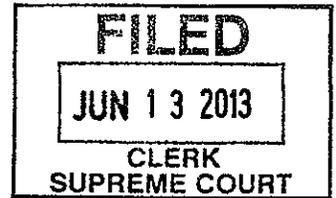


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
CASE NO. 2012-SC-000519



JIMMY KIRBY

APPELLANT

v.

COURT OF APPEALS NO. 2010-CA-001798  
APPEAL FROM FAYETTE CIRCUIT COURT  
CIVIL ACTION NO. 09-CI-04480

LEXINGTON THEOLOGICAL SEMINARY

APPELLEE

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**BRIEF OF APPELLEE**

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Respectfully submitted,



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**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 on this the 13th day of June, 2013: Hon. Samuel P. Givens, Jr., Clerk of Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Thomas L. Clark, Chief Regional Circuit Judge, Fayette County Courthouse, 120 North Limestone, Room 511, Lexington, Kentucky 40507; Douglas C. Howard, Howard Law Group, PLLC, P.O. Box 562, Frankfort, Kentucky 40601-0562 and Amos N. Jones, The Amos Jones Law Firm, 1150 K. Street NW, Ninth Floor, Washington DC 20005-6809, counsel for Appellant. I further certify that counsel for Appellee did not withdraw the record on appeal when preparing this Brief.



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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.

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## COUNTERSTATEMENT OF THE CASE<sup>1</sup>

### 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 0199 [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 0207, 0213[Appx. 2]) 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. *Id.* All courses and degree programs offered by the Seminary are religious and in furtherance of its religious mission. (RA 0199 [Appx. 1, 0207-14 [Appx. 2]) The Seminary is, and has been since its inception, an unequivocally *religious institution*<sup>2</sup> and a ministry of the Christian Church (Disciples of Christ). (RA 0191-94 [Appx. 3], 0196-97 [Appx. 4])

The Seminary is funded by the Christian Church (Disciples of Christ) and its members. For instance, the Disciples Mission Fund,<sup>3</sup> which is a subset of the Christian Church (Disciples of Christ), receives financial support from individual Christian Churches (Disciples of Christ) and in turn distributes funds to entities, including the Seminary, that further the Church's mission. In order to receive money from this fund, the Seminary is required to enter into and remain in a covenant relationship with the Christian Church (Disciples of Christ). (RA 0333-35) Pursuant to this covenant, the

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<sup>1</sup> Pursuant to CR 76.12(4)(d)(iii), the Seminary states it does not accept Appellant's Statement of the Case. The Seminary also objects to the Appellant's "Summary of Legal Argument" and "Questions Before the Court" as not authorized by CR 76.12 and inaccurate summaries of the legal arguments and issues before the Court.

<sup>2</sup> Jimmy Kirby ("Kirby") concedes the Seminary is a "religious institution." (VR No. 2: 12/4/09; 1:58:12-59:08, 2:07:02-06, 2:13:02-40)

<sup>3</sup> The Disciples Mission Fund is one of the ways funds from the Church are directed to the Seminary.

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 and volunteers in order that they might effectively interpret and promote the church’s wider mission.” (RA 0334) At all times material hereto, the Seminary has been in a covenant relationship with the Christian Church (Disciples of Christ) and has received funds from its Mission Fund. (RA 0337-38)

This covenant relationship requires that the Seminary be held accountable to the Christian Church (Disciples of Christ) in its operation. The Seminary is required, for instance, to submit reports to the Christian Church (Disciples of Christ) on an annual basis in order to continue to receive this funding.<sup>4</sup> (RA 0340-41, 0193 [Appx. 3]) On at least an annual basis the Seminary submits reports for consideration at the Church’s Assembly meetings in several regions. (RA 0193 [App. 3])

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 giving 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, but is instead a religious

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<sup>4</sup> The Seminary is officially connected with eleven (11) regions of the Christian Church (Disciples of Christ) and reports to these regions and Churches within these regions on a regular basis. (RA 0211 [Appx. 2])

institution supported by, and committed to supporting, the Christian Church (Disciples of Christ).<sup>5</sup>

The Seminary's Bylaws<sup>6</sup> evidence the Seminary's 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 0321) 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 0321, 0191 [Appx. 3]) 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 0207, 0210-11 [Appx. 2]) The Christian Church's (Disciples of Christ) commitment to Christian unity and the Church's needs inform decisions involving the Seminary's faculty. (RA 0199 [Appx. 1], 0207-14 [Appx. 2])

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<sup>5</sup> 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 0343-46) 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 purposes", but also "operated, supervised, controlled, or principally supported by" the Christian Church (Disciples of Christ). Id.

<sup>6</sup> As required by the Bylaws, Board of Trustees meetings are opened and closed with prayer. (RA 0321) The Bylaws also identify the Seminary's corporate seal, which contains a sketch of a book inscribed "Holy Bible." Id.

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 0192-93 [Appx. 3], 0199-201 [Appx. 1]) The Seminary's Handbooks acknowledge this fact, requiring every faculty member to be an active member in a congregation, teach a Biblically-based curriculum and model the ministerial role for the Seminary's students. (RA 0226, 0242 [Appx. 5]) The Seminary evaluates its faculty on religious criteria, including the faculty's ability to contribute to students' pastoral and spiritual formation and teach subjects that are relevant to ministry. (RA 0363-65 [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 0229 [Appx. 5], 0240)

**ii. Kirby's Ministry at the Seminary.**

In 1994, the Seminary issued Kirby a "call to carry out your ministry" at the Seminary, offering him employment as Instructor of Church and Society. (RA 0002, 0216 [Appx. 7]) The fact that Kirby was called to ministry at the Seminary cannot be disputed and is confirmed in a writing addressed to Kirby at the time of his hiring. (RA 0216 [Appx. 7]) Kirby accepted the call and corresponding commitment to preparing future Church leaders.

As a faculty member, Kirby was tasked with instructing students about the Bible in a manner that was consistent with the Seminary's religious mission. (RA 0192 [Appx. 3]) Indeed, Kirby was hired to strengthen or grow the Church by educating individuals consistently with the Christian faith. The Seminary did not hire Kirby to teach history or

teach about different religions, nor did it hire him to teach religious doctrine “writ large” as he now suggests. Rather, the Seminary hired Kirby to teach future leaders of the Christian Church (Disciples of Christ) consistent with the faith of the Christian Church (Disciples of Christ). (RA 0216 [Appx. 7], 0226 [Appx. 5]) In that regard, the Faculty Handbook recognizes that the faculty’s “basic responsibility” is the preparation of students for Christian ministry. (RA 0226 [Appx. 5])

Kirby was expected not only to prepare Church leaders through the curriculum he taught, but also by his own example. The Seminary’s Handbooks required Kirby to participate actively in a congregation and model the ministerial role for the students, both inside and outside of the classroom. (RA 0192 [Appx. 3]) Kirby himself recognized this ministerial obligation, noting in a self-evaluation that all of the courses he taught furthered “the overall ministry and goals of this Seminary.” (RA 0221[Appx. 8]) Kirby also admitted he taught from the Bible, encouraged students to discover “the Church’s task,” and made students aware of their own “ministry in church.” (RA 0220 [Appx. 8]) ***Kirby opened each and every class he taught with prayer.*** (RA 0359-66 [Appx. 6]) Kirby fails to acknowledge or address any of these admissions in his brief. Instead, without any citation to the record,<sup>7</sup> Kirby alleges that he has never been called to ministry and that he “only *marginally and voluntarily* demonstrated a faith commitment as part of his employment” with the Seminary. See Appellant’s Brief p. 1. Kirby’s allegations are self-serving at best. The Seminary issued a call to Kirby and required him to demonstrate a faith commitment while at the Seminary in more than a marginal way. (RA 0216 [Appx. 7], 0226, 0244-45 [Appx. 5]) As discussed in detail below, the Seminary’s faculty

