministerial employee).

2. The Seminary is not entitled to less First Amendment protection because it has an ecumenical faith.

The fact that Kant was not an ordained minister of the Christian Church (Disciples of Christ) is in accord with the Church's beliefs. The record establishes and, again, Kant does not contest the fact that the Christian Church (Disciples of Christ) is intentionally ecumenical, promoting and fostering interdenominational unity.⁴⁹ (RA 0295, 0298 [Appx. 2]) As such, there is nothing inconsistent with a member of another faith training future leaders of the Christian Church (Disciples of Christ). As the Court recognized in Hosanna-Tabor, a religious institution has the exclusive right to determine who will teach its faith. Id. at 703. Kant taught the Bible; Kant taught the faith.⁵⁰ The Seminary's employment of a Jewish individual to teach certain portions of the faith or particular spiritual matters is in alignment with Christian beliefs. The Christian Church (Disciples of Christ) is intentionally ecumenical and, thus, there is nothing inconsistent about its employment of non-ordained faculty members or faculty members of a different religion. (RA 0295, 0297 [Appx. 2]) Kant does not, and could not credibly, dispute the foundational ties between the Jewish and Christian faiths, including the fact that Christians believe that Jesus, their Savior, was himself raised Jewish and taught in Jewish temples. See Luke 2:41-49. Moreover, portions of the Bible and Torah, a Jewish holy book, are of course identical.⁵¹ Kant and the Seminary both recognized that his personal faith did not inhibit his ability to contribute to the Seminary's ministry or the theological

⁴⁹ Because the Seminary is in a covenant relationship with the Christian Church (Disciples of Christ), "the Seminary maintains an ecumenical spirit. This is reflected not only in denominational diversity but in the inter-faith inclusiveness of the student body, faculty, staff, trustees, and curriculum." (RA 0295 [Appx. 2])

⁵⁰ *Amica curiae* Griffin incorrectly alleges that the Kentucky Court of Appeals applied a "primary duties" test when concluding that Kant was a ministerial employee. The Kentucky Court of Appeals noted Kant's primary duty – teaching future Church leaders – but did not apply a primary duty test. Instead, the Court considered all undisputed facts in the record.

⁵¹ Even *amicus curiae* ADL does not contest the fact that portions of the two faiths are identical and are based on the same holy texts.

education of the Seminary's students.⁵² Furthermore, the fact that the Seminary has an inclusive faith does not in any way diminish the Seminary's First Amendment rights. The Seminary is an unequivocally religious institution and entitled to the same First Amendment protection as is any other religious institution.

As Justice Thomas explained in Hosanna-Tabor, this Court should defer to the Seminary's characterization of Kant as a ministerial employee. Hosanna-Tabor, 132 S. Ct. 694, 710. The Seminary's "right to choose its ministers would be hollow . . . if secular courts could second-guess the organization's sincere determination." Id. Indeed, a court's decision to re-evaluate or question a religious institution's conclusion that an individual is a ministerial employee would violate the First Amendment by resulting in an analysis of the beliefs of the Christian Church (Disciples of Christ). What is relevant, and the only thing this Court may properly consider, is the fact that the Seminary clearly, genuinely and consistently considered Kant a ministerial employee, an individual tasked with teaching the faith to future church leaders. A religious institution has the exclusive right to determine who will teach its faith. Id. Kant taught the faith to the faithful, including theology and New Testament courses. See Appellant's Brief p. 1. Kant was a ministerial employee.

3. The ministerial exception is a complete defense to all claims Kant asserts against the Seminary.

The ministerial exception is a complete defense to all claims that challenge a religious institution's employment decisions with respect to its ministerial employees.

⁵² During his employment, Kant took the position that his faith was not a barrier to the students' theological development. (RA 0695) In a Self-Evaluation, Kant stated his own faith would "encourage [students] to explore their own particular missions *as Christians*." (RA 0472, emphasis added [Appx. 9]) The Seminary also recognized that Kant's analysis was "needed in the preparation of our students for ministry." (RA 0683) Accordingly, Kant's post-lawsuit argument that he could not contribute to the students' theological development because he is Jewish is unfounded and disingenuous.

