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

DR. LAURENCE H. KANT — **APPELLANT**

V.

LEXINGTON THEOLOGICAL SEMINARY — **APPELLEE**

ON APPEAL FROM
KENTUCKY COURT OF APPEALS
NO. 2011-CA-000004-MR

ORIGINAL ACTION ARISING FROM
FAYETTE CIRCUIT COURT
CASE NO. 2009-CI-04070
HONORABLE KIMBERLY N. BUNNELL, JUDGE

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS IN SUPPORT OF DR. LAURENCE H. KANT

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CERTIFICATE OF SERVICE

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STATEMENT OF *AMICUS* INTEREST

The American Association of University Professors (AAUP) is a national organization devoted to the principles of academic freedom, academic due process, and shared governance. Membership is open to all faculty, librarians, and academic professionals at two-year and four-year accredited public and private colleges and universities. AAUP regularly submits *amicus* briefs in state and federal courts when issues of academic freedom and academic due process are at stake. Because of the far reaching implications of the Court of Appeals' decision for academic tenure and due process at Kentucky universities, AAUP respectfully submits this *amicus* brief to highlight issues left unconsidered by the Court of Appeals.

ARGUMENT

The Lexington Theological Seminary ("LTS") and Dr. Laurence Kant entered a contract that assured Dr. Kant of a tenured position on its faculty in exchange for his agreement to abide by certain corresponding restrictions that LTS imposed through its Faculty Handbook. Having accepted all of the benefits of this arrangement, LTS now attempts to evade its burdens by terminating Dr. Kant's appointment on grounds not found in the handbook and by seeking refuge under a First Amendment doctrine recently created by the United States Supreme Court simply to permit churches freedom to select their own ministers. In fashioning this narrow principle of law—known as the "ministerial exception"—the Supreme Court only intended to prevent courts from interfering in internal church disputes over doctrine. As LTS admitted, its contract dispute with Dr. Kant arises out of the school's desire to assert greater control over its budget. Consequently, Kentucky courts have jurisdiction to decide this matter based upon neutral principles of contract law. In the absence of action by this Court, faculty committed to a particular university in return for assurances of academic freedom and job security would find those promises illusory, if not affirmatively

misleading. Because courts in the Commonwealth have the ability to hear simple contract claims against religiously affiliated institutions, the AAUP respectfully submits this *amicus* brief requesting that this Court reverse the Court of Appeals' decision.

I. THE SUPREME COURT'S NEWLY MINTED MINISTERIAL EXCEPTION DOES NOT APPLY TO CONTRACT DISPUTES.

The Supreme Court has narrowly carved out a ministerial exception to protect religious institutions from judicial interference with church doctrine, not to provide them an escape hatch to evade previously negotiated contractual obligations on which others have relied. Recognizing the danger that always attends a judicially fashioned privilege, the Supreme Court expressly declined to hold that the ministerial exception bars contract claims by employees against their religiously affiliated employers. To do otherwise would upset decades of case law that requires courts to apply "neutral principles of law" to contractual and property disputes involving religious institutions. *Jones v. Wolf*, 443 U.S. 595, 597 (1979). Where, as here, a court can interpret the terms of a contract without adjudicating issues of religious doctrine, a court must decide the legal and factual disputes before it. *Id.* Because the Court of Appeals and the Circuit Court mistakenly held that the ministerial exception broadly prevents courts from hearing standard contract suits against religious institutions, this Court should reverse the judgment below and remand for further proceedings.

A. *Hosanna-Tabor* Expressly Excluded Contract Claims from Its Holding.

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Supreme Court, for the first time, adopted the ministerial exception under the Constitution's First Amendment. 132 S. Ct. 694, 706 (2012). The ministerial exception, based on religious groups' right under the Free Exercise Clause to shape their own "faith and mission," prohibits application of certain anti-discrimination laws to "the employment relationship between a religious institution and its ministers." *Id.* at 705-06. In that case, a "commissioned minister"

of the Lutheran Church, who taught at the church's elementary school, sued the church under the Americans with Disabilities Act. *Id.* at 700-01. The dispute arose when the church refused to permit her to return to work after a period of disability leave. *Id.* at 700. The EEOC subsequently sustained the charges of discrimination and filed suit against the church, asserting that it had violated the ADA by retaliating against the minister for asserting her rights under the Act. *Id.* at 701; *see* 42 U.S.C. § 12203(a).

On appeal, the Supreme Court held that the ministerial exception barred the EEOC's suit because the plaintiff (1) was a formally trained, commissioned Lutheran minister; (2) publicly held herself out as a minister, for example, by taking a tax deduction available only to those in the ministry; and (3) led daily religious rituals in the classroom. *Hosanna-Tabor*, 132 S. Ct. at 707-08. Consequently, any further inquiry into the church's obligation to retain one of its own ministers to perform explicitly religious functions would impermissibly entangle the courts in the internal affairs of a religious institution. *Id.* at 709. The Court, however, carefully curtailed the