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<sup>7</sup> By failing to cite to the record, Appellant failed to comply with CR 76.12(4)(c)(v). See Surber v. Wallace, 831 S.W.2d 918 (Ky. App. 1992) (court did not consider issue because party failed to comply with mandates in rule).

members are evaluated on religious criteria. (RA 0359-65 [Appx. 6]) There is nothing voluntary about it. (RA 0192-93 [Appx. 3])

**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 giving 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 early 2009. (RA 0309-10 [Appx. 9]) 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 0188-89 [Appx. 4], 0312-16) The financial exigency and corresponding restructuring included a tailoring of the curriculum to focus on better integrating students into congregations through a pastoral life program. (RA 0188-89 [Appx. 4]) Ultimately, the Seminary was forced to eliminate all courses that did not further its commitment to meeting the needs of today's Church through a more streamlined pastoral life program. Because the Seminary concluded Kirby'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, Kirby filed this lawsuit, alleging the Seminary's religious restructuring resulted in a breach of contract, a breach of its implied duty of good faith and race discrimination. (RA 0001-06) Notably, Kirby 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 0324) Kirby has not identified or placed into the record any contract of employment signed by the Seminary's president. Kirby's employment with the Seminary was shaped by 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 Seminary renewed approximately one year later.<sup>8</sup> (RA 0011-20, 0159-60) The Circuit Court granted the Seminary's renewed Motion for Summary Judgment and dismissed all of Kirby'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. Kirby's claims challenge the Seminary's right to decide who will teach future Church leaders, a right protected by the First Amendment's Right of Free Exercise. The corresponding Establishment Clause prohibits the judiciary from evaluating employment decisions made by the Seminary and in furtherance of the Seminary's religious mission. A consideration of Kirby's claims would necessarily require the Court to delve into and assess the Seminary's religious mission and spiritual restructuring. Indeed, the Seminary has a constitutional right to decide for

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<sup>8</sup> The Seminary filed its initial Motion to Dismiss or in the Alternative Motion for Summary Judgment on September 25, 2009 and the Circuit Court heard oral arguments on December 4, 2009. (RA 0019-20) When denying the Seminary's initial Motion, the trial court noted that additional information about Kirby's status as a ministerial employee was needed 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 0159-60) For simplicity, and unless otherwise noted, the Seminary will hereinafter refer to the aforementioned Motions collectively as its Motion for Summary Judgment.

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 Kirby admits the Seminary is a religious institution, and the record 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 this dispute. The Kentucky Court of Appeals thereafter correctly affirmed the Circuit Court’s order with respect to both the general ecclesiastical abstention doctrine and the ministerial exception, 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 Kirby’s claims “without also considering the Seminary’s internal affairs regarding the restructuring of their curriculum to reflect the goals of their religious mission.” See Kirby v. Lexington Theological Seminary, 2012 Ky. App. Unpub. LEXIS 1007, \*10 (Ky. App. July 27, 2012). The Appellate Court also concluded that the ministerial exception barred Kirby’s claims, noting that he was “entrusted to further the spiritual education of church leaders at the Seminary.” Id. at \*16. The Appellate Court appropriately noted the scope of the First Amendment and recognized the Seminary’s right “to decide who will further the instruction of [its] faith.” Id. at \*18.

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.

### 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 has been made applicable to the States through the Fourteenth Amendment. U.S. Const. amend. I; Cantwell v. Connecticut, 310 U.S. 296, 305 (1940). These principles are consistently interpreted to preclude any court 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 Kirby’s claims against the Seminary.

Although Kirby acknowledges these constitutional mandates, he argues that they do not apply to this case because he is asserting a breach of contract claim and he is not an ordained minister of the Christian Church (Disciples of Christ). Kirby, however, cannot avoid the rule set forth by the U.S. Supreme Court in Hosanna-Tabor with artful pleading. Fundamentally, Kirby’s breach of contract claim challenges the Seminary’s right to decide who will train future leaders of the Church. Irrespective of what his 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). Furthermore, this Court and other Kentucky courts expressly recognize that breach of contract claims are off limits. 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).

Courts also recognize that these constitutional protections are not limited to ordained clergy. Indeed, the Seminary does not lose its constitutional protections because it hired a non-ordained member of another denomination 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, Kirby and the Seminary both believed that Kirby's personal beliefs permitted him to participate in the Seminary's ministry. By accepting the call, Kirby 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 Kirby's Claims Against the Seminary.**

In his Motion for Discretionary Review, Kirby did not seek review of the Kentucky Court of Appeals' opinion to the extent it affirms the Circuit Court's dismissal of his claims against the Seminary pursuant to the ecclesiastical abstention doctrine. It is well-settled that the only issues addressed by the Kentucky Supreme Court are the issues

raised in the motion for discretionary review. See Wells v. Commonwealth, 206 S.W.3d 332, 335 (Ky. 2006). In other words, if a party fails to raise an issue in his or her motion for discretionary review, this Court will decline to address that issue. See Coleman v. Bee Line Courier Service, Inc., 284 S.W.3d 123 (Ky. 2009). By failing to seek review of the Appellate Court's application of the ecclesiastical abstention doctrine, Kirby concedes that the ecclesiastical abstention doctrine bars his claims against the Seminary. To the extent this Court nevertheless concludes that a review of the lower courts' application of the ecclesiastical abstention doctrine is appropriate, and as explained in detail below, the Appellate Court and Circuit Court properly applied this legal principle and refused to consider Kirby's claims against the Seminary.

**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) (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 the rulings of civil courts. Music v. United Methodist Church, 864 S.W.2d 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 expressly recognized not only 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 United States 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 decision without entangling itself with the Seminary's religion and religious acts. Kirby effectively concedes this fundamental truth by urging the Court to evaluate the Seminary's employment decision and interpret the Seminary's Handbooks,<sup>9</sup> the precise type of document the Kentucky Supreme Court refused to interpret in Music.

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

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<sup>9</sup> When Kirby urges the Court to interpret his "tenure contract," he presumably is asking the Court to interpret the Seminary's Handbooks, which the Music court prohibits. The Seminary's 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 0227 [Appx. 5], emphasis in original.) The Employee Handbook expressly authorizes terminations due to financial exigencies. (RA 0291)

replete with religious references. (RA 0224-0307) 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 0227 [Appx. 5]) Indeed, 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. By asking the Court to determine his rights under the Seminary's Handbooks, Kirby 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, Kirby's claims may not be adjudicated in this secular forum.

**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 is improper under the First Amendment.

More specifically, when faced with claims similar or identical to the claims Kirby asserts against the Seminary, courts consistently recognize their inability to consider the merits of the claims and therefore dismiss the claims. See e.g., Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012) (First Amendment bars consideration of claims asserted under the ADA and Michigan's civil rights act by a teacher against religious school); 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 interfered with religious institution's employment decisions, a "prime ecclesiastical concern").

