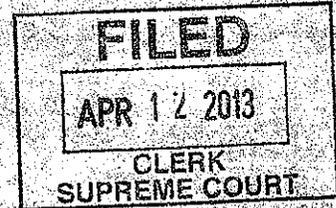


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2012-SC-00502-DG



On Appeal from Kentucky Court of Appeals,
Case No. 2011-CA-000004-MR

DR. LAURENCE H. KANT

APPELLANT

v.

LEXINGTON THEOLOGICAL SEMINARY

APPELLEE

BRIEF ON BEHALF OF APPELLANT, DR. LAURENCE H. KANT

This is to certify that a true and correct copy of the foregoing has been served by mailing same this the 12th day of April, 2013, to the following: Hon. Richard G. Griffith and Hon. Elizabeth S. Muyskens, Stoll Keenon Ogden, PLLC, 300 W. Vine Street, Suite 2100, Lexington, Kentucky 40507, Counsel for Appellees; Judge Kimberly Bunnell, Fayette Circuit Court, 120 N. Limestone, Lexington, Kentucky 40507; Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, and by hand-delivering ten copies to Hon. Susan Stokley Clary, Clerk, Court Administrator and General Counsel, Kentucky Supreme Court, 209 Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601.

Respectfully submitted,


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INTRODUCTION

This is a breach of contract case in which the Appellant, Dr. Laurence H. Kant, (hereinafter "Kant" or "Appellant") was terminated from his employment with the Appellee, Lexington Theological Seminary (hereinafter "Appellee" or "LTS") despite the fact that Kant was tenured at LTS. LTS does not argue that Kant violated any provision of the tenure contract sufficient to justify his termination. The Fayette Circuit Court granted LTS summary judgment on the basis that Kant, a man of Jewish faith, was a minister at LTS and therefore the "ministerial exception" applied and barred the Trial Court from hearing the case. In a 2-1 decision, with each Judge writing opinions, the Court of Appeals affirmed the summary judgment. Kant now appeals from this Opinion on the grounds that (1) the ecclesiastical doctrine does not apply to this case; (2) if this Court decides to adopt the ministerial exception, it should not find that same applies to Kant's action against LTS; and (3) LTS is liable on its valid contracts, even if it is a "religious institution."

STATEMENT CONCERNING ORAL ARGUMENT

The issues involved in this action are not only interesting from a legal scholar's viewpoint, but extremely important to educators with tenure all across this Commonwealth. Kant respectfully submits that oral argument will be helpful to the Court to fully address and sift through the issues raised by this appeal.

STATEMENT OF POINTS AND AUTHORITIES

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APPENDIX

STATEMENT OF THE CASE

1. **Kant was a tenured professor of the History of Religion at LTS and his Primary Duties were not in any way Religious**

Between June 2002 and January 2006, Kant taught fourteen courses at LTS (a seminary associated with the Disciples of Christ church) in the areas of Jewish Studies, theology, cultural studies, ethics, Hebrew Bible, New Testament, world religions, American religion, genocide, violence, peace studies, and Greek and Hebrew language. (Kant's January 2006 Self-Evaluation for Tenure, pg. 4, RA 0156). Although he taught a broad array of courses, Kant was a "utility player" with respect to the Seminary's mission. (May 1, 2005 Letter from Dean Dare to Kant, RA 0161). Moreover, as time passed, Seminary colleagues and administration became concerned that Kant and LTS needed to "define more specifically what religious studies should entail." *Id.* (emphasis in original). In his January 2006 Self-Evaluation for Tenure, Kant "defin[ed] his future core teaching interests and also suggest[ed] [his] possible title." (January 2006 Self-Evaluation, RA 0160).

On the latter, I would recommend the following: "Associate Professor of the History of Religion." As I have taught a wide variety of courses, I regard the following areas as integral to my responsibilities: 1) Biblical Studies (including biblical languages, as needed); 2) Jewish studies and Jewish-Christian Relations; 3) World Religions (including religions in the US); and 4) Religion and Cultural Studies (including thematic courses, such as religion and violence, religion and literature, and religion and film). My roots and interests start with scripture, but cover a wide expanse of intellectual territory beyond it. Many of my courses cover more than one of these areas (such as "Bible, Holocaust, and Jewish and Christian Memory"). Likewise, most of my courses touch in some way Jewish studies and cultural studies. "Jesus the Jew" is one new course I would very much enjoy teaching. In addition, I can easily transform my course, "Thinking Theologically in the Church," to "The Meaningful Life" for use in another context. Indeed, issues of meaning are what motivate many in our pool of potential students. I have a solid

foundation of courses from which to draw and hope to be able to repeat many of them in future years.

Clearly, the main focus of Kant's employment with LTS was Jewish studies. On February 20, 2006, LTS identified Kant's discipline, consistent with this January 2006 Self-Evaluation, as "History of Religion." (February 20, 2006 Letter from Dean Machado to Kant, RA 0162-0163) In this February 20, 2006 letter, Dean Machado informed Kant that his role "in the preparation of ... students for ministry in a global context" was "cultural analysis." *Id.* (Emphasis added). The plain fact is that Kant was not hired to espouse the tenets of the Disciples of Christ faith, and he never did so. There is not a single piece of evidence, testimony, or argument that Kant espoused the Disciples of Christ faith to LTS students at any time or in any fashion, inside or outside the classroom.

On March 6, 2006, LTS's Board of Trustees granted Kant tenure as an Associate Professor of the History of Religion effective August 1, 2006, based upon the unanimous recommendation of LTS faculty. (Complaint ¶ 7, RA 0002; March 7, 2006 Letter from Robert Cueni to Kant granting Tenure, RA 0161). Kant was a Professor of Religion, like many professors employed across this nation with schools both public and private, both secular and church-affiliated. Kant never "taught" the tenets or faith of the Disciples of Christ nor of any other religious denomination, including the Jewish faith. (Second Affidavit of Laurence H. Kant, RA 0665-0668) Further, while LTS' President, Mr. Johnson, "beat around the bush" as to this issue in his Affidavit (RA 0756-0757), the plain fact is that LTS provides degrees, it does not ordain ministers. Moreover, Kant's primary responsibility was not to prepare students for the Seminary's "religious mission," but rather to teach the

classes he was assigned to teach, and provide the other normal functions of a Professor of Religion.