Kant asserts breach of contract and breach of implied duty of good faith and fair dealing claims (collectively “state law claims”) against the Seminary. (RA 0001-7) Both of these claims arise from the Seminary’s decision to end its employment relationship with Kant. See Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940, 943 (6th Cir. 1992) (appellate court affirmed dismissal in favor of religious institution on breach of contract, promissory estoppel and loss of consortium claims); Hutchinson v. Thomas, 789 F.2d 392, 392-93 (6th Cir. 1986) (appellate court affirmed dismissal in favor of religious institution on breach of contract, defamation and intentional infliction of emotional distress claims); Ogle v. Church of God, 153 Fed. Appx. 371 (6th Cir. 2005)⁵³ (appellate court affirmed dismissal in favor of religious institution on breach of implied contract, invasion of privacy, conspiracy and emotional distress claims); Klouda v. Southwestern Baptist Theological Seminary, 543 F. Supp. 2d 594 (N.D. Tex. 2008) (court dismissed a breach of contract claim and other common law claims asserted by a faculty member against a seminary). The ministerial exception bars all claims a ministerial employee may assert against a religious institution because any claim arising from the employment relationship between the two necessarily involves an ecclesiastical inquiry from which the courts are forbidden.⁵⁴

⁵³ It is curious Kant relies heavily on Petruska v. Gannon Univ., 462 F.3d 294 (3rd Cir. 2006), a Third Circuit opinion that was an outlier when decided and is now inconsistent with the rationale in Hosanna-Tabor, yet ignores the unequivocal Sixth Circuit authority mandating dismissal of all of Kant’s claims against the Seminary. The Petruska court did not agree to hear a breach of contract claim, but only stated that it did not appear from the “outset” that the claim turned on an ecclesiastical inquiry. In contrast, this matter turns on an ecclesiastical inquiry from the outset.

⁵⁴ Kant disregards this mandate by incorrectly suggesting Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) and Minker v. Baltimore Annual Conf., 894 F.2d 1354 (D.C. Cir. 1990), permit an inquiry into a religious institution’s contracts, when, in fact, the Rayburn court heeded the constitutional prohibition, refusing to inquire into the institution’s employment decision. Id. at 1171. The Minker court similarly dismissed a breach of contract claim premised on a religious institution’s written pronouncements because such an inquiry would “constitute excessive entanglement in its affairs.” Id. at 1360. The Minker court did not initially dismiss the minister’s oral breach of contract claim premised on statements made by another individual because it was not immediately apparent the court would be forced

The ministerial exception also applies irrespective of whether the institution asserts a religious basis for the professor's discharge.⁵⁵ EEOC v. Catholic Univ., 83 F.3d 455, 464-65 (D.C. Cir. 1996). The ministerial relationship "lies so close to the heart of the church that it would offend the Free Exercise Clause simply to require the church to articulate a religious justification for its personnel decisions." Alcazar v. Corp. of the Catholic Archbishop of Seattle, 627 F.3d, 1288, 1291 (9th Cir. 2010). That is, "[i]n these sensitive areas, the state may no more require a minimum basis in doctrinal reasoning than it may supervise doctrinal content." Rosati v. Ohio Catholic Diocese, 233 F. Supp. 2d 917, 922 (N.D. Ohio 2002) (citations omitted). Because a religious institution's employment decisions relating to its faculty are "per se" ecclesiastical in nature, these decisions are entitled to the religious freedoms guaranteed in the First Amendment.

While the Court in Hosanna-Tabor was not faced with a breach of contract claim, it clearly prohibited the judiciary from inquiring into or second-guessing employment decisions of religious institutions. Id. at 708-09. It is indisputable that Kant's state law claims challenge the Seminary's employment decision. That is, Kant alleges the Seminary breached a contract and an implied covenant of good faith and fair dealing when it decided to end Kant's employment. Fundamentally, and as the U.S. Supreme Court recognized, this Court may not properly question the Seminary's employment

to inquire into matters of ecclesiastical policy when deciding this claim. Id. Here, Kant does not assert a breach of contract claim based upon any oral representations. As the Circuit Court and Court of Appeals correctly recognized, Kant's breach of contract claim, premised on the Faculty Handbook, requires an inquiry into ecclesiastical matters.