**Kirby has not identified a single opinion in which a court concludes that it has authority to hear a professor's challenge to a seminary's employment decision.**<sup>10</sup> Stated another way, and as far as we are aware, *every court asked to evaluate an employment decision made by a seminary and involving one of its professors has refused to do so, citing First Amendment mandates.* 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 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

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<sup>10</sup> In addition to failing to identify a single court opinion in which a court has entertained a professor's claims against a seminary, Kirby fails to address in his brief the many opinions in which courts have refused to entertain professor's claims against seminaries.

cannot impose restrictions on a religious institution's decisions regarding those who will perform its ministerial functions. Alicea, 608 A.2d 218. 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. In this action, the Seminary is entitled to the same First Amendment protection.

**C. The Ecclesiastical Abstention Doctrine Bars Kirby's Claims.**

The ecclesiastical abstention doctrine, rooted in the First Amendment's Free Exercise and Establishment Clauses, prevents this Court from entertaining Kirby's claims against the Seminary. Fundamentally, Kirby'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, the interests of the Church of Jesus Christ by training future Church leaders is unequivocally ecclesiastical and a matter of internal governance. Such matters of internal structure and governance are not within the purview of the courts. Music, 864 S.W.2d 286.

Kirby's claims also inappropriately seek an assessment of the Seminary's religious restructuring and policies. Kirby's employment ended because a financial exigency required the Seminary to restructure. (RA 0309-10 [Appx. 9]) It is inappropriate for this Court to evaluate the needs of the Christian Church (Disciples of Christ), the Seminary's assessment of those needs and the Seminary's related spiritual restructuring. It is also inappropriate for this Court to evaluate the policies the Seminary created to govern its relationship with those who will train future church leaders.

To the extent Kirby was unhappy with the Seminary's employment decision, or felt that it was in any way unfair or in violation of the Seminary's policies, Kirby had the option of challenging the decision through the Seminary's grievance procedures.<sup>11</sup> That is, the Seminary has developed grievance procedures that are consistent with its faith and that it set forth in Appendix B to the Faculty Handbook. (RA 0229 [Appx. 5]) Additionally, the Seminary has a specific process by which faculty members may appeal a tenure termination. (RA 0240) Kirby never filed a grievance or initiated any of the established procedures for challenging the Seminary's employment decision. Kentucky's Highest Court has recognized that persons assuming a relationship with a religious institution, like the Seminary, "impliedly, if not expressly, voluntarily covenant[] 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, Kirby agreed to conform to the Seminary's rules and utilize its grievance procedures in the event of a dispute.

Instead of acknowledging the Seminary's grievance process and the many court opinions requiring judicial abstention when employment decisions at seminaries are involved, Kirby tries to convince this Court to evaluate the Seminary's spiritual restructuring by generally alleging his claims may be addressed "based on secular principles of contract and employment law." See Appellant's Brief p. 4. While there are limited instances when a court may properly, and constitutionally, be able to apply secular or "neutral principles" to a dispute involving a religious institution, this is not one

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<sup>11</sup> In his brief, Kirby suggests that the Seminary should never have "entered into a contract with Appellant in the first place" if it could not be enforced in this Court. See Appellant's Brief p. 9. It is entirely appropriate for religious institutions to prescribe guidelines for their members and employees. While courts historically refuse to consider and evaluate these guidelines because of the ecclesiastical concerns, no court has ever concluded that it is inappropriate for religious institutions to issue such documents.

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.

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

Irrespective of the labels Kirby puts on his causes of action, Kirby is challenging an employment decision. That is, Kirby is asking this Court to order the Seminary to retain an individual whose training and background are not suited to support its spiritual redesign. Kirby 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, Kirby is challenging the Seminary’s decision to end his employment because the courses he taught did not comport with the Seminary’s religious restructuring. (RA 0001-07) 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, 864 S.W.2d at 288. 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.

**2. There is no tenure contract of secular governing document.**

Moreover, there is no “contract” to which the neutral principles test could be applied.<sup>12</sup> Indeed, the only document Kirby alleges this Court should interpret is the Seminary’s Faculty Handbook.<sup>13</sup> 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. (RA 0227 [Appx. 5]) The First Amendment not only prohibits the Court from weighing in on religious institutions’ decisions regarding the individuals called to carry out their religious missions, but also from interpreting religious documents. See Music, 864 S.W.2d at 289-90. Because Kirby’s claims effectively ask this Court to determine -- unconstitutionally -- who can carry out the Seminary’s religious mission, this Court should uphold the Kentucky Court of Appeals’ decision affirming the Circuit Court’s dismissal of this matter.

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<sup>12</sup> The Seminary’s bylaws require that any and all employment contracts be signed in writing by the President. (RA 0324) Kirby has not identified any contract signed by the President.

<sup>13</sup> 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 0227 [Appx. 5].) Proof that the Faculty Handbook is not to be read in isolation is the fact that it expressly refers 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 0227 [Appx. 5], 0260) While the lower courts correctly recognizes that they could not consider the merits of Kirby’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 0291, emphasis added.) Kirby does not dispute the fact that the Seminary experienced a financial exigency. Moreover, even if the Seminary had not expressly authorized Kirby’s separation of employment, courts consistently interpret tenure policies to contain an 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). These opinions are 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).

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

The United States Supreme Court recently recognized a very specific bar to judicial intervention – 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 States 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.* 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 Kirby's claims.

**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). More specifically, in Hosanna-Tabor, when considering the claims of a teacher at a religiously-affiliated elementary school, the Court began with an analysis of this country's historical

commitment to religious freedom.<sup>14</sup> The Court expressly recognized that individuals fled to this country not only to escape a national church, but also to establish their own church, elect their own ministers and pursue their own modes of worship, all free from government intrusion. Id. at 702. Upon these ideals, the First Amendment was adopted.

The Court also acknowledged that the First Amendment's Free Exercise Clause and Establishment Clause ensure that the government will have **no role** in filling ecclesiastical positions at religious institutions. Id. at 703. In other words, "the Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own" ministers. Id. at 703. As such, "it is impermissible for the government to contradict a church's determination of who can act as its ministers." Id. at 704.

With this understanding of the First Amendment, the U.S. Supreme Court recognized and adopted the ministerial exception, a doctrine that prohibits government intrusion into employment decisions made by religious institutions and relating to their ministerial employees.<sup>15</sup> In this country, religious institutions are afforded the right to select their own ministerial employees. The government, including the judiciary, is forbidden from weighing in on these employment decisions. To the extent the

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<sup>14</sup> The Seminary remains puzzled by Kirby's elaborate treatment of Watson v. Jones, 80 U.S. 679 (1872) and Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). Both illustrate this country's historical commitment to religious freedom, a fact that favors rather than undercuts the Seminary's position here. Neither opinion contains a discussion of the ministerial exception nor involves an employment dispute between a Seminary and a professor. In Watson, the Court refused to involve itself in a property dispute between two factions of a church. In Milivojevich, the Court refused to involve itself in a dispute involving church property and administration.