LTS argued to the Trial Court that because Kant used the word "ministry" in one of his letters that he was obviously a minister. However, the record is littered with documents relating to Kant's work duties which define his role at LTS, and none of these documents expressly or impliedly state that Kant was a minister of this faith. This point is made clear through various documents placed into evidence before the Trial Court. For example:

- a. The March 7, 2006 tenure appoint letter references teaching, scholarship, and academics, but nothing about ministry or espousing the tenets of LTS' faith (RA 0684);
- b. 2002-2008 Annual Appointment Letters refer to courses, student advising, and participating in life of community, not the ministry or espousing LTS' faith (RA 0686-0693);
- c. Tenure Track Appointment Announcement from LTS Newsletter, May/June 2002 refers to courses, academic background, and languages but nothing about ministry (RA 0694);
- d. Dare Self Evaluation Response 2003A discusses Kant's collegiality, public presence, excitement for teaching, scholarship and also says "**Your witness is one of personhood and integrity and not one of doctrine**" (RA 0695)(Emphasis added);
- e. Dare Self Evaluation Response 2003B discusses deep involvement in Lexington community, fine teaching, academic breadth and ability, and scholarly production but nothing about ministry (RA 0696);

- f. Dare Self Evaluation Response 2004 references teaching, diversity, energy and breadth of knowledge/engagement, cooperativeness, broad contacts, teaching, PR abilities, and states that Kant has “been the most important PR person the seminary has had for some time,” but contains nothing about ministry (RA 0697); and
- g. 2006 Summary of Faculty Responses Response 2006 references Kant’s cultural analysis in his classes, connection to the wider community, his comfort being Jewish in a Christian environment, and that the definition of his discipline being History of Religion, but nothing about ministry espousing the tenets of LTS’ faith. (RA 0682-0683)

Kant provided the following un-contradicted sworn testimony in his Second Affidavit provided to the Trial Court: (RA 0665-0668):

¶ 8 Such references to the spiritual/religious nature of my courses or my teaching simply establishes that I am a person of faith (to use a Christian phrase) and that I incorporated that into my teaching. They do not constitute the definition of a minister or of a ministerial employee. I am glad that I, apparently, inspired some of my students, but that makes me a good teacher, not a minister. I also did that in my teaching at private and public universities. If being a person of faith and being spiritual makes one a minister, then most laypersons in congregations would be ministers. Such a conclusion would make the legal definition of the term, "minister," so broad as to render it meaningless...

¶ 9 It is totally implausible that teaching religion and Bible makes one a minister. Courses on religion and the Bible may be found in public universities and public high schools, as well as in private secular universities and colleges. I taught them at Cornell and York Universities before I ever taught them at LTS. Theology courses are also found at public and private secular institutions. One does not have to espouse a doctrine or set of beliefs to teach theology, and **I did not do so while teaching in my tenured position at LTS...**

¶ 10 The LTS motion also refers to syllabi. By definition, syllabi are directions and calendars for educational instruction, not ministerial

documents. Thus, as the Court can see from documents attached to my response to this Motion, it makes sense that the correspondence from LTS to me usually cites my teaching as a central part of my duties, along with scholarship and participating in the life of the community...

¶ 11 Of course, I contributed to the Ministerial Education Fund ("MEF"). Bob Cueni asked the faculty to do so, as did others, and I wanted to be a good team player. I do not believe that the mere fact that I contributed to this fund makes me a minister. Certainly, I never took any ministerial tax deductions, and it would not have been permitted for me to do so because I am not a minister.

In his tenured role, Kant could not and did not teach Seminary students the tenets or doctrine of the Disciples of Christ Church. LTS has not, and cannot, point to a single job function of Kant's which was designed in any way to espouse or teach the tenets of LTS' particular religion to its students. Instead, as emphasized in Dean Dare's May 1, 2005 letter, Kant was merely a "utility player" with respect to LTS' overall mission. He did not "personify" LTS' beliefs because he himself did not believe same.

2. The Terms of Kant's Contract with LTS

At the Trial Court level, LTS argued that its *Employee Handbook* (RA 0777-0803) somehow governed the parties' relationship with respect to this issue of tenure. However, it is the *Faculty Handbook*, not the *Employee Handbook*, which governs the terms of the contract between the Kant and LTS. The *Employee Handbook* explicitly states, "The information contained in this handbook applies to all employees unless otherwise indicated. **With respect to faculty, the *Faculty Handbook* supersedes the *Employee Handbook*." *Id.*, p. 1 (emphasis added).**

Kant was a tenured Associate Professor of the History of Religion at the time of his termination. According to the 2006-07 *Faculty Handbook* (RA 0165-0191), Associate

Professors are

[p]ersons who, by their records of service as instructors and/or assistant professors, have demonstrated high professional competence and commitment to continued professional growth in the areas of teaching, scholarship and faculty responsibilities. They shall have completed an appropriate academic degree, have some teaching experience, and are understood *to be tenured or on a tenure track*. Generally, five years of service as associate professor are expected prior to consideration for promotion to professor.

(*Faculty Handbook*, p. 5; RA p. 168 [backside])(emphasis in original).

The relevant *Faculty Handbook* provisions governing tenure are as follows:

- (1) Tenure at Lexington Theological Seminary means appointment to serve until **retirement, resignation, or dismissal for adequate cause**.

(*Id.*, p. 11; RA 171 [backside])

- (2) The procedure to terminate the employment of tenured faculty may be initiated by the president, the dean, or a member of the faculty. **The only grounds for dismissal of a tenured faculty member are moral delinquency, unambiguous failure to perform the responsibilities outlined in this Handbook, or conduct detrimental to the Seminary.**

(*Id.*, p. 14; RA 173)(Emphasis added).

As the Court can see, an alleged financial exigency is not grounds for the termination of a tenured professor, under the very language which LTS wrote in its *Faculty Handbook*.

3. **The Changing Rationale proposed by LTS in Relation to its Decision to Eliminate Tenure**

Prior to the institution of this lawsuit, LTS unequivocally informed the public, Kant, and the Fayette Circuit Court (in another, related action, *In the matter of the Lexington Theological Seminary*, Fayette Circuit Court, Civil Action No. 09-CI-896) that it eliminated

tenure and terminated Kant's employment due to a financial exigency or emergency.

On January 14, 2009, the Courier Journal published an article titled "Lexington seminary faces fiscal crisis," purportedly based on information communicated to it by agents or representatives of LTS. (Peter Smith, "Lexington seminary faces fiscal crisis," *Louisville Courier-Journal*, January 14, 2009 (RA 0623-0624)). In this article, the reason given for the elimination of tenured faculty positions was "financial emergency." "By declaring a financial emergency – an official declaration that the seminary's survival is at stake – **the board of trustees** authorizes the seminary to cut tenured faculty positions." *Id.* This decision was made by LTS' Board of Trustees, not the Disciples of Christ Church or its Convention, and at no time did LTS state that this was a "religious" decision. Jim Johnson, President of the Seminary, also informed the Courier Journal (and therefore the public) that "many of the seminary's plans are still in flux because of the sudden impact of a 'tsunami of economic disasters that we have not seen in our lifetimes.'" *Id.*

On February 24, 2009, LTS offered Kant an agreement (drafted by LTS) that was, for all intents and purposes, a proposed severance agreement. (February 24, 2009, Letter from James Johnson to Kant with attached Proposed Agreement, RA 0625-0631). This agreement did not mention any purported religious motivation for terminating Kant. Instead, the reasons LTS provided for this settlement offer were:

1. LTS' Board of Trustees ("Board") has determined that LTS has experienced and is experiencing significant financial exigencies ("Financial Exigencies").
2. LTS' Board also has determined that, as the result of the Financial Exigencies, it is necessary and in LTS' best interests to eliminate tenure and restructure its faculty and staff.

