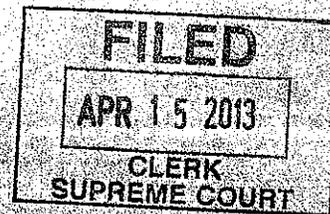


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO.: 2012-SC-00519-D



JIMMY KIRBY

APPELLANT

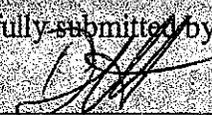
V. APPEAL FROM KENTUCKY COURT OF APPEALS
CASE NO.: 2010-CA-001798

LEXINGTON THEOLOGICAL SEMINARY

APPELLEE

APPELLANT'S BRIEF

Respectfully submitted by:



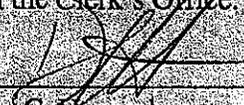
Douglas C. Howard
Howard Law Group, PLLC
PO Box 562
Frankfort KY 40602-0562
PH: (502) 352-4950
E-Mail: doug@howardlawgroup.com



Amos N. Jones
The Amos Jones Law Firm
1150 K Street NW, Ninth Floor
Washington, DC 20005-6809
PH: (202) 351-6187
Co-Counsel for Jimmy Kirby, Appellant

CERTIFICATE

The undersigned counsel hereby certifies that the original and nine copies of this brief were served upon the Clerk of the Supreme Court, 700 Capital Ave., Frankfort KY 40601, and with copies to the Clerk of the Court of Appeals, 360 Democrat Dr., Frankfort KY 40601; Hon. Judge Thomas L. Clark, Fayette Circuit Court Clerk, 120 N Limestone, Lexington KY 40507-1152, and Hon. Richard G. Griffith, Hon. Elizabeth S. Muyskens, Stoll Keenon Ogden PLLC, 300 W Vine St, Ste 2100, Lexington KY 40507-1801, on this 15th day of April, 2013, via U.S. Mail pre-paid, first class mail. The undersigned counsel further certifies that the record was not removed from the Clerk's Office.



Douglas C. Howard

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¹ Per KY ST RCP Rule 76.28(4), Appellant includes this case at this point in his Brief not as authoritative; rather, this unpublished opinion is properly cited to exemplify the inconsistent application of First Amendment law in the Commonwealth of Kentucky as understood by various panels of the Kentucky Court of Appeals.

have the power to hear, will always vary under the Free Exercise and Establishment clauses of the First Amendment, and Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11 (Ky.App. 1979), should not be overturned.11

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APPENDIX

1. Kentucky Court of Appeal’s July 27, 2012 Opinion Affirming Order entered by Fayette Circuit Court.
2. Fayette Circuit Court Order entered September 2, 2010 Dismissing Action
3. Verified Complaint filed by Dr. Jimmy Kirby, August 24, 2009

INTRODUCTION

Appellant Jimmy Kirby, by and through counsel, has appealed the July 27, 2012, Kentucky Court of Appeals Opinion Affirming the decision of the Fayette Circuit Court and respectfully requests that the Supreme Court of Kentucky reverse the Kentucky Court of Appeals decision affirming the 2010 dismissal of Kirby v. Lexington Theological Seminary, Civ. Act. No. 09-CI-04480 (2010). In the respects set forth *infra*, the rule of that case of first impression unconstitutionally nullified tenure contracts of all seminary professors across the Commonwealth of Kentucky as the intermediate Court erroneously implemented the rule from the concurrent U.S. Supreme Court decision in Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 132 S. Ct. 694 (2012).

Appellant bases his request for reversal on the legal requirement of a limiting principle on the application of the ministerial exception, which has been located by the Supreme Court of the United States firmly within the ecclesiastical abstention doctrine of the First Amendment of the Constitution of the United States. The principal question presented to the Kentucky Supreme Court, at this point, is, "Is an unordained professor who was awarded tenure by a non-hierarchically arranged denomination's Kentucky seminary, who is a lay, tenured academician not even a member of the church allegedly breaching the contractual duties, who has never been called to ministry by any denomination or by himself, and who only marginally and voluntarily demonstrated a faith commitment as part of his employment, in fact a '*minister*' as contemplated in the rule of *Hosanna-Tabor*?"

In this Brief, Appellant sets forth the reasons that the answer is "no."