<sup>15</sup> We are also puzzled by Kirby's claim on appeal that the ecclesiastical abstention doctrine and ministerial exception are the same thing. The U.S. Supreme Court does not reach this conclusion and instead makes it clear that the ministerial exception applies to employment disputes between religious institutions and their ministerial employees. See Hosanna-Tabor, 132 S. Ct. 694. The Court recognizes that the First Amendment prohibits much more than what is captured by the ministerial exception. Id. at 702-04. Courts refer to the broader, more general mandate of religious freedom as ecclesiastical abstention or the doctrine of church autonomy.

government impermissibly interferes with internal church governance, deprives religious groups of the right to select those who will personify their beliefs or entangles itself in ecclesiastical decisions, the government denies religious institutions First Amendment protections. *Id.* at 706. The U.S. Supreme Court reaffirmed the First Amendment's guarantees of religious freedom and issued a mandate against government involvement in the employment decisions of religious institutions when it adopted the ministerial exception in Hosanna-Tabor.

After concluding the ministerial exception is alive and well, the Court considered whether the former employee was a "minister" for purposes of the doctrine. 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. Importantly, the United States Supreme Court expressly recognizes that *application of the ministerial exception is not limited to ordained ministers*. *Id.* at 707. The Justices did not adopt a rigid formula<sup>16</sup> for determining when an employee is a minister, but unanimously concluded that the ministerial exception is not limited to the head of a religious congregation.<sup>17</sup> *Id.* In fact, in Hosanna-Tabor, *the Justices unanimously determined that an individual teaching secular subjects and approximately forty-five minutes of religion each day to children in kindergarten and*

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<sup>16</sup> Kirby incorrectly alleges the United States Supreme Court limited itself to four considerations when determining whether the plaintiff was a ministerial employee. See Appellant's Brief pp. 6, 15. In fact, the United States Supreme Court expressly stated that it was not adopting a "rigid formula" for deciding whether an employee qualifies as a ministerial employee. Hosanna-Tabor, 132 S. Ct. at 707. The Court considered all of the undisputed facts in the record before it when assessing the applicability of the ministerial exception. *Id.* at 707-09. The Court instructed lower courts not to consider a single factor in isolation, but rather to consider "all circumstances." *Id.* at 707.

<sup>17</sup> Kirby repeatedly asserts that the lower court incorrectly concluded he was a "minister" at the Seminary. Kirby misunderstands the ministerial exception to the extent he claims the relevant inquiry is whether he is an ordained minister. Courts do not ordain ministers. Because only a faith can determine who the ministers are of that particular faith, the relevant inquiry for the courts is whether the individual served as a ministerial employee. This inquiry requires an analysis of all circumstances. The record establishes Kirby was a ministerial employee.

*fourth grade at a religiously-affiliated school qualified was a minister.* Id. at 708-09.

Because the complaining party was a minister asserting employment claims against her former employer, a religious school, the Court inquired no further and dismissed the suit entirely. Id.

The factors considered by the U.S. Supreme Court in *Hosanna-Tabor* as applied to the record on appeal in this matter mandate a finding that Kirby was a ministerial employee. The Court concluded the teacher in *Hosanna-Tabor* was a minister based on the following considerations:

- The school extended Perich a “call” to teach and gave her a ministerial title, “Minister of Religion, Commissioned.”<sup>18</sup> Id. at 707.
- Perich completed eight college-level courses in subjects including biblical interpretation and church doctrine before receiving the call. Id.
- Perich was required to perform her job according to God’s Word. Id.
- Perich was required to convey the Church’s message and mission. Id.
- The school evaluated Perich on religious criteria. Id.
- Before filing suit, Perich admitted she was part of a teaching ministry. Id. at 708.
- About twice a year, Perich led chapel services at the school. Id.
- Perich taught religion to students approximately forty-five minutes a day.<sup>19</sup> Id.

These same considerations, as applied to Kirby’s employment at the Seminary, reveal that Kirby was a ministerial employee:

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<sup>18</sup> Kirby refers to Perich as “ordained.” See Appellant’s Brief p. 6. The U.S. Supreme Court did not conclude Perich was an “ordained” minister.

<sup>19</sup> When analyzing Perich’s employment, the Court also noted that she claimed a housing allowance on her taxes. Id. at \*35. There is nothing in the record regarding Kirby’s personal tax returns despite his claim that he never sought “clerical tax or other advantages.” See Appellant’s Brief p. 6.

- The Seminary extended Kirby a “call” to teach and gave him a ministerial title – Instructor of Church and Society. (RA 0216 [Appx. 7], 0002)
- Kirby received a Masters in Christian Education from the Christian Theological Seminary before receiving the call. (RA 0356-57)
- As a faculty member, Kirby was required to prepare students for Christian ministry in accordance with the Seminary’s religious mission.<sup>20</sup> Further, Kirby was expected to teach Biblically-based curriculum and model the ministerial role for the Seminary’s students. (RA 0192-93 [Appx. 3])
- Kirby was required to present the curriculum in accordance with the Church’s message and the Seminary’s mission. (RA 0242 [Appx. 5])
- The Seminary evaluated Kirby on religious criteria. (RA 0359-61, 0363-65 [Appx. 6])
- Before filing suit, Kirby admitted he was a part of a teaching ministry, acknowledging he taught from the Bible and that the courses he taught furthered “the overall ministry and goals of this Seminary.” (RA 0220-21 [Appx. 8])
- Kirby led faculty worship services and participated in chapel services. (RA 0354; 0220-22 [Appx. 8])
- Kirby exclusively taught religious courses. (RA 0192 [Appx. 3])

According to the United States Supreme Court, the aforementioned undisputed<sup>21</sup> facts demonstrate that Kirby was a minister for purposes of the ministerial exception. In

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<sup>20</sup> Kirby tries to distinguish himself by stating that Perich was engaged to teach “students how to successfully develop in the particulars of the religious beliefs of their own faith.” See Appellant’s Brief pp. 8-9. Kirby was hired for the same reason – to encourage students to develop their own faith so that they could serve the Church.

<sup>21</sup> Kirby does not dispute the facts set forth above. He simply ignores them.

addition to the foregoing, the undisputed record also establishes the following with respect to Kirby's employment with the Seminary:

- All of the courses and degree programs offered by the Seminary are religious and consistent with the Christian Church's (Disciples of Christ) commitment to Christian unity. (RA 0199 [Appx. 1], 0207-14 [Appx. 2])
- As a faculty member, Kirby was responsible for the spiritual formation of the future leaders of the Church. (RA 0192-93 [Appx. 3])
- Kirby admits he opened every class he taught with prayer. (RA 0359-66 [Appx. 6])
- Kirby acknowledged imitating Jesus during his employment. (RA 0220-22 [Appx. 8])

Evidence that the Seminary employed Kirby in a ministerial role is overwhelming. Indeed, there can hardly be a more ministerial position than a professor teaching religion at a Seminary. Kirby was not teaching math and science at an elementary school as was Perich in Hosanna-Tabor.<sup>22</sup> Kirby was employed for the sole purpose of preparing future leaders of the Christian Church (Disciples of Christ) in accordance with the Church's mission for the world. (RA 0192-93 [Appx. 3]) According to Kirby's own proclamation, he taught future church leaders by imitating Jesus. (RA 0221 [Appx. 8]) Indeed, both the Seminary and Kirby recognized that Kirby was called to carry out a ministry at the Seminary, an institution in a covenant relationship with the Christian Church (Disciples of Christ). (RA 0216 [Appx. 7], 0192 [Appx. 3])

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<sup>22</sup> Kirby did not teach, and the Seminary did not offer, and has never offered, secular courses. (RA 0192 [Appx. 3]; 0348-50)

After considering the factors above, two Justices set forth a general formula for determining whether an individual is a minister for purposes of the ministerial exception. More specifically, the Justices concluded the ministerial exception should apply to employees “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.” *Id.* at 712. As discussed above and as established by the trial court record, Kirby, as a faculty member, participated, even organized, worship services, attended chapel and taught the faith to the next generation. Accordingly, pursuant to both the formula adopted by two Justices and the factors considered by the entire Court when analyzing Perich’s position, Kirby was a ministerial employee.