3. Despite the Financial Exigencies, LTS wishes to employ Professor Kant through the conclusion of the Spring semester of 2010 under the terms and conditions set forth in this Agreement. *Id.* p. 2.

Through this offer, Kant was offered the ability to be employed for one more year if he agreed to release all claims he had against LTS. (RA 0256). He declined to do so.

On July 20, 2009, the Seminary filed a Motion to Release Restrictions with the Fayette Circuit Court in *In the matter of the Lexington Theological Seminary*. (Motion to Release Restrictions and Memorandum in Support of Same, RA 0632-0636). In the Supporting Memorandum, LTS informed the same Trial Court that granted LTS' Summary Judgment in the instant action that, as a result of the "material decline" in its endowment over the past year, the Seminary took "dramatic steps," including, *inter alia*, "eliminating the tenure of its faculty." (*Memorandum in Support of Motion to Release Restrictions*, p. 1, RA 0632.)

Clearly, at the time the decision to terminate Kant and eliminate tenure was made, LTS' public (and only) positions were that (a) it suffered from a financial emergency; (b) this financial emergency gave it the power and right to eliminate tenure; and (c) LTS eliminated tenure due to this financial exigency.

When LTS re-filed its Motion for Summary Judgment before the Trial Court, it changed its stance, arguing that it terminated Kant's employment because he did not fit into the LTS' newly stated "decision to restructure its curriculum in order to reach more of today's church." (*Memorandum in Support of LTS' Renewed Motion to Dismiss or in the Alternative Motion for Summary Judgment*, RA 0249).

As an aside, this case does not implicate First Amendment concerns at all. First, it is not a case in which Kant is asking the Court to interfere in matters of church governance or in matters of doctrine. It is instead a case in which LTS voluntarily entered into a tenure contract with Kant and later breached its terms. Moreover, the issue at the heart of this case, i.e. whether LTS was permitted to eliminate tenure and terminate Kant due to a financial exigency, is a narrowly tailored, non-religious question that will not require this Court to intrude on or analyze matters of church doctrine or governance.

In papers filed with the Trial Court, LTS made the following argument:

The financial exigency and corresponding restructuring required a tailoring of the courses and degree programs offered by the Seminary. Ultimately, the Seminary was forced to eliminate all courses that did not comport with or 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).

(Page 4, footnote 3, of LTS' second Memorandum; RA 0252)

The Court is requested to examine exactly what LTS is saying here. First, of course, there is the obvious change in stance regarding why tenure was eliminated. As an aside, LTS has still not made an argument or provided any facts whatsoever as to how eliminating tenure supposedly helps lessen a purported financial exigency. There are still professors at LTS teaching courses. When Kant sued, LTS' story changed, and now Kant did not comport with LTS' "redesign" of its "commitment to pastoral life." Clearly, this was because he is and was Jewish. If so, however, how can LTS credibly argue to this Court that Kant was a minister who was teaching and espousing the tenets of their faith?

LTS argued to the Trial Court that this lawsuit arose "from the Seminary's spiritual

decision to restructure its curriculum in order to reach more of today's church." (LTS Memorandum, p.1, RA 0249). However, this "new curriculum" did not exist prior to the time that LTS declared it was terminating Kant. (Second Affidavit of Kant; RA 0665-0668) (*Id.*, ¶13). Indeed, this "new curriculum" was not in place until late May or early June of 2009. Further, there were no faculty meetings about the new curriculum until after the February 2, 2009 declaration from LTS' affiant, Jim Johnson, that tenure would be terminated. (*Id.*). Finally, as Kant notes in his Affidavit, the *Faculty Handbook* does not identify "curriculum" change as a valid reason for terminating tenured faculty.¹

Further, this "spiritual decision" came on the heels of the hiring of the new LTS President, Mr. Johnson, who is no longer with LTS. Mr. Johnson states in his Affidavit (Exhibit 2 to LTS' papers; RA 0279-0282) that "all faculty members are tasked with instructing students in teachings of the Bible consistent with the Seminary's religious mission and purpose." However, from LTS' own exhibits, and particular, the student evaluations of Kant's work as a Professor, it is clear that Kant's focus as a professor at LTS was not to instruct his students in conformity with the Disciples of Christ's way of thinking, but, rather, of interfaith issues. Comments from students such as "there was little conversation on theo[logy];" "interfaith discussions were especially enriching;" "in considering the theology of those involved in the Holocaust, I refined my theology;" and "sensitivity and knowledge of anti-Semitism" are prevalent throughout Kant's student

¹ As seen from Kant's prior Affidavit, ¶¶ 7-8, RA 0661-0664, LTS never informed him that the elimination of tenure was motivated by religious issues and that an alleged financial emergency was the reason for his termination, and, further, that prior to its first Motion to Dismiss/Alternative Motion for Summary Judgment, LTS never informed him that he was a ministerial employee or that he was being terminated due to religious or ecclesiastical concerns. LTS has not offered evidence to contradict either of these facts.

evaluations. (Exhibit 24 to LTS' second motion, RA 0458-0460). Kant has stated in his Affidavits (RA 0661-0664, RA 0665-0668) that he did not teach the tenets of the Disciples of Christ because **he does not believe those tenets.** For example, in Kant's Second Affidavit, he stated under oath as follows:

I cannot espouse Christian or Disciples of Christ (DOC) doctrine, because I do not believe it. I cannot lead a Christian worship service or officiate at Christian events, because I am neither licensed nor qualified to do so. I never took communion nor a blessing at communion (always staying in my seat or moving to the back of the room so as to avoid people having to climb over me). (¶3, ROA 0665)

While Mr. Johnson apparently wanted to change things at LTS after he was hired in 2008, he himself indicated to the public that the elimination of tenure was due to an alleged "financial exigency." The Court may well notice that not even Mr. Johnson was willing to state in his Affidavit that Kant was a "minister" of LTS, or the Disciples of Christ faith. The reason for this is apparent-it is simply not true. LTS claimed in Court and to the public that the elimination of tenure was due to an alleged "financial exigency." The *Faculty Handbook* does not allow for a tenured professor to be terminated because of an alleged financial exigency, and that document defines the contours of Kant's contract with LTS. Then, when Kant filed suit to enforce his contractual rights, LTS then changed its story and now claims that the elimination of tenure was somehow a "religious" decision, but such an argument does not hold water.