STATEMENT CONCERNING ORAL ARGUMENT

Appellant desires oral argument. Appellant believes that oral argument would be helpful to the Court in deciding the issue presented because analyses of the arguments could be informed by concurrent guidance from the Supreme Court of the United States, to the extent that the justices have appeared to contemplate a revisitation of the new ministerial-exception rules. See Hosanna-Tabor, 132 S. Ct., 710 (Supreme Court's concluding its relatively brief opinion stipulating that "[t]oday the Court holds only that the ministerial exception bars an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. The Court expresses no view on whether the exception bars other types of suits. ... There will be time enough to address the applicability of the exception to other circumstances if and when they arise").

SUMMARY OF LEGAL ARGUMENT

Jimmy Kirby v. Lexington Theological Seminary, Civ. Act. No. 09-CI-04480 (2010), is a case of first impression for the Kentucky Supreme Court in which Appellant challenges a dismissal from Fayette Circuit Court for lack of subject-matter jurisdiction under the religion clauses of the First Amendment to the Constitution of the United States of America. The Kentucky Supreme Court is asked to reverse this dismissal by construing the ministerial exception corollary of the ecclesiastical abstention doctrine as inapplicable in this case. Such construal would accord with progeny of the still-followed, 140-year-old interpretation by the Supreme Court of the United States of the First Amendment's religion clauses by allowing the case to proceed in Fayette Circuit Court as if summary judgment and/or jurisdictionally based dismissal had never been granted. Reinstating the case also would accord with the breach-of-contract case law that has emerged with clarity: At least two courts since Hosanna-Tabor and

Kirby have allowed actual ministers – pastors with the Presbyterian Church and the African Methodist Episcopal Church – to pursue breach of contract lawsuits without even mentioning Hosanna-Tabor. See Crynes v. Grace Hope Presbyterian Church, Inc., 2012 WL 3236290 (Ky. App. Aug. 10, 2012)¹ and Second Episcopal District African Methodist Episcopal Church v. Prioleau, 49 A.3d 812 (D.C. Aug. 9, 2012).

STATEMENT OF THE CASE

Appellant Dr. Jimmy Kirby (“Professor Kirby”) was employed by the Lexington Theological Seminary (“LTS”) as a teacher of social ethics for fifteen years prior to his termination in 2009. Professor Kirby was a tenured member of the faculty. Although LTS is administered by the Christian Church (Disciples of Christ), a denomination of congregational polity, Professor Kirby is not, and never has been, a member of this church; he is a lifelong member of the Christian Methodist Episcopal Church, a denomination of episcopally hierarchical polity. He has never been or held himself out as a minister.

LTS encountered financial difficulties in 2009 and terminated the employment of Professor Kirby in spite of his contract for continued employment with LTS. Prior to terminating Professor Kirby’s employment contract, LTS had offered him a severance contract to replace his tenure contract, which Professor Kirby rejected.

Professor Kirby initiated Fayette Circuit Court Civil Action 09-CI-4480 by filing a Complaint on or about August 24, 2009. In his Complaint, Professor Kirby, a tenured academician whose employment was terminated despite his property and contractual rights guaranteed by being tenured, asserted the following claims against LTS: breach of contract,

¹ Per KY ST RCP Rule 76.28(4), Appellant includes this case at this point in his Brief not as authoritative; rather, this unpublished opinion is properly cited to exemplify the inconsistent application of First Amendment law in the Commonwealth of Kentucky as understood by various panels of the Kentucky Court of Appeals.

breach of implied duty of good faith and fair dealing, and race discrimination. Professor Kirby also sought a declaratory judgment, alleging that his separation of employment constituted a breach of contract. A copy of the Complaint is appended hereto as Appendix 3.

After more than a year of Discovery, LTS responded by placing before the court the doctrine of ecclesiastical abstention and a ministerial-employee exception theory despite LTS's having professed purely economic motives in removing Professor Kirby in the lead-up to his wrongful termination. On August 27, 2010, the Fayette Circuit Court entered a written order granting the motion of LTS, dismissing all claims asserted by Professor Kirby. A copy of the written Order is appended hereto as Appendix 2. On August 20, 2010, prior to entering the one-page written order but after reviewing briefs and hearing approximately 15 minutes of oral argument from counsel for both parties, Fayette Circuit Court Judge Thomas L. Clark issued an oral ruling, granting the Seminary's motion to dismiss and dismissing with prejudice all claims asserted by Kirby. *See* Aug. 20, 2010, Motion Hour recording.