**B. Opinions Issued Since the U.S. Supreme Court’s Recognition of the Ministerial Exception Confirm the Applicability of the Doctrine to Kirby’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.<sup>23</sup> 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.” *Id.* at 443. The

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<sup>23</sup> The teacher lost her job when the religious school restructured to better meet the needs of the temple. *Id.* at 434.

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. 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 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. Fundamentally, courts cannot inquire into employment decisions relating to those chosen to carry out the religious institution’s mission.

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, Kirby ignores all of the above and, instead, cites two court opinions when arguing that courts since Hosanna-Tabor have allowed pastors to pursue breach of contract claims against churches. See Appellant's Brief pp. 2-3. Neither of these court opinions involves the same type of contract claim Kirby asserts against the Seminary. Specifically, in Second Episcopal District African Methodist Episcopal Church v. Prioleau, 49 A.3d 812 (D.C. App. 2012), the plaintiff asserted a breach of contract claim against the church, alleging the church failed to pay her \$39,000 that it owed her for services performed. Id. at 813-14. Importantly, the plaintiff there sought to recover money for service already performed. The church admitted the services had been performed and admitted that it owed the plaintiff \$39,200. Id. at 814. The church did not allege that there was anything wrong or inadequate with the plaintiff's provision of services. Id. When denying the motion to dismiss, the court expressly acknowledged the difference between breach of contract claims that challenge a religious institution's employment decisions and breach of contract claims that only seek payment for services rendered. The court recognized that the former may not be considered by the judiciary

because such claims “limit the church’s choice of its religious representatives.” Id. at 817. Because the plaintiff did not challenge the church’s employment decision, the court concluded that it could consider whether the plaintiff was owed money for services rendered. Id.

The Court in the other case cited by Kirby when arguing his breach of contract claim should be allowed to proceed makes the same distinction. In Crymes v. Grace Hope Presbyterian Church, Inc., 2012 Ky. App. Unpub. LEXIS 564 (Ky. App. Aug. 10, 2012),<sup>24</sup> the court noted that the plaintiff “was not contesting Grace Hope’s termination of him as a pastor. Rather, Crymes is merely seeking compensation for unpaid salary and benefits allegedly owed to him for work performed prior to his termination.” Id. at \*4-5. Indeed, the court permitted the matter to go forward because the plaintiff was not challenging whether he was properly terminated. The court expressly recognized that it was faced with a different type of breach of contract claim from that faced by the Court in Music. In Music, the breach of contract claim challenged the church’s employment decision. In Crymes, the court allowed the breach of contract claim to go forward because the plaintiff only challenged the church’s failure to pay him for services rendered. Id. at \*5.

Courts applying the ministerial exception make this same distinction, recognizing that the ministerial exception applies to breach of contract claims that challenge the religious institution’s employment decision (as opposed to claims that only seek money for services rendered). See e.g., DeBruin, 816 N.W.2d 878. In that regard, and since the issuance of the U.S. Supreme Court’s Hosanna-Tabor opinion, the Washington Supreme

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<sup>24</sup> Pursuant to CR 76.28(4)(c), unpublished opinions may be cited only in certain situations. Kirby does not contend his citation of Crymes comports with CR 76.28(4)(c).

Court noted as follows when refusing to consider a breach of contract claim asserted by a church director:

Were DeBruin seeking contract damages for past services provided, her claim would be much like the corner grocer who delivers food to a parish, sends a bill and remains unpaid for that which he has provided. Court adjudication of that type of breach of contract claim would not run afoul of the First Amendment because it would not require a court to examine the ecclesiastical decision to terminate a ministerial employee.

DeBruin, 816 N.W.2d at 888. Because the plaintiff challenged the fact of her termination, or challenged the religious institution's employment decision, the court applied the ministerial exception and dismissed the breach of contract claim, noting that the "church must be free to choose those who will guide it on its way" and that the First Amendment "restrains the State from invalidating the institution's reasons that underlie its choice." Id. at 888.

Here, Kirby does not seek money for services rendered. Rather, Kirby alleges that the Seminary should not have ended his employment. *It is undisputed that Kirby challenges the Seminary's employment decision with this lawsuit.* Since the U.S. Supreme Court's decision in Hosanna-Tabor, federal and state courts have clearly and unequivocally refused to entangle themselves in disputes such as this, disputes involving personnel decisions made by religious institutions. This Court should similarly apply the ministerial exception and dismiss Kirby's claims. He was hired, and ultimately terminated, in furtherance of the Seminary's mission. This is not within the court's purview.

**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 organizations, 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); Klouta v. Southwestern Baptist Theological Seminary, 543 F. Supp. 2d 594 (N.D. Tex. 2008) (seminary constitutes religious institution for purposes of ministerial exception). Kirby concedes the Seminary is a religious institution. (VR No. 2: 12/4/09; 1:58:12-59:08, 2:07:02-06, 2:13:02-40) Kirby does not argue to the contrary in the Brief he submitted to this Court.

Courts also regularly conclude professors at these religious institutions are ministerial employees for purposes of the ministerial exception. By way of example, in EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996), 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. The appellate court ultimately dismissed the case, concluding that the non-ordained professor was a ministerial employee because the role performed by the "faculty is vital to the spiritual and pastoral mission of the Catholic Church." Id. at 464. The court further 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 court ultimately applied the ministerial exception and dismissed the suit despite the fact that the professor taught lay persons,*

*that the religious institution did not assert any religious basis for denying the plaintiff's tenure application and that the Senate CAP, a secular body, examined the plaintiff's qualifications "in accordance with the secular criteria set forth in the Faculty Handbook." Id. at 464-66. The court simply recognized the institution's religious mission and the First Amendment mandates, leaving the dispute to be decided in accordance with the university's own dispute resolution process. Id.*

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 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.

Here, the trial court's grant of summary judgment should be affirmed because, as discussed in detail below, the record unequivocally establishes Kirby served as a ministerial employee while at the Seminary. This conclusion is consistent with opinions from courts all over the country that have recognized that theology professors and those charged with training future church leaders are unequivocally ministerial employees. See e.g., Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994) (suit dismissed because lay theology teacher was a ministerial employee; the determination as to the appropriate person to teach theology at the high school should be made by the religious institution, not the government or the secular courts); 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). Because the Seminary is a religious institution that does not offer any secular courses<sup>25</sup> 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 0192 [Appx. 3]) Indeed, there can hardly 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.