When Kant refused to sign the proposed severance agreement, in direct breach of its contractual commitments of tenured employment to Kant, and for no adequate cause whatsoever, LTS terminated Kant's employment effective July 31, 2009. This lawsuit

followed.

4. The Court of Appeals 2-1 Decision

a. Judge Moore's Opinion

In Judge Moore's opinion, she found that both the "ecclesiastical matters rule" and the "ministerial exception" applied to bar Kant's lawsuit against LTS. Judge Moore relied heavily upon language in the introductory portions of LTS' *Faculty Handbook* and an affidavit from LTS' then-President Johnson to find that LTS' only goal is to "prepare students for Christian Ministry." As such, she found that LTS was a religious institution, thereby satisfying the first prong of the ministerial exception affirmative defense.

Judge Moore further found that Kant "never wavered from his Jewish beliefs and faith while teaching at LTS," but also that because he took part in a couple of religious services throughout his many years at LTS, he was a "minister" at LTS. (COA Opinion, p. 15, Appendix Tab 2).

Judge Moore further found that "Kant would have this Court entangle itself with how the Disciples of Christ Church can structure and reorganize LTS and have us evaluate and condone who the Church selects to train the future leaders of the Christian faith attending there." (*Id.*). First, there is no proof in the record that the Disciples of Christ had anything whatsoever to do with LTS' "re-structure." Clearly, the record reflects that this was undertaken and carried out upon the recommendation of the LTS Board. Second, Kant is not asking this Court to entangle itself with LTS' decision as to who may teach at its facility. Rather, Kant is asking the Court to uphold his clear contractual rights once LTS itself made the decision to hire Kant to teach at its facility.

Judge Moore rightly noted that the United States Supreme Court recently held in *Hosana-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694 (2012) that the purpose of the ministerial exception is to stop a Court's interference with "the selection of those who personify its beliefs." (COA Opinion, p. 16, Appendix Tab 2)(citing *Hosana-Tabor*, 132 S.Ct. at 706). Quite simply, Judge Moore's opinion cannot be reconciled with the plain fact that Kant, a Jewish scholar, did not personify LTS' beliefs, and neither Kant nor LTS held Kant out as so doing. Indeed, he did not do so because he did not adhere to those beliefs. Judge Moore's Opinion, while well written, marginalizes this clear and important fact.

Judge Moore's finding in this regard is contrary to language she cited from Justice Alito in his concurring Opinion in *Hosana-Tabor* wherein he noted that "ministers" are those who "serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with **teaching and conveying the tenets of the faith to the next generation.**" (Emphasis added)(*Id.*, p. 19)(citing *Hosana-Tabor*, 132 S.Ct. at 712). The record reflects, and all of the Court of Appeals Judge's seem to agree, that Kant never taught or conveyed the tenets of LTS' faith to anyone, at any time. The "primary duties" test was apparently rejected by the United States Supreme Court in favor of a test to examine all relevant factors. However, what cannot be lost is that Kant was Jewish, and he did not teach or espouse the tenets of LTS' faith because he did not believe in same. While Kant may have taught to students who desired to become involved in the Christian ministry, he also taught to those who were simply interested in learning more about the History of Religion and various other

Jewish related courses. The central question is not to whom did Kant teach, but rather what did he teach, and did he espouse the tenets of the Disciples of Christ faith upon his students, or, as Judge Keller found, was he merely teaching about religion. Judge Moore's finding that it is "irrelevant" that Kant was Jewish, and that he did not "espouse of support the tenets of the Disciples of Christ faith," simply run counter to the applicable case law and the reason for the ministerial exception in the first instance. (COA Opinion, pp. 22-23, Appendix Tab 2).

b. Judge Acree's Concurring Opinion

Judge Acree, citing *Presbyterian Church in US v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 89. S.Ct. 601 (1969), disagreed with Judge Moore and found that a review of Kant's breach of contract claim would not "inject the civil courts into ecclesiastical matters." He therefore found that the ecclesiastical matters doctrine did not apply to Kant's lawsuit against LTS and that the Trial Court had subject matter jurisdiction to hear same. (COA Opinion, p. 25, Appendix Tab 2).

However, Judge Acree agreed with Judge Moore's analysis that Kant was a "minister" for LTS and that therefore the ministerial exception applied. Even Judge Acree noted, however, that "I do not pretend this is a clear or easy determination." (*Id.*, p. 30).

3. Judge Keller's Dissent

Judge Keller wrote a dissent in which she found that neither the ecclesiastical matters doctrine nor the ministerial exception served to bar Kant's lawsuit against LTS. She first found that she was not convinced that LTS' "primary, if not sole, 'purpose is to prepare faithful leaders for the Church of Jesus Christ.'" (*Id.*, p. 31). She found that LTS' own documents revealed that LTS also advertised its curriculum to students who "simply want to

study Christianity in a disciplined way," and further rightly noted that LTS offered courses unrelated to the ministry such as a Master of Arts Degree and a joint Master of Arts degree from LTS and a Master of Social Work degree from the University of Kentucky. (*Id.*, p. 31).

Judge Keller also found that there would be no interpretation of church law necessary to decide whether LTS had the contractual right to terminate Kant's employment because of an alleged financial exigency. Finally, she found that the ministerial exception does not apply to this case because Kant taught "about" religion and that this type of instruction "takes place on a regular basis in both religious-based and secular colleges and universities throughout this country." (*Id.*, p. 33). Unlike the majority, Judge Keller was unwilling to overlook or find unimportant the fact that Kant was Jewish in making this finding. She found, rightly, we believe, that the matter should be remanded back to the Trial Court for discovery and to address whether LTS' tenure policy in the *Faculty Handbook* contained a right to eliminate tenure because of an alleged financial exigency. (*Id.*, p. 34).

ARGUMENTS

1. Preservation for Appellate Review

The issues currently on appeal were properly preserved for Appeal by Kant through his Response to LTS' Motion to Dismiss and Motion for Summary Judgment, filed on October 16, 2009; his Response to LTS' Renewed Motion to Dismiss, or in the Alternative Motion for Summary Judgment filed on July 27, 2010; and his timely Notice of Appeal, filed on December 29, 2010 (RA 0127-0213; RA 0639-0718; RA 1130), and also with his filing of his Motion for Discretionary Review with this honorable Court.