The Kentucky Court of Appeals affirmed the lower court in an opinion entered July 27, 2012, a copy of which is attached hereto as Appendix 1. The Court of Appeals found in favor of the seminary, heavily quoting the recent Supreme Court opinion in Hosanna-Tabor, to invalidate jurisdiction on First Amendment grounds. The Court first held that the doctrine of ecclesiastical abstention prevented it from inquiring into Professor Kirby's claims because doing so would require it to delve too deeply into the religious affairs of the church even in deciding what was, ultimately, a claim based on secular principles of contract and employment law. The Court further held that the ministerial exception applied *sub judice* by way of the same case.

QUESTIONS BEFORE THE COURT

The principal question and related sub-questions presented to the Supreme Court of Kentucky fourteen months after Hosanna-Tabor center on the urgent need to announce the limiting principle on the ministerial exception in Kentucky, where two three-judge panels of the Court of Appeals simultaneously invalidated tenure contracts for Seminary professors across the Commonwealth.²

A. Do Kentucky Courts violate the Religion Clauses of the U.S. Constitution when they determine that unordained laypersons not members of the offending religious institution's constituent church are, in fact, ministers of a church -- and subject to the sweeping jurisdictional bar and/or affirmative defense that strikes their otherwise actionable legal claims?

B. Does finding an employee to be a minister for purposes of the ministerial exception, as the Kentucky Court of Appeals has done, require courts to stop any inquiry into a dispute, or can a plaintiff be found to be a minister and still have certain kinds of claims heard?

C. Which kinds of claims do courts have the power to hear, and which kinds do they not have the power to hear, under the Free Exercise and Establishment clauses of the First Amendment? Is Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11 (Ky.App. 1979), overturned?

² The simultaneously decided Kant v. Lexington Theological Seminary, NO. 2011-CA-000004-MR, included one dissenting opinion, one concurring opinion, and one majority opinion barring judicial review. Between the two cases arising from the same set of firings by Appellee, two appellate panels with five justices produced two majority opinions, two concurrences, and one dissent. This dissonance highlights the need for resolution by the highest court in the Commonwealth.

ARGUMENT

I. **Kentucky Courts violate the Religion Clauses of the U.S. Constitution when they determine that unordained laypersons not members of the offending religious institution's constituent church are, in fact, *ministers* of a church – and subject to the sweeping jurisdictional bar and/or affirmative defense that strikes their otherwise actionable legal claims.**

In adopting Appellee's theory, the Court of Appeals panel in *Kirby* relied most heavily on the holding in Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694 (2012), in which the Supreme Court of the United States validated the ministerial exception doctrine and found that the Sixth Circuit U.S. Court of Appeals was wrong to exercise jurisdiction over employment-discrimination claims brought by an ordained Lutheran educator "called" by the denomination to serve her ministerial mandate as a schoolteacher in a church-run day school. While stipulating that even such a title as commissioned minister, by itself, does not automatically ensure coverage under the ministerial exception, the U.S. Supreme Court undertook four considerations to determine who is a minister: the formal title given by the Church, the substance reflected in that title, the employee's own use of that title, and the important religious functions performed for the Church. Hosanna-Tabor, 132 S. Ct., 708.

Unlike in *Hosanna-Tabor*, where the Supreme Court "express[es] **no view** on whether the exception bars other types of suits, including actions by employees alleging **breach of contract**" because "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise," Hosanna-Tabor, 132 S. Ct., 710 [emphasis supplied], Professor Kirby's case presents breach-of-contract claims. Moreover, unlike the plaintiff in Hosanna-Tabor, Professor Kirby was not ecclesiastically titled, called, and/or compensated as a minister of any kind for the defendant church, nor did he hold himself out as such or seek clerical tax and other advantages based on that special status.

“Address[ing] the applicability of the exception to other circumstances” requires a careful analysis of the purposes of the exception as set forth in Hosanna-Tabor: preserving church discipline and ecclesiastical authority. Id. at 704 (repeating and applying the longstanding rule of Watson v. Jones, 13 Wall. 679 (1872), that “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them”). The U.S. Supreme Court’s opinion in Hosanna-Tabor is specifically and firmly grounded in the post-Civil War Constitutional law precedents and traditions informing the established church in England. These authorities track the very authorities and interpretations already furnished to the Kentucky Court of Appeals in the Brief for Appellant. Compare Hosanna-Tabor, 132 S. Ct., 702-04 (summarizing the history of ecclesiastical-state entanglement in England and how it animated the American Constitutional framing) and Brief for Appellant at Page 9, FN 8 (plainly noting that “[i]n a rejection of long-standing English practice, the framers of America’s Constitution expressly rejected establishing ecclesiastical courts for both religious and institutional-competency reasons” and citing Akhil Reed Amar, America’s Constitution, 210 (Random House, 2005)).