**D. The Ministerial Exception Bars Kirby's Claims.**

Kirby admits the Seminary is a religious institution and the record establishes he is a ministerial employee. Because the Seminary does not offer any secular courses or degree programs,<sup>26</sup> the Seminary obviously hires faculty exclusively for, and entrusts the faculty with, the training of future leaders of the Church of Jesus Christ. (RA 0192 [Appx. 3]) 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 0192-93 [Appx. 3], 0207-0214 [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 0209 [Appx. 2]) Even more fundamentally, the Seminary's Faculty Handbook mandates the "basic responsibility of the faculty" shall be to uphold the

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<sup>25</sup> Kirby admits he was a religion professor teaching Biblical courses. (RA 0002, 0402-03) Kirby does not allege he taught, or that the Seminary even offered, secular courses such as math or spelling.

<sup>26</sup> The degrees available to Seminary students include the Master of Divinity, Doctor of Ministry and Master of Arts in Pastoral Care. (RA 0192 [Appx. 3]) 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 0348-50)

Seminary's religious Mission and "prepare faithful leaders for the Church of Jesus Christ." (RA 0226 [Appx. 5]) 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 truth, the Judge of human thoughts and the Ultimate End of all theological inquiry." (RA 0230 [Appx. 5])

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 0226, 0244-45 [Appx. 5]) Kirby was obviously aware of, and tried to satisfy, these ecclesiastical obligations. (RA 0354, noting Kirby's "willingness to preside at the Monday morning worship service"). Kirby admits he held active membership in a congregation. See Appellant's Brief p. 3.

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 0192 [Appx. 3]) Obviously recognizing this, Kirby informed the Seminary of his religious education when applying for employment, advising that he received a Masters in Christian Education from the Christian Theological Seminary and then continued his education at Boston University School of Theology. (RA 0356-57) Kirby utilized his religious education at the Seminary to teach courses that were part of the core curriculum for the Master of Divinity Program<sup>27</sup> prior to the Seminary's spiritual

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<sup>27</sup> The Master of Divinity Program is the flagship degree program specifically designed to prepare students for ministry. (RA 0192 [Appx. 3])

restructuring, courses like *The Church and the Urban Poor*, *The Development of Social Christianity in America* and *The Black Religious Experience in America*. (RA 0192 [Appx. 3], 0220 [Appx. 8]) The Seminary required Kirby to present the curriculum in keeping with its Mission Statement. (RA 0242 [Appx. 5]) Obviously, then, Kirby was responsible for developing and presenting the curriculum to future leaders of the Christian Church (Disciples of Christ), consistent with his services as a ministerial employee. See Klouda, 543 F. Supp. 2d at 602.

Religious criteria played a role in Kirby's hiring and job responsibilities, and also in how he was evaluated by the Seminary. That is, the Seminary evaluated Kirby's performance based on religious criteria. The Seminary customarily, at the end of each semester, requested that all students in a course taught by its professors, including Kirby, complete an evaluation about each professor. The evaluations were reviewed by the Dean, who would then 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 0359-61 [Appx. 6])

The course evaluations were specifically designed to, and did in fact, elicit comments about the students' spiritual growth under Kirby's direction. In evaluations about Kirby's courses and his ability as a faculty member, some of the students responded as follows: "helped to see different viewpoints of issues in Christianity," "insights I can use in the church" and "spiritual formation was deepened by further

insight to what following Christ looks like and how my personal calling may differ from another.” (RA 0363-65 [Appx. 6]) The course evaluations unequivocally establish Kirby opened each class with prayer. (RA 0361 [Appx. 6]) Accordingly, the undisputed record reveals Kirby taught religious courses, incorporated prayer into each class and was evaluated based on religious criteria at a religious institution. Kirby was a ministerial employee.

**1. Kirby has acknowledged 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), Kirby repeatedly admitted he worked in a ministerial capacity while at the Seminary. By way of example, the syllabi Kirby created for his courses establish Kirby’s own understanding that he was hired for, and expected to fulfill, a ministerial role. In one syllabus, Kirby stated the course begins “with the assumption that all individual Christians and churches have a responsibility to do love and justice in concrete situations in the community” and focuses on “urban ministry.” (RA 0367-70) In another syllabus, Kirby admitted that his course was designed to guide students in the basic principles of Christian Ethics. (RA 0372-75)

In a self-evaluation, Kirby referenced the Christian courses he taught at the Seminary and stated that the courses “make a significant contribution to the overall teaching *ministry* and educational objectives of this seminary.” (RA 0380 [Appx. 8]) (emphasis added) Kirby explained that, as an instructor, his “primary focus and interest are on the church’s role, relationship and responsibility to society.” (RA 0220-22 [Appx. 8]) Kirby also pledged to maintain “that common touch which permits me to interact and relate to the ‘folk,’ or as Jesus said, ‘to the least of these.’” Id. The fact that Kirby

believed he was required, as a faculty member, to imitate Jesus compels the conclusion that he was a ministerial employee.

In addition to the self-evaluations, Kirby also submitted information about himself for inclusion in the Seminary's Faculty Annual Reports, each time detailing his contributions to the Seminary over the past year. Kirby's autobiographical submissions are telling for purposes of the ministerial analysis and again unequivocally establish Kirby served a ministerial role at the Seminary. In one submission, for instance, Kirby stated that he read scripture at the Seminary's chapel services and participated in communion services. (RA 0397-431) Kirby also noted his service as a worship leader at a faculty retreat<sup>28</sup> and his participation in chapel worship services. Id. Subsequent autobiographies unequivocally establish that Kirby participated in numerous ordination services on behalf of the Seminary. Id. Kirby also touted his participation in worship services, convocations and various other religious services sponsored by the Seminary. Id.

Despite his own admissions and the fact that the record reveals his employment with the Seminary required the teaching of religious courses, prayer, scripture reading and participation in chapel services, Kirby tries to persuade this Court that he was not a ministerial employee by relying exclusively on one fact – that he is not an ordained minister of the Christian Church (Disciples of Christ). Significantly, Kirby does not cite a single case stating, or even suggesting, the ministerial exception is limited to ordained ministers. In fact, the constitutional protections relating to religious freedom do not apply exclusively to ordained ministers. The constitutional protections apply more generally,

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<sup>28</sup> The fact that the Seminary required its faculty members to worship together is evidence that the Seminary is not a secular institution and also of the importance of faculty members in furthering the Seminary's religious mission.

prohibiting the establishment of a religion and protecting the free exercise thereof. Courts have consistently defined these protections to include relationships between religious institutions and individuals who are not ordained into the faith.

Furthermore, the Court in Hosanna-Tabor made it clear that a single factor is insufficient to remove someone from the scope of the ministerial exception. Hosanna-Tabor, 132 S. Ct. 707. The Court also made it clear the ministerial exception is not limited to the head of a congregation. Id. at 33. In fact, in the brief he submitted to the Kentucky Court of Appeals, Kirby acknowledges that courts regularly apply the ministerial exception to individuals who are not ordained. See Appellant Brief pp. 16-17. 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 Kirby has not been ordained by the

Christian Church (Disciples of Christ) is insufficient to establish error by the Circuit Court and the Kentucky Court of Appeals.

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

The fact that Kirby was not an ordained minister of the Christian Church (Disciples of Christ) is in accord with the Church's beliefs. Because the Seminary is in a covenant relationship with the Christian Church (Disciples of Christ), the Seminary maintains an ecumenical spirit that is reflected in the inter-faith inclusiveness of the student body, faculty, staff and curriculum. (RA 0207 [Appx. 2]) Indeed, the record establishes and Kirby does not contest the fact that the Christian Church (Disciples of Christ) is intentionally ecumenical, promoting and fostering interdenominational unity. (RA 0207, 0210-11 [Appx. 2]) As such, the Seminary does not believe it is inappropriate for a member of another faith to participate in the training of future leaders of the Christian Church (Disciples of Christ). The fact that the Seminary has an inclusive faith does not in any way lessen or diminish the Seminary's First Amendment rights. The Seminary is an unequivocally religious institution and entitled to the same First Amendment protection as any other religious institution.