2. There would be no Excessive Entanglement in Religious Issues by

Determining Kant's Breach of Contract Claim and Hence the Ecclesiastical Matters Rule does not Apply

As two of the Court of Appeals judges found, the ecclesiastical matters rule does not apply to this case. LTS did not file its own Motion for discretionary review on this issue, and 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. This issue is not properly before the Court. However, Kant will provide some argument on this issue, and how it does not bar the Circuit Court from hearing Kant's breach of contract claim, in the event that the Court still wishes to hear arguments on this issue.

Prior to the Court of Appeals decision in this matter, there was scant Kentucky law on these issues, and no Kentucky appellate case which adopted the "ministerial exception." Indeed, the only Kentucky case which even touches upon this general subject is *Music v. United Methodist Church*, 864 S.W.2d 286, 287 (Ky. 1993). There, the court held that the Ecclesiastical Abstention Doctrine holds that:

[T]he First and Fourteenth Amendments permit hierarchial [sic] religious organizations to establish their own rules and regulations for internal discipline and government and to create tribunals resolving disputes over these matters. Where this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding. Civil courts may intervene in ecclesiastical areas, however, if there is fraud, collusion or arbitrariness.

In *Music*, the Kentucky Supreme Court held that "as appellant's claim herein cannot be separated from an interpretation of church law, *Book of Discipline*, we must find that an excessive entanglement with religion would exist, so as to preclude jurisdiction." *Music*, at p. 289. To be sure, there is no such "entanglement" in the case, *sub judice*. All the Court must

do is examine the *Faculty Handbook's* provisions on when a tenured professor's contract may be terminated to determine the real issue in this case. Of course, LTS does not even suggest that Kant engaged in any of those "for cause" provisions sufficient to justify his termination, but rather it relies upon the alleged financial exigency to terminate his tenure contract, a provision that it not contained in the *Faculty Handbook* at all. In other words, under LTS' stated view, the Court would not even have to review or examine the *Faculty Handbook* at all in this case.

"[C]hurches are not – and should not be – above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts." *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). The terms of the *Faculty Handbook* unambiguously prohibit LTS from terminating Kant's employment due to a so-called financial emergency. The terms of the contract between Kant and LTS are set forth exclusively in the *Faculty Handbook*. The *Faculty Handbook* spells out the situations where LTS is permitted to dismiss a tenured professor, and a "financial emergency" is not one of those situations.

This is **not** a case where the Court needs to review, interpret, make reference to, or even know about any particular religious dogma, tenets, disciplinary rules, or internal religious policy statements of LTS in order to properly rule on Kant's breach of contract claim. There would be absolutely no entanglement by the Court in any ecclesiastical matter at all. This alleged financial exigency cannot be said to be some sort of spiritual decision. Rather, it was a financial decision.

As Judge Acree wrote in his concurring Opinion in which he found that the

ecclesiastical matters rule does not apply here, "the civil courts could adjudicate the rights under the [employment contract] without interpreting or weighing church doctrine but simply by engaging in the narrowest kind of review of a specific church decision [to terminate Kant, as opposed to another employee]. Such review does not inject the civil courts into substantive ecclesiastical matters.' *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 451, 89 S.Ct. 601, 607, 21 L.Ed.2d 658 (1969)." (COA Opinion, p. 25, Appendix Tab 2).

This Court should not forget that civil courts do not inhibit the free exercise of religion (the very underpinnings of the ministerial exception) where neutral principles of law may be applied. *Employment Div. Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). Indeed, personnel decisions of religious institutions are only protected from civil court scrutiny when it would require the court to interpret and apply religious doctrine or ecclesiastical law. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

As the United States Supreme Court held two years after *Milivojevich* :

There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. See *Serbian Eastern Orthodox Diocese v. Milivojevich*. But this Court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. 426 U.S., at 709-710, 96 S.Ct., at 2380-2381. **Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.**

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v. Superior Court of California, San Diego County 439 U.S. 1355, 1372-1373, 99 S.Ct. 35, 38 (U.S. Cal., 1978). (Emphasis added)

Indeed:

A church is always free to burden its activities voluntarily through contracts, and such contracts are fully enforceable in civil court. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 714, 20 L.Ed. 666 (1871). In *Jones v. Wolf, supra*, the Supreme Court specified that courts may always resolve contracts governing "the manner in which churches own property, *hire employees*, or purchase goods." *Id.* at 606, 99 S.Ct. at 3027. Even cases that rejected ministers' discrimination claims have noted that churches nonetheless "may be held liable upon their valid contracts."

Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354, 1359 (D.C. Cir. 1990)(Emphasis added).

This Court distinguished *Minker* (but otherwise cited it with approval) in *Music v. United Methodist Church*, 864 S.W.2d 286 (Ky. 1993), on the grounds that the plaintiff's breach of contract claim arose solely from terms contained in the United Methodist Church's *Book of Discipline* and therefore could not "be separated from an interpretation of church law." *Id.* at 287-88. The Court observed that the provisions of the *Book of Discipline* were "highly subjective, spiritual, and ecclesiastical in nature," and that the lawsuit also involved "interpretation of the minister's occupational qualifications." *Id.* at 290. No such entanglement is present in the matter before this Court.

The Third Circuit opinion, *Petruska v. Gannon University*, 462 F.3d 294 (3d. Cir. 2006), provides an analytical framework that explains the distinction between this case and *Music*. In *Petruska*, the Third Circuit found that the Ministerial Exception did not apply to the breach of contract claim at issue. The First Amendment to the United States Constitution encompasses two rights, known as the Free Exercise Clause and the Establishment Clause.

The first step of the *Petruska* court's analysis was to determine whether the exercise of jurisdiction would inhibit the religious institution's free exercise of religion.

In cases such as this, the Free Exercise Clause protects a religious organization's right to choose who will carry its message and its right to decide matters of faith, doctrine, and church governance. *Id.* at 306-07. However, when a Church voluntarily enters into a contract, this Free Exercise component does not apply.

On its face, application of state contract law does not involve government-imposed limits on Gannon's right to select its ministers: Unlike the duties under Title VII and state tort law, contractual obligations are entirely voluntary. As the court noted in *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C.Cir.1990), "[a] church is always free to burden its activities voluntarily through contract, and such contracts are fully enforceable in civil court." *See also, e.g., Rayburn*, 772 F.2d at 1171 ("Like any other organization, [churches] may be held liable ... upon their valid contracts."). Enforcement of a promise, willingly made and supported by consideration, in no way constitutes a state-imposed limit upon a church's free exercise rights. Accordingly, application of state law to *Petruska's* contract claim would not violate the Free Exercise Clause.