⁵⁵ The Seminary had a religious basis for Kant's separation of employment. As explained above, the courses taught by Kant did not further the Seminary's reinvention and commitment to pastoral life. Kant, implicitly recognizing his separation of employment was the result of the Seminary's spiritual restructuring, argues that he could not be a ministerial employee because his position did not comport with the Seminary's redesign. See Appellant Brief p. 10. This argument, however, assumes the Seminary was not acting in accordance with its mission before the redesign. That is not the case. At all times material hereto the Seminary has been committed to training ministers of the Christian Church (Disciples of Christ). Today, the Seminary simply has to pursue this mission - - which effectively has been honed - - on a limited budget and without Kant's ministry.

decisions relating to its ministers, including Kant. Indeed, the First Amendment prohibits the Court from deciding who will teach future leaders of the Christian Church (Disciples of Christ) or who will carry out the Church's mission. Id. To the extent any court were to address the merits of Kant's claims, it would be deciding who could teach the beliefs of the Christian Church (Disciples of Christ) and carry out the Church's mission. The First Amendment plainly prohibits this inquiry.

Moreover, Kant cannot "secularize" his claims or otherwise remove them from the scope of the First Amendment by alleging that merely a "tenure contract" is at issue. First, there is no tenure contract. Instead, Kant relies on the Seminary's Handbook to support his common law claims. The Seminary's Handbook is not a secular document. To the contrary, the Handbook was created to govern the Seminary's relationships with its ministerial employees, expressly proclaims the Seminary's purpose and is replete with religious references. (RA 0375-401, 0898-1122) Additionally, and pursuant to its express terms, the Handbook must "be conceived and implemented in a way that reflects God's gracious and steadfast love made known through Jesus Christ." (RA 0901 [Appx. 8]) Kant asks this Court to interpret the Seminary's Handbook, which, by the Handbook's terms, would require an assessment of the Seminary's mission and of how God's "gracious and steadfast love" informs the interpretation of the Handbook. Such involvement in the affairs of a religious institution would be manifestly unconstitutional.

Neither does Kant's contention that the Seminary's employment decision was based on financial reasons⁵⁶ remove Kant's claims from the scope of the First Amendment. In Hosanna-Tabor, the Court refused to evaluate the bases for the

⁵⁶ Kant's employment ended because the Seminary engaged in a spiritual reinvention, taking drastic measures to restructure its curriculum to better meet the needs of the Church. (RA 0276-77 [Appx. 5])

termination, stating: “The purpose of the exception is not to safeguard a church’s decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church’s alone.” *Id.* at 709. In other words, the reason for the employment decision is irrelevant. Ultimately, because Kant’s claims challenge the Seminary’s employment decision with respect to its ministerial employee, the First Amendment forbids such an inquiry and this Court should affirm the trial court’s order.

IV. Kant Improperly Encourages the Court to Address Issues Outside of the Case and Controversy Before It.

As with this Court, both the Circuit Court and Kentucky Court of Appeals were tasked with reviewing and deciding only the case and controversy before it.⁵⁷ In the Introduction to his brief, however, Kant incorrectly asks this Court to determine whether the Seminary “is liable on its valid contracts, even if it is a ‘religious institution.’”⁵⁸ See Appellant Brief p. i. This Court is not tasked with setting forth a broad rule regarding the enforceability of the Seminary’s contracts.⁵⁹ This Court is only tasked with resolving the issue before it – a discrete personnel issue involving the Seminary and an individual responsible for training future Church leaders. This matter does not involve, for example,

⁵⁷ Kentucky courts must refrain from giving advisory opinions on hypothetical issues which may or may not occur in the future. *Nordike v. Nordike*, 231 S.W.3d 733, 739 (Ky. 2007); *Associated Indus. v. Commonwealth*, 912 S.W.2d 947, 951 (Ky. 1995).