Kirby also tries to make much of the fact that he did not go through the same process as Perich, the ministerial employee in the Hosanna-Tabor case, before he was called to ministry at the Seminary. See Appellant's Brief p. 6. Again, this is a difference in faiths, not something that impacts the constitutional mandates against judicial interference.<sup>29</sup> Perich was called pursuant to the Lutheran process. See Hosanna-Tabor,

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<sup>29</sup> Without any citation to the record, Kirby also refers to the Seminary as a "non-hierarchically arranged denomination" and a "denomination of congregational polity." See Appellant's Brief pp. 1, 3. It is unclear whether Kirby uses these labels to try to distinguish the Seminary from the Lutheran church, the church

132 S. Ct. 707. Kirby was called pursuant to the Seminary's process. (RA 0216 [Appx. 7]) Both the Lutheran faith and the Christian Church (Disciples of Christ) faith are entitled to the same First Amendment protections.

As Justice Thomas recognized in a concurring opinion in Hosanna-Tabor, this Court should defer to the Seminary's characterization of Kirby as a ministerial employee. Hosanna-Tabor, 132 S. Ct. 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 consider, is the fact that the Seminary clearly, genuinely and consistently considered Kirby a ministerial employee, an individual tasked with teaching the faith to future church leaders. Id. A religious institution has the exclusive right to determine who will teach its faith. Kirby taught the faith to the faithful, including courses such as The Development of Social Christianity in America and The Church and the Urban Poor. (RA 0220 [Appx. 8]) Kirby was a ministerial employee.

**3. The ministerial exception is a complete defense to all of Kirby's claims.**

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

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involved in the Hosanna-Tabor case, or whether Kirby uses these labels to suggest the Seminary is lawless. The Seminary is not lawless. As mentioned above, the Seminary has grievances procedures that Kirby could have utilized to grieve his termination. The fact that the Seminary has a different structure from that of the Lutheran church is irrelevant for purposes of the ministerial exception. Both are entitled to First Amendment protection.

both employment discrimination claims as well as common law claims. When faced with breach of contract claims, courts have consistently concluded that the ministerial exception bars such claims against religious employers. See Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618, 626-27 (6th Cir. 2000) (appellate court affirmed summary judgment in favor of religious institution on Title VII claims); 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, intentional infliction of emotional distress, 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) (appellate court affirmed dismissal in favor of religious institution on breach of implied contract, tortious interference with business relationships, invasion of privacy, conspiracy, intentional infliction of emotional distress and defamation claims).<sup>30</sup> Indeed, the ministerial exception bars essentially 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.

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<sup>30</sup> It is curious Kirby 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 Kirby's claims against the Seminary. The Petruska court did not agree to hear a breach of contract claim, but only stated that from the "outset" it did not appear the claim turned on an ecclesiastical inquiry. From the outset, this matter turns on an ecclesiastical inquiry. Furthermore, the U.S. Supreme Court cited Petruska approvingly only for the proposition that the ministerial exception is an affirmative defense. Hosanna-Tabor, 132 S. Ct. at 709. The U.S. Supreme Court did not comment on the Third Circuit's analysis of Petruska's breach of contract claim.

In his complaint, Kirby asserts race discrimination, breach of contract and breach of implied duty of good faith and fair dealing claims against the Seminary. (RA 0001-07) All of these claims arise from the Seminary's decision to end its employment relationship with Kirby, a former faculty member. *Id.* Applying the reasoning in Hosanna-Tabor to the record before this Court, Kirby was a ministerial employee. Accordingly, the First Amendment bars Kirby's claims against the Seminary.

Kirby's first claim alleges the Seminary engaged in employment discrimination in violation of state law. (RA 0001-07) The teacher in Hosanna-Tabor asserted an almost identical state-law employment discrimination claim against her former employer. The U.S. Supreme Court expressly addressed and dismissed<sup>31</sup> Perich's state-law employment discrimination claim, concluding ministerial employees are barred from bringing employment discrimination claims against its religious employers. Hosanna-Tabor, 132 S. Ct. 694. Pursuant to the U.S. Supreme Court's mandate, Kirby race discrimination claim is barred.

While the Court in Hosanna-Tabor was not faced with a breach of contract claim, the Court clearly prohibited courts from inquiring into or second-guessing employment decisions of religious institutions.<sup>32</sup> *Id.* It cannot be disputed Kirby's two other state law

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<sup>31</sup> Like Perich and the EEOC in Hosanna-Tabor, Kirby predicts a "parade of horrors" if this Court were to recognize and apply the ministerial exception to Kirby's claims. The Court rejected Perich's and the EEOC's assertions, stating as follows: "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way." *Id.* at 710.

<sup>32</sup> Kirby states that his appeal is based on "the legal requirement of a limiting principle on the application of the ministerial exception, which has been located by the Supreme Court." See Appellant's Brief p. 1. We can only assume Kirby is referring to the fact that the U.S. Supreme Court did not decide whether the ministerial exception applies to breach of contract claims. The U.S. Supreme Court did not set forth a limiting principle. The U.S. Supreme Court did not expressly issue a ruling as to breach of contract claims because the plaintiff in Hosanna-Tabor did not assert a breach of contract claim against her former employer.

claims, breach of contract and breach of covenant of good faith and fair dealing, challenge the Seminary's employment decision. That is, Kirby alleges the Seminary breached a contract and covenant of good faith and fair dealing *when the Seminary decided to end Kirby's employment*. Fundamentally, and as the U.S. Supreme Court recognized, this Court may not properly question the Seminary's employment decisions relating to its ministerial employees, including Kirby. The First Amendment plainly 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.

In keeping with these constitutional freedoms, the court in Klouda v. Southwestern Baptist Theological Seminary, 543 F. Supp. 2d 594 (N.D. Tex. 2008) dismissed a breach of contract claim and other common law claims asserted by a faculty member against a seminary. In doing so, 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 other words, if the dispute involves the employment relationship between a religious institution and its ministerial employee, the First Amendment prohibits Court intervention.

Kirby cannot "secularize" his claims or otherwise remove them from the scope of the First Amendment by alleging that all this Court has to do is interpret a tenure contract. As explained above, there is no tenure contract. Instead, Kirby relies on the Seminary's Handbook as the basis for his common law claims. The Seminary's Handbook is not a secular document. To the contrary, the Seminary's Handbook was created for the purpose of governing the Seminary's relationships with its ministerial

employees, the individuals charged with carrying out its religious mission. It cannot be disputed the Handbook expressly proclaims the Seminary's purpose and is replete with religious references. (RA 0224-0307) 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 0227 [Appx. 5]) The judiciary would violate the First Amendment if it were to interpret the Seminary's Handbook, which would require both an assessment of the Seminary's mission and of the Seminary's interpretation of God's gracious and steadfast love.