Id. at 310.²

The second step of the *Petruska* court's analysis was to determine whether the plaintiff's breach of contract claim implicated Establishment Clause concerns, i.e. whether it

² *See also Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) ("Of course churches are not - and should not be - above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions."); *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468, 471 (8th Cir. 1993) ("The First Amendment does not shield employment decisions made by religious organizations from civil court review, however, where the employment decisions do not implicate religious beliefs, procedures, or law"); *Welter v. Seton Hall University*, 128 N.J. 279, 297, 608 A.2d 206, 215 (N.J., 1992) ("A court might also determine that a ministerially-functioning employee contracted with the employer to avail himself or herself of the jurisdiction of secular courts. Conversely, courts should enforce non-ministerially-functioning employees' contractual waivers of the right to avail themselves of secular law. Similarly, courts should respect contractual waivers of a religious institution's right to exercise certain tenets of the religion even in cases in which the non-ministerially-functioning employee holds religious office.").

fostered "an excessive government entanglement with religion." *Id.* at 311. The essential question here, as phrased by the Third Circuit, is whether the "breach of contract claim can be decided without wading into doctrinal waters." *Id.* at 312. If the claim will inevitably or necessarily lead to government inquiry into religious mission or doctrines, as did the claim in *Music*, 864 S.W.2d 286, it fails the Establishment Clause test.

The *Petruska* court's opinion is consistent with this Court's holding in *Music* and also explains why the *Music* court held that it could not hear a claim based on the constitution of the United Methodist Church. As the Kentucky Supreme Court observed, it could not resolve the plaintiff's claims without wading into doctrinal waters. In other words, the claim in *Music* failed the Establishment Clause component, not the Free Exercise component.

Unlike the claim in *Music*, the issue in this case has nothing to do with church law, nothing to do with contractual terms that are "highly subjective, spiritual, and ecclesiastical in nature," and nothing to do with interpretation of the Plaintiff's occupational qualifications (except to the extent they are necessary to determine whether the ministerial exception even applies). LTS claims that it terminated Kant's tenured position because of a financial exigency. The *Faculty Handbook* provision regarding termination of a Tenured Professor does not provide for termination of tenure in the event of a financial exigency. This is a simple, narrowly tailored question that has nothing to do with "ecclesiastical matters." Further, this Court would not be infringing upon LTS' free exercise of religion at all. LTS entered into a voluntary, contractual relationship with Kant, and this Court's enforcement of that valid contract using neutral principles of law in no way imposes upon LTS' free exercise of religion, nor does it violate the ecclesiastical matters rule.

3. The Ministerial Exception does not Apply to Kant's Breach of Contract Claim

a. The Body of Law prior to *Hosanna-Tabor*

The Third Circuit explained the constitutional rationale for the ministerial exception as follows:

The Free Exercise Clause protects not only the individual's right to believe and profess whatever religious doctrine one desires,...but also a religious institution's right to decide matters of faith, doctrine, and church governance....[L]ike an individual, a church in its collective capacity must be free to express religious beliefs, profess matters of faith, and communicate its religious message...A minister is not merely an employee of the church; she is the embodiment of its message. A minister serves as the church's public representative, its ambassador, and its voice to the faithful. Accordingly, the process of selecting a minister is *per se* a religious exercise...Consequently, any restriction on the church's right to choose who will carry its spiritual message necessarily infringes upon its free exercise right to profess its belief.

Petruska v. Gannon College, 462 F.3d 294, 302 (3rd Cir. 2006) (Internal citations omitted).

The Court should not forget the purpose of the "ministerial exception." That is, the "minister is the chief instrument by which the church seeks to fulfill its purpose...[and]...matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *McClure v. Salvation Army*, 460 F.2d 553, 558-559 (5th Cir.), *cert denied*, 409 U.S. 896 (1972). "Whose voice speaks for the church is *per se* a religious matter." *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1357 (U.S. Dist. D.C. 1990).

LTS simply cannot provide the Court with any precedent supporting its position that a Jew is a minister or clergyman of the Disciples of Christ faith, or that a Jew is the instrument by which the Disciples of Christ is heard, or that a Jew speaks for this seminary. A finding

that a Jewish professor of Religion is a "minister" at a Christian seminary flies directly in the face of the very reason for the exception in the first place. A Jewish professor is not the "embodiment" of the Disciples of Christ's message, nor is he its public representative, ambassador, or its voice to the faithful.

LTS will no doubt cite a laundry list of cases to this Court in support of its arguments, but what it cannot do is cite this Court to any case with similar facts and which applies the ministerial exception. At the Trial Court, LTS cited many cases, without actually providing the Court with the facts of those cases. For example, *Hollins v. Methodist Healthcare, Inc.*, 379 F.Supp.2d 907 (W.D.Tenn. 2005) involved a plaintiff who was in the defendant's CPE Residency Program as a Resident Level II. This CPE program was a "form of theological education that involves academic study and clinical education in settings where ministry is practiced." The plaintiff there was responsible for "providing pastoral care and/or counseling" to "patients, family members, associates, medical staff and visitors associated with Methodist Hospitals of Memphis." The plaintiff was further required to "initiate pastoral visits with patients and family members..." and to "be an on-call primary chaplain during non-work hours for all Methodist health care hospitals in the Memphis area."

Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church, 860 F.Supp. 1194 (W.D.Ky. 1994) involved a plaintiff who was an actual minister and who brought a defamation claim against the church. *Pardue v. City Center Consortium Schools of the Archdiocese of Washington, Inc.*, 875 A.2d 669 (D.D.C. 2005), was a case brought by a principal of a religious school. There, the court held as follows:

But she was also principal of a Roman Catholic school, and thus she, more

than anyone else at the school except the pastor, *see* discussion, *infra*, was answerable to the religious authorities for providing, in myriad ways not reducible to a listing of tasks, “spiritual leadership in and for the school community.” As the evidence before the trial court makes clear, these many responsibilities—some predominantly “secular” and some predominantly religious—are inextricably intertwined in the school's mission and in the principal's role in fulfilling it.