By contrast, Appellee and the Court of Appeals ruefully miss the point and the applicability of the precedential Supreme Court caselaw; Appellee has attempted in this litigation to dismiss Appellant’s early Constitutional engagement of *Watson* and British colonial history as an “abstract, and largely irrelevant, discussion.” Brief of Appellee at 4. In that Brief, Appellee dismissed the importance of the seminal ecclesiastical-abstention case of *Watson*, stating that “*Watson* ... involves a real property dispute between two factions of a church, something not at issue here.” Brief of Appellee at 21, FN 27 [emphasis in original]. Appellee dismissed *Watson*

as “only inapplicable” and likewise failed to regard as subsequently applicable its modern-day confirmatory progeny, Serbian Eastern Orthodox Diocese for United States of Am. and Canada v. Milivojevich, 426 U.S. 696 (1976).³ Id.

In its summary holding in Hosanna-Tabor, however, the Supreme Court adopted the methodical approach to this subject matter put forth continuously by Appellant, premising its discussion as Appellant has premised his argument on appeal: “This Court first considered the issue of government interference with a church’s ability to select its own ministers in the context of church property. This Court’s decisions in that area confirm that it is impermissible for the government to contradict a church’s determination of who can act as its ministers. *See Watson v. Jones, ... Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America, ... Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich...*” Hosanna-Tabor, 132 S. Ct., 697 (citations omitted).

While the Supreme Court in Hosanna-Tabor positively expressed no view on whether the ministerial exception bars other types of suits. Hosanna-Tabor, 132 S. Ct., 710, Kentucky courts permit jurisdiction over claims such as Professor Kirby’s: To be sure, Vance, as shown *infra*, *requires* jurisdiction over at least two of Professor Kirby’s three counts. A refusal to properly distinguish Perich from Professor Kirby led the Kentucky Court of Appeals to fail to correctly apply the rule of Hosanna-Tabor holding; the Supreme Court found the plaintiff in Hosanna-Tabor to be a minister because she was called as a minister and as such controlled by her own denomination to engage in teaching students how to successfully develop in the particulars of the

³ Discussed at length in *Hosanna-Tabor* and characterized in the same manner as in the Brief of Appellant filed with the Kentucky Court of Appeals in 2011 (*see Hosanna-Tabor*, 132 S. Ct., 702-04), these cases confirm the classical ecclesiastical abstention doctrine as indistinguishable from the common-law “ministerial exception” of other jurisdictions and therefore would require this Court to find Professor Kirby to be a nonmember of Appellee’s Christian Church (Disciples of Christ) denomination, and not subject to a ministerial exception.

religious beliefs of their own faith. Hosanna-Tabor, 132 S. Ct., 710. She was teaching a particular religious doctrine, not religious doctrine writ large. Her circumstances were vitally distinguishable from the activities undertaken by Professor Kirby. He makes no claim even to be qualified and able to teach students how to be good Christian Church (Disciples of Christ) members because he is not a member of that religious organization and is not a minister of that church (or any other). The difference between teaching religious doctrine and teaching about religious doctrine is fundamental; the former is the role of priests, rabbis, imams, and ministers, while the latter is the role of theologians and professors. Although these realms may intersect – particularly at a seminary that requires ordination and/or denominational membership or doctrinal confession of faith for employment, such as Louisville’s Southern Baptist Theological Seminary – forcing professors into the Christian ministry through the hermeneutical hopscotching of three-judge panels works an injustice of Constitutional proportions on the contract-holding employee who finds himself “judicially ordained.”

The Court of Appeals decision unconstitutionally converted Professor Kirby into a *de jure* minister of a faith not even his own. The Court then abdicated the field with regard to Professor Kirby’s breach of contract, breach of implied duty of good faith and fair dealing, and racial discrimination claims. Before the Court of Appeals, Appellee was unable to answer repeated inquiries as to why it entered into a contract with Appellant in the first place, aware from its own unsuccessful 1979 litigation on that very jurisdictional point before the Kentucky Court of Appeals that it was bound by the contracts it made even with its ministers-in-training subject to the ecclesiastical authority of the church.⁴

⁴ E.g., February 29, 2012, Oral Argument before the Kentucky Court of Appeals, time stamp at 20:26. (Appellee’s counsel answering question whether all Kentucky seminary professors’

II. Finding an employee to be a minister for purposes of the ministerial exception, as the Kentucky Court of Appeals has done, does not automatically require courts to stop any inquiry into a dispute, as plaintiffs may be found to be a minister and still have certain kinds of claims heard.