Neither does Kirby's contention the Seminary's employment decision was based on "purely economic motives" remove Kirby's claims from the scope of the First Amendment.<sup>33</sup> See Appellant's Brief p. 4. The Seminary has consistently explained, both at the time of Kirby's termination and throughout this litigation, that a financial exigency necessitated a restructuring. The financial exigency and restructuring cannot be separated from each other. Furthermore, the Court rejected an identical argument in Hosanna-Tabor. Id. at 709. When urged to address Perich's contention she was fired for secular reasons, the Court unequivocally refused, 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. Ultimately, because Kirby's claims challenge the Seminary's employment decisions with respect to its ministerial employee, the First Amendment forbids such an inquiry.

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<sup>33</sup> The record clearly establishes Kirby's employment ended because of the Seminary's spiritual restructuring. After prayer and deliberation, and in response to a financial exigency, the Board of Trustees committed the Seminary to a congregation-based model of learning. (RA 0188-89, 0196 [Appx. 4], 0309-10 [Appx. 9])

The ministerial exception also applies irrespective of whether the institution asserts a religious basis for the professor's discharge.<sup>34</sup> 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.

#### **IV. Kirby Improperly Attempts to Expand the Issues on Appeal.**

In addition to failing to address one of the bases for the Appellate Court's opinion, Kirby improperly attempts to expand the issues on appeal. Kirby may not raise new theories, contentions, assertions or legal arguments on appeal. See Blue Movies, Inc. v. Louisville/Jefferson County Metro Gov't, 317 S.W.3d 23, 39 (Ky. 2010); Larkins v. Miller, 239 S.W.3d 112, 115 (Ky. App. 2007); Henderson v. Thomas, 129 S.W.3d 853, 856 (Ky. App. 2004).

Kirby requests an advisory opinion to the extent he, for the first time on appeal, urges the Court to determine that Kentucky courts violate the federal constitution by finding laypersons are ministers and to determine what "kinds of claims the courts have the power to hear." See Appellant's Brief, Statement of Points and Authorities. The

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<sup>34</sup> Here, the Seminary does assert a religious basis for Kirby's separation of employment. As explained above, the courses taught by Kirby did not further the Seminary's reinvention and commitment to pastoral life.

Circuit Court was not tasked with ordaining, and did not ordain, anyone. Rather, both the Circuit Court and Kentucky Court of Appeals were tasked with reviewing and deciding only the case and controversy before it, or whether the Court may entertain the claims Kirby asserts against the Seminary. The lower courts correctly concluded Kirby's claims must be dismissed because, among other things, Kirby was a ministerial employee for purposes of the ministerial exception.

When trying to convince this Court to address issues beyond the scope of the actual case and controversy, Kirby makes alarmist arguments and suggests the lower Courts issued, or this Court should issue, a ruling that will once and for all resolve every issue involving a religious institution and its employees.<sup>35</sup> This is impossible and inappropriate. The only issue on appeal involves the judiciary's ability to entertain the claims Kirby asserts in his Complaint. Because the Kentucky Court of Appeals and Circuit Court correctly concluded that under either the ministerial exception or the more general ecclesiastical abstention doctrine, the judiciary may not entertain the claims, the lower courts' opinions should be upheld.

For the first time on appeal, Kirby also argues the applicability of Lexington Theological Seminary v. Vance, 596 S.W.2d 11 (Ky. App. 1979).<sup>36</sup> Specifically, Kirby repeatedly suggests that the Vance court concluded it had "jurisdiction" to consider a

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<sup>35</sup> As the Seminary's counsel explained during oral arguments before the Kentucky Court of Appeals, the Court is not tasked with evaluating the relationship between all seminaries and their faculty members. Kirby's claims do not involve other seminaries and there is nothing in the record before this Court about the role of faculty members at other seminaries. For that reason, the Seminary cannot say whether and what effect the Appellate Court's opinion will have on tenure policies at other seminaries.

<sup>36</sup> Kirby concedes he did not argue the applicability of Vance until filing his Reply Brief with the Kentucky Court of Appeals. See Motion for Discretionary Review p. 6 fn. 2. Because Vance was not before the Circuit Court, it is improper for Kirby to argue its applicability to this Court. See Henderson, 129 S.W.3d at 856 (appellate court refused to consider alternate theory not presented to the trial court); Carr v. Cincinnati Bell, Inc., 651 S.W.2d 126, 127 (Ky. App. 1983) (appellate court refused to consider contention not raised in the lower court).

similar issue. Vance does not include an analysis of jurisdiction and, in fact, the word “jurisdiction” is not in the court’s opinion. The Vance opinion also does not involve a similar issue. The court in Vance was not asked to consider an employment relationship or employment-related claims. As such, Kirby’s suggestion that the Vance opinion bears on the ministerial exception or the justiciability of contract claims between a religious institution and its ministerial employees is unfounded. The applicability of the ministerial exception is limited to the employment context and applies when a ministerial *employee* sues a religious institution. See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012). The Vance opinion involves claims brought by a student.<sup>37</sup> No one in Vance contended the student was an employee and, as a result, the parties did not make arguments regarding, and the Vance court did not address, the ministerial exception.

Kirby’s suggestion the Vance court rejected the Seminary’s constitutional arguments is also misguided. Instead, the Vance court applied the principle of constitutional avoidance, deciding that it “does not feel bound to decide this case on First Amendment grounds.” Id. at 14. Kirby’s claim that Vance is instructive with respect to the Seminary’s status as a religious institution is irrelevant. Kirby concedes the Seminary is a religious institution. (VR No. 2: 12/4/09; 1:58:12-59:08, 2:07:02-06, 2:13:02-40) The record establishes Kirby is a ministerial employee.

Finally, it is unclear why Kirby attempts to rely upon Vance, a Kentucky Court of Appeals opinion that does not involve any employment claims or include a discussion of the First Amendment’s impact on the employment relationship between a religious

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<sup>37</sup> Contrary to Kirby’s suggestion, the Vance opinion does not address anything other than the case and controversy before it. In the Vance opinion, the court simply affirmed the decision made by the Seminary’s Board of Trustees as it related to the awarding of a degree to a student. Vance, 596 S.W.2d at 15.

institution and its ministerial employees, when there is a more recent, relevant Kentucky Supreme Court opinion - Music v. United Methodist Church, 864 S.W.2d 286 (Ky. 1993). In Music, the Kentucky Supreme Court expressly addresses whether the judiciary may, and concludes that the judiciary may not, consider a breach of contract claim asserted by a ministerial employee against a religious institution. In light of this, and the fact that Music is a more recent opinion from a higher court, Music governs.

### **CONCLUSION**

For the reasons set forth above, Lexington Theological Seminary respectfully requests that the Court uphold the Kentucky Court of Appeals opinion affirming the Circuit Court's grant of summary judgment in its favor.

Respectfully submitted,



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**APPENDIX**

Appendix 1	Seminary Mission and Purpose	RA 0199-201
Appendix 2	Excerpts from Seminary Catalog	RA 0207-214
Appendix 3	Affidavit of Dr. James P. Johnson	RA 0191-194
Appendix 4	Seminary Brochures	RA 0188-189, 0196-197
Appendix 5	Excerpts from Seminary Handbooks	RA 0224-230, 0242, 0244-245
Appendix 6	Course Evaluations	RA 0359-366
Appendix 7	Letter to Kirby	RA 0216
Appendix 8	Self-Evaluations	RA 0220-222, 0379-381
Appendix 9	Courier Journal Article	RA 0309-310

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