In the case, *sub judice*, there is no dispute that Kant's primary role was to teach classes to students. He was not required or even asked to espouse or support the tenets of the Disciples of Christ faith. Indeed, an argument to the contrary is ludicrous, as Kant is a Jew and does not believe in such tenets. There is nothing in the hiring criteria, the job application, the employment contract, actual job duties (primary or otherwise), or performance evaluations which required Kant to espouse the tenets of this faith in his role as a professor. Further, he never, at any time, performed any quintessentially religious tasks, such as evangelizing, church governance, supervision of a religious order, nor did he oversee or lead religious rituals, worship, and worship services. These are the factors that must be examined when determining whether his “primary duties” were religious so as to invoke the ministerial exception. *Coulee Catholic Schools v. Labor and Industry Review Com'n, Dept. of Workforce Development*, 768 N.W.2d 868 (Wis. 2009). “In general, the more closely an employee's job responsibilities are tied to the ministering, governing, or the development of an orthodoxy, the less likely courts are to apply Title VII to employment decisions made by the religious institution regarding that employee.” *Miller v. Bay View United Methodist Church, Inc.*, 141 F.Supp.2d 1174 (E.D.Wis., 2001). Here, Kant's duties were tied to teaching the history of religion, not to espouse the tenets of LTS' faith

In *Weishuhn v. Catholic Diocese of Lansing*, 756 N.W.2d 483 (2008), the court noted

that “[t]he ministerial exception is a nonstatutory, constitutionally compelled exception to the application of employment-discrimination and civil rights statutes to religious institutions and their ‘ministerial’ employees. The ministerial exception has its roots in the Establishment and Free Exercise of Religion clauses of the First Amendment and generally bars inquiry into a religious institution’s underlying motivation for a contested employment decision.” As the Court can see from a review of the cases cited in *Weishuhn*, courts across the country have refused to apply this ministerial exception to theology teachers at arguably religious schools unless the defendant demonstrated that such teaching was primarily religious and/or consisted of spreading the faith or supervising or participating in religious ritual or worship. See, e.g., *Longo v. Regis Jesuit High School Corp.*, 2006 WL 197336 (United States District Court for the District of Colorado)(cited in *Weishuhn*). Indeed, the cases cited in *Weishuhn* where the ministerial exception was applied to allegedly religious schools involved teachers who were required to teach the tenets of that particular school’s own denominational religion. *Weishuhn* at pp. 164-165. There is no such allegation made here by LTS, nor can there be.

The *Weishuhn* court also examined the body of case law where the ministerial exception was not applied to a religious school’s teachers, noting as follows:

In *Hartwig v. Albertus Magnus College*,...the United States District Court for the District of Connecticut found that there was a genuine issue of material fact regarding whether the plaintiff’s duties were “primarily religious.” And in *Guinan v. Roman Catholic Archdiocese of Indianapolis*,...the United States District Court for the Southern District of Indiana concluded that the application of the ministerial exception to non-ministers, like the plaintiff, was generally reserved to positions that were “close to being exclusively religious based, such as a chaplain or a pastor’s assistant.” The court also noted that “the secular nature of [the plaintiff’s] position [was] underscored

by the fact that the [defendant] did not require teachers at [its school] to be Catholic...

Weishuhn, at pp. 164-165 (internal citations omitted).³

The exact same logic applies to the matter, *sub judice*. Obviously, LTS did not require that Kant be a member of its faith, and it knew full well that Kant was a Jew.

In the Courts below, LTS argued that "[m]atters relating to a religious institution's 'selection and retention' of its employees, as well as the motivations behind these decisions, are inherently ecclesiastical," and cited *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). A review of this actual case does not reflect any such statement. That case involved the employment of a bishop, and the court there rightly noted that the First Amendment merely bars the civil court from reviewing religious' entities employment decisions relating to its clergy, not all employees as suggested by LTS. *See, also, Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 942 (6th Cir 1992).

Appellee relied heavily upon the case of *EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) in support of its argument that Appellant was one its "ministers,"

³ *See also*, the following cases where courts refused to apply the ministerial exception to teachers at religious schools: *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993)(math teacher at Catholic school, even though he led students in prayer and took them to mass); *Guinan v. Roman Cath. Archdiocese of Indianapolis*, 42 F.Supp.2d 849 (S.D.Ind.1998) (ministerial exception did not apply to a fifth grade teacher at a religious school who taught both secular and religious subjects); *E.E.O.C. v. First Baptist Church*, 1992 WL 247584 (N.D.Ind.1992) (ministerial exception did not apply to teachers at a religious elementary school); *U.S. Dept. of Labor v. Shenandoah Baptist Church*, 707 F.Supp. 1450, 1462, fn. 12 (W.D.Vir.1989)(employees of private religious school not considered clergy); *Geary v. Visitation of the Blessed Virgin Mary*, 7 F.3d 324 (3rd Cir.1993)(ministerial exception not applied to lay teacher at church operated school as long as teacher did not challenge the validity of religious reason for termination). Certainly, Kant has not challenged any alleged religious reason for his termination here. *See also, Welter v. Seton Hall University*, 608 A.2d 206 (N.J. 1992)(ministerial exception did not apply to nuns teaching computer science at religious school).

describing the plaintiff there as a "professor." However, the plaintiff there was a Catholic nun teaching at a school established by Pope Leo XIII in 1887. The case concerned interpretation of the University's Department of Canon law, the Roman Catholic Church's "fundamental body of ecclesiastical laws." *Id.* at 457. The nun had actually been accepted into a tenure track position after receiving her Doctorate of Canon Law, and she performed various consulting services. Indeed, her primary duties for the University were, unlike Appellant, to "foster and teach sacred [Catholic] doctrine and the disciplines relating to it." *Id.*, at 463-464. As a result, the court there was willing to extend the ministerial exception to non-ordained ministers in that particular instance. In so doing, the court relied upon *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) and *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981). However, as the *Catholic University* court correctly pointed out, *Rayburn* involved an "associate pastor who had completed seminary training but was not ordained, and whose role involved preaching and other 'evangelical, liturgical and counseling responsibilities.'" *Catholic Univ.*, 83 F.3d at 463, quoting *Rayburn*, 772 F.2d at 1165. Further, the court rightly noted that *Southwestern Baptist* involved faculty who were predominantly ordained ministers, and who were evaluated primarily on their "Christian character, positive and consecrated attitudes, [and] **faithful allegiance to the Baptist faith.**" *Catholic Univ.*, 83 F.3d at 463, quoting *Southwestern Baptist*, 651 F.2d at 280, 283 (Emphasis added).