Even where a plaintiff is found to be a minister in a jurisdiction where a ministerial-exception is long-recognized, courts have acknowledged that the ministerial exception does not serve as a full jurisdictional bar to all claims, but rather as a defense to particular kinds of claims. Petruska v. Gannon University, 462 F.3d 294, 310 (3d Cir. 2006), a leading ministerial-exception case that has been cited in briefs and at oral argument in Kirby and approvingly in Hosanna-Tabor, see Hosanna-Tabor, 132 S. Ct., 713, provides the appropriate analysis.

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

Petruska, 462 F.3d, 310 [emphasis supplied].

Similarly, Professor Kirby's claims do not present an ecclesiastical conflict; Professor Kirby was not removed because he was teaching contrary to the tenets of the church. In fact, according to the Seminary at the time of his termination and during Discovery before the Circuit Court, Professor Kirby was terminated for economic purposes. Even the severance agreement

contracts should be invalidated along the lines of Professor Kirby's with "...I can't say..." and judge replying that "[i]t sounds to me like your answer would be 'yes'").

offered to Professor Kirby by Appellee seminary would have had the force of Kentucky law, or else Appellee was engaging in fraud in the inducement in attempting to have Professor Kirby agree in 2009 to contractual terms that no court in the Commonwealth had the power to adjudicate if ever disputed. Quite clearly, the secular courts are the appropriate forum for deciding economic disputes based on contract claims, as Appellee through its conduct in 2009 conceded. The Kentucky Supreme Court is asked to again make plain this basic legal principle – a principle that is long-established in Kentucky law and in the precedents of the Supreme Court of the United States, and, as shown in Section I, *supra*, not at all in conflict with the rule of Hosanna-Tabor.

III. Which kinds of claims courts have the power to hear, and which kinds do they not have the power to hear, will always vary under the Free Exercise and Establishment clauses of the First Amendment, and Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11 (Ky.App. 1979), should not be overturned.

The Kentucky Court of Appeals previously ruled on the issue of contracts between seminaries and their charges in Vance. In that influential case, the Court rejected the seminary's repeated assertion that the Fayette Circuit Court lacked jurisdiction over a claim brought by one of its students in the Master of Divinity program attempting to enter Christian ministry who openly informed deans of his homosexuality and demanded that his withheld degree be granted despite this moral quandary. As in the case at bar, the Seminary unsuccessfully asserted a First Amendment-based jurisdictional-bar argument. Affirming the trial court's rejection of this assertion, the Kentucky Court of Appeals ordered as axiomatic that such breach-of-contract cases are to be heard by Kentucky Courts. See Vance, 596 S.W. 2d, 12-14 ("The Seminary argues three issues on appeal: (1) That the order compelling the conferring of the degree was a violation of the First Amendment right to freedom of religion... The Seminary asserts that the order

compelling the conferring of the graduate degree to Vance was a violation of the First Amendment. Again, we do not feel bound to decide this case on First Amendment grounds, but rather on the basis of whether the Seminary breached its contract to Vance by refusing to grant him his degree.”).

The reasoning in Vance indicates that breach-of-contract claims like those alleged in the present case in no way embody an “ecclesiastical matter,” making Appellee’s reliance on and discussion of Music v. United Methodist Church, 864 S.W.2d 286 (Ky. 1993), irrelevant. Music obviously did not in any way overturn Vance, a breach-of-contract case in which Kentucky’s trial and appellate courts lawfully engaged in interpretation of LTS’s catalog to decide an intra-Seminary dispute. To be sure, the Vance court specifically held that words and phrases such as “Christian ministry,” gospel transmitted through the “Bible,” “servants of the gospel,” “firmly committed to the role and mission with which they will begin their ministry,” “fundamental character” and “display traits of character and personality which indicate probable effectiveness in the Christian ministry” were not vague or indefinite. Vance, 596 S.W.2d at 13-14.