⁵⁸ Kant also justifies his request for oral argument by claiming that this action is “interesting from a legal scholar’s viewpoint” and “important to educators with tenure.” The Seminary is not defending its personnel decision so that legal scholars will be entertained. Neither is the Seminary asking this Court to make a rule that affects all tenured educators in Kentucky. The Seminary simply seeks to protect its First Amendment right to determine how best to meet the needs of the Christian Church (Disciples of Christ). As the U.S. Supreme Court recognized in *Hosanna-Tabor*, this Court’s inquiry is limited to the facts before it.

⁵⁹ Amicus curiae ADL also inappropriately urges this Court to conclude that all “contracts” involving the Seminary are enforceable, repeatedly alleging that the Seminary is seeking “blanket immunity.” The Seminary is not seeking and never has sought blanket immunity from judicial interference. Rather, the Seminary has repeatedly explained that this Court is only tasked with deciding the matter before it - whether the Court can involve itself in or second-guess the Seminary’s decision that Kant did not comport with its spiritual redesign.

the Seminary's contract with a wholesale foods distributor for Communion wine or crackers. Neither does this matter involve the Seminary's contract with students who rent dormitories on the Seminary's property.

Indeed, the relevant inquiry is very limited. Both the Circuit Court and the Appellate Court recognized this fact and correctly applied the First Amendment's ecclesiastical abstention doctrine and the ministerial exception to bar review of Kant's claims. In that regard, amicus curiae ADL and AAUP are simply incorrect when alleging that the Kentucky Court of Appeals failed to make a case-by-case determination⁶⁰ and instead adopted a "per se" rule that all Seminary faculty are ministerial employees or that courts are prohibited from hearing "standard contract suits." In fact, the Kentucky Court of Appeals expressly discussed Kant's role at the Seminary. Kant v. Lexington Theological Seminary, 2012 Ky. App. Unpub. LEXIS 1014, *29-33 (Ky. App. July 27, 2012). The Appellate Court considered the undisputed facts before it when recognizing the constitutional mandates that apply to Kant's claims. It is improper for Kant now to try to convince this Court to issue an advisory ruling that will once and for all resolve every issue involving contracts with religious institutions. This Court should limit its inquiry to the case and controversy before it and uphold the lower courts' opinions.

CONCLUSION

For the reasons set forth above, Lexington Theological Seminary respectfully requests that the Court uphold the opinion of the Kentucky Court of Appeals affirming

⁶⁰ Amicus curiae ADL incorrectly suggests that the ministerial exception, an affirmative defense, requires some sort of factual inquiry or heightened burden that is more rigorous than that required by other affirmative defenses. Neither of the opinions cited by the ADL support this claim. Moreover, in both of the cited opinions this Court applies the summary judgment standard – no genuine issue of material fact – when determining whether the lower court correctly applied an affirmative defense. See Bank One v. Murphy, 52 S.W.3d 540, 545 (Ky. 2001); Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489, 493 (Ky. 1983).

the Circuit Court's grant of summary judgment in its favor.

Respectfully submitted,



Richard G. Griffith
Elizabeth S. Muyskens
Stoll Keenon Ogden PLLC
COUNSEL FOR APPELLEE

APPENDIX

Appendix 1	Seminary Mission and Purpose	RA 0291-93
Appendix 2	Excerpts from Seminary Catalog	RA 0295-302
Appendix 3	Courier Journal Article	RA 0403-04
Appendix 4	Affidavits of Dr. James P. Johnson	RA 0279-82, 0756-757
Appendix 5	Seminary Brochures	RA 0276-77, 0284-85
Appendix 6	Course Evaluations	RA 0458-60, 0462-66
Appendix 7	Correspondence from Kant	RA 0304, 0468
Appendix 8	Excerpts from Faculty Handbook	RA 0898-901, 0904, 0916, 0918-19
Appendix 9	Self-Evaluations	RA 0306-13, 0315-17, 0472-75