The Court of Appeals majority opinion relied upon the case of *Klouda v. Southwestern Baptist Theological Seminary*, 543 F.Supp.2d 594 (N.D. Tex. 2008). In *Klouda*, a new president was hired for the seminary, and he decided that all professors at the

school must be eligible to be actual pastors--i.e., must be men, a "religious" decision. Based upon this "religious" decision, Klouda, the only female professor at the seminary, was effectively terminated. Allegedly, the new president told Klouda that she could not remain in her tenure-track position (she, unlike Appellant, was not actually tenured) because she was a woman. The trial court there found this decision to be a "religious" decision and therefore dismissed Klouda's claims. However, the trial court relied heavily upon language in the seminary's *Faculty Manual* stating that "[a] tenure-track faculty member may be dismissed if, in the exercise by the Seminary of its sole discretion over matters of ecclesiastical concern it determines ... that it is not in the best interests of the mission of the Seminary to continue the employment." (*Id.*, at 601)(Emphasis added). The court also relied heavily upon language in the seminary's By-Laws stating that "[t]he selection, election, promotion, granting of tenure, and termination of faculty members are viewed as matters of ecclesiastical concern and as commitments of faith between the Seminary and faculty members." (*Id.*)(Emphasis added). In finding that the ecclesiastical doctrine and ministerial exception applied, this Texas trial court found, based upon the foregoing, that "the faculty of Seminary are hired, assigned, advanced, tenured, evaluated, and terminated on predominantly religious criteria." (*Id.*, at 602). There are no such facts present in the matter, *sub judice*.

b. The United States Supreme Court decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694 (2012)

In 2012, the United States Supreme Court issued the seminal decision of *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 132 S.Ct. 694 (2012)(hereinafter "the Decision."). In the Decision, the Supreme Court held that there was indeed a "ministerial exception," and furthermore that same applied to bar the plaintiff's

employment discrimination suit brought against her former employer, since she was a "minister." This opinion is highly instructive to this Court when deciding the matter, *sub judice*. There are essentially four tenets to take away from the Decision which impact upon this action.

First, the facts of Dr. Kant's case and the plaintiff in the decision are very different and can be easily distinguished. Indeed, the plaintiff there, Ms. Perich, was a "commissioned minister" for Hosanna-Tabor, having gone through training and schooling to become same, along with a formal religious process of commissioning.

Second, the Court specifically held that there is no rigid formula for deciding when an employee qualifies as a minister. *Id.* at p. 707. LTS has previously argued that that there is such a formula for making such a determination, and that since some of Kant's "primary duties" involved "teaching," he somehow automatically qualifies as a minister. The Supreme Court essentially rejected this formulistic approach as put forth in *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007). Instead, the Supreme Court looked to "all the circumstances" of Perich's employment. 132 S.Ct. at 707.

Third, the Supreme Court's elucidation on the history of the establishment of the separation of church and state, and hence the "ministerial exception," clearly shows that these concepts and laws are designed to keep government out of a church's "control over the selection of those who will personify its beliefs." *Id.* at p. 706. Indeed, this is at the very heart of the ministerial exception. Kant was not someone who preached LTS' beliefs, taught their faith, or carried out their mission. Indeed, to argue otherwise would be disingenuous in that Kant is Jewish and he did not teach the LTS' beliefs because he did not adhere to these

beliefs himself.

Finally, the Supreme Court held that its holding was limited to employment discrimination suits, and that "we express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers." *Id.* at p. 710. The action, *sub judice*, is not an employment discrimination suit but rather is a breach of contract (tenure) action. There is good reason for the Supreme Court to make such a statement particularly when considered in light of the case law cited above that churches are, and have always been liable on their valid contracts.

As noted above, the Supreme Court went to great lengths to state the history and reasoning behind the First Amendment's separation of church and state, and that dogma's application to what has become known as the ministerial exception. These laws were meant to allow a church to "shape its own faith and mission through its appointments" and to limit government interference with "internal governance of the church, depriving the church of those **who will personify its beliefs.**" *Id.* at p. 706. (Emphasis added). After recognizing the existence of the ministerial exception, the Supreme Court was quick to note that "[w]e are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment." *Id.* at p. 707. The Supreme Court then held that Perich was indeed a "minister" for purposes of the exception.

The employment circumstances between Perich and Kant could not be much more different. The only thing they had in common was that they were both teachers. Perich was

held out by Hosanna-Tabor as a minister, which was a role that was distinct from most of the rest of its members. She was issued a "diploma of vocation" and was required to perform her commissioned office "according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the sacred scriptures." The congregation periodically reviewed Perich's "skills of ministry" and "ministerial responsibilities." Perich became a commissioned minister of that church, which was preceded by a "significant degree of religious training followed by a formal process of commissioning." She further had to pass various religious testing prior to becoming commissioned, as opposed to a lay teacher, and it took her six years of training and education to become so commissioned. Perich held herself out as a minister, claiming an allowance on her tax returns that was only available to people "involved in the exercise of the ministry." *Id.* at pp. 707-709.

Finally, and perhaps most importantly, Perich's job duties required her to convey that particular church's message and the carrying out of its mission. She was required to teach the tenets of that particular church's beliefs when teaching the students. She led students in prayer three times a week, she took her students to chapel service, and she even led the chapel service twice a year, "[c]hoosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible." She led her class in devotional exercises each morning. As the Supreme Court held, she "performed an important role in transmitting the Lutheran faith to the next generation." *Id.* at p. 708.

Every single item listed above, which the Supreme Court found relevant in analyzing whether Perich was a "minister," are not present in this action. Kant was not tasked with spreading the doctrine of the Disciples of Christ faith in any way, at any time. He was and is

a man of Jewish faith; he did not teach these tenets because he himself does not believe them; and there is not a single shred of evidence in this case that Kant was required to or in fact ever did spread this faith in any way.

CONCLUSION

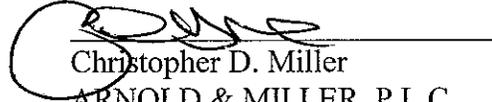
Kant worked as a Professor of the history of Religion for LTS. He was neither required to nor did he in fact espouse the tenets of the Disciples of Christ faith in so doing because he does not believe them. He was not evaluated based upon his role as a Christian leader or anything of the sort, and he was not the prime voice of this institution's religious beliefs. He held a tenure contract with clear and unambiguous "for cause" termination provisions, which can easily be interpreted by this Court without wading, or indeed, even stepping a toe into, ecclesiastical waters. LTS has argued that the elimination of tenure, and therefore Kant, was somehow at first economically driven when it suited it to argue this when asking for a release of restrictions on endowments. Then, somehow, its decision to eliminate tenure (and clearly breach Kant's contractual rights to same) turned into some type of "spiritual" decision when sued in civil court for breach of contract. The Board of LTS may well have prayed over its decisions which caused this lawsuit, but that does not make the decision a religious decision.

LTS would have this Court not only adopt the ministerial exception, but also strain its contours to such an extent that the application of same runs contrary to every case across the country with similar facts. Kant was never required to be a member of or somehow espouse the tenets of the Disciples of Christ faith because he is a Jew, and finding that he was somehow a member of this faith's "clergy" is illogical on its face and unsupported by any

precedent whatsoever.

For all of these reasons, Kant respectfully requests this Honorable Court to REVERSE the Opinion of the Kentucky Court of Appeals, and remand this action back to the Circuit Court for trial.

Respectfully submitted,



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APPENDIX

Description

Tab #

Fayette Circuit Court Order entered December 3, 2010A

Court of Appeals Opinion rendered July 27, 2012B