Even the dissenting opinion in Vance assumed that Kentucky courts should decide such breach-of-contract claims brought by Christians against seminaries, stipulating: “The seminary raised a question regarding religious freedom and the separation of church and state. ... I do not find that the trial court’s judgment violates the constitutional requirements of religious freedom and the separation of church and state.” Id at 16. Noting that this case was decided seven years after the ministerial exception was first articulated, in McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), Appellant asserted before the Kentucky Court of Appeals that the rule of this case should have been dispositive of the jurisdictional issue as to Appellant’s breach-of-contract

claim. Appellant's Supplemental Brief Analyzing Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. ____ (2012), at 7-8.

In Vance, in its striking down LTS's assertion of a First Amendment-based jurisdictional-bar argument, the Kentucky Court of Appeals ordered as axiomatic that such breach-of-contract cases are to be heard by Kentucky Courts. See Vance, 596 S.W. 2d, 12-14. This rule as set forth in Vance indicates that breach-of-contract claims like those alleged in the present case are justiciable because they do not embody an "ecclesiastical matter." The Court received the case as a breach-of-contract case in which the trial court lawfully engaged in interpretation of the seminary's catalog to decide an intra-Seminary dispute.

In the instant case, the Kentucky Court of Appeals merely recognized the existence of the 33-year-old settled rule of, its Vance precedent. In a footnote near the end of the opinion, the panel noted that the Seminary "arguably questions the continued validity of the court's reasoning in *Lexington Theological Seminary, Inc. v. Vance*, 596 S.W.2d 11, 14 (Ky.App. 1979), wherein the court likened the Seminary to a private graduate school, i.e., a college or a university." Kirby v. Lexington Theological Seminary, 2012 WL 3046352 (Ky.App.) at *6. Unfortunately, the Kirby court offered no further rule on "the continued validity of [its] reasoning." See id.

Thus, Kentucky law currently now appears to hold two contradictory conclusions when viewing contractual relations between seminaries and those who would contract with them; the seminaries will be treated as "essentially a private graduate school" under Vance, permitting judicial review, but as inherently "a religious institution" under the ruling of the Court of Appeals in Kirby, invalidating jurisdiction, while deciding them if following Vance. Kentucky is home to at least six seminaries, including those of Disciples of Christ, Southern Baptist, Methodist, and Presbyterian Church (U.S.A.) identities. To allow such a conflict before

Kentucky courts to stand invites further confusion on the issue while contracts continue to be entered into.

IV. Hosanna-Tabor embodies guideposts limiting the scope of the ministerial exception such that LTS lies outside the exception as to Professor Kirby's claims.

Finally, even if Vance were overturned in the instant proceeding, and even if the rule of Hosanna-Tabor were simultaneously assumed by this Court to be applicable here, Professor Kirby's employee status falls far short of that which the Supreme Court envisioned as ecclesiastically barred from secular-court oversight. The Hosanna-Tabor opinion sets forth four considerations in determining when an employee is a minister covered under the exception that are unsatisfied by Professor Kirby's employment, a ministerial calculus resembling the three-part test distilled by Appellant for this Court from caselaw deriving from Watson as well as the more modern Milivojevich.

The Supreme Court framed Hosanna-Tabor's rule in terms of a self-professed minister uniquely subject to plaintiff Cheryl Perich's denomination's ecclesiastical "call" and revocation of said "call." Hosanna-Tabor, 132 S.Ct., at 695. In fact, the Court's entire discussion, deliberately tailored, was premised on Perich's incontrovertible status as "called to [her] vocation by God" as "commissioned." Id. Here, Professor Kirby was not formally "called" (he was an academic recruit), was not a commissioned minister (he was a layman), and was not employed in his church (he was Christian Methodist Episcopal, not Disciples of Christ). See Fayette Circuit Court Record, Civil Action No. 09-CI-04480, Plaintiff's Response to Defendant's Renewed Motion to Dismiss or in the Alternative Motion for Summary Judgment, p. 436, Affidavit of Dr. Jimmy Kirby, p. 440. The Supreme Court's guidance was intentionally narrow: "The Court, however, does not adopt a rigid formula for deciding when an employee qualifies as

a minister,” and the title minister, “by itself, does not automatically ensure coverage” of the ministerial exception. Hosanna-Tabor, 132 S.Ct., at 697. “Today we hold only that the ministerial exception bars such a suit. **We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.** There will be time enough to address the applicability of the exception to other circumstances if and when they arise.” Id. at 710 [emphasis supplied].

But the High Court certainly provided clarity on the high threshold of voluntary and bilateral commitment to a church that is required for an employee to rise to the level of a minister, relying on four considerations in its assessment of whether Perich was ministerial. See id. at 708 (“In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.”). As suggested above, it can never be lost on this honorable Court that the Supreme Court grounded this guiding ministerial calculus in the post-Civil War Constitutional law precedents and historiography relating to the established church in England that track these authorities and interpretations furnished to Kentucky Court of Appeals in the Brief for Appellant.

The Supreme Court’s four considerations to determine who is a minister are: “the formal title given ... by the Church, the substance reflected in that title, [the employee’s] own use of that title, and the important religious functions [] performed for the Church.” Id.⁵ Here,

⁵ The Supreme Court’s four-tiered analysis bears a striking resemblance to the three-tiered approach distilled by Appellant from decades of Constitutional caselaw and submitted to the Kentucky Court of Appeals by Professor Kirby. Accord Brief for Appellant at 9 (“(1) The plaintiff must have been voluntarily affiliated with the religion that acted offensively. (2) The plaintiff must have knowingly assented to the religion’s authority. (3) The challenged

Professor Kirby engaged in none of what Perich did, as Appellee's own collection of facts shows. See generally Brief of Appellee at 15-20 (devoid of any facts from the record showing that Professor was called by a church to, or held himself out in, the Christian ministry and acted pursuant to employment therein). To be sure, the Supreme Court almost scolds Appellees setting forth arguments like Lexington Theological Seminary's today, advising: "The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed **and the other considerations discussed above.**" Hosanna-Tabor, 132 S.Ct., at 709 (emphasis supplied).

The "other types of suits" from which the bar of Hosanna-Tabor is expressly cautioned include breach-of-contract suits. Cf. id at 710. Accord Douglas Laycock, "Hosanna-Tabor and the Ministerial Exception," 35 Harv. J.L. & Pub. Pol'y 839 (2012), at 861 (constitutional authority who argued successfully for Supreme Court's recognition of ministerial exception in Hosanna-Tabor explaining the most obvious limit on high court's unanimous decision by flatly declaring that under Hosanna-Tabor, "[a] minister's contract claim for unpaid salary or retirement benefits surely can proceed to the merits.").⁶

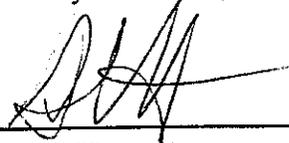
For the reasons set forth herein, the Kentucky Supreme Court should correct the Court of Appeals in its improper affirmance of the abrogation of the non-ministerial employee Appellant's rights to carry forward his claims of breach of contract, breach of the implied duty of

action must have been based upon spiritual, doctrinal, and/or ecclesiastical ground (most notably demonstrated by the final ruling of what Milivojevic called the highest ecclesiastical adjudicatory body of the religious group.").

⁶ With the notable and singular exception of the Roman Catholic Church's Pope, churches do not grant tenure to ministerial employees precisely in order to maintain absolute ecclesiastical control, without limitation, over who for them ministers to the faithful. Cf. Hosanna-Tabor, 132 S.Ct. at 705 (opinion of the Court) (quoting with reaffirmation Milivojevic, 426 U.S. 696 (1976) at 724, for its condensed version of the Watson formulation: "[T]he First Amendment 'permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.'").

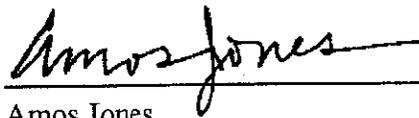
good faith and fair dealing, and racial discrimination, and the decision of the Fayette Circuit Court should be REVERSED.

Respectfully Submitted,



Douglas C. Howard
Howard Law Group, PLLC
PO Box 562
213 St Clair St, Ste 101
Frankfort KY 40601-0562
PH: (502) 352-4950
E-Mail: doug@howardlawgroup.com

and



Amos Jones
The Amos Jones Law Firm
1150 K Street NW, Ste. 902
Washington DC 20005-6809
PH: (202) 351-6187
E-Mail: jones@amosjoneslawfirm.com

Co-counsel for Appellant

APPENDIX

1. Kentucky Court of Appeal's July 27, 2012 Opinion Affirming Order entered by Fayette Circuit Court.
2. Fayette Circuit Court Order entered September 2, 2010 Dismissing Action
3. Verified Complaint filed by Dr. Jimmy Kirby, August 24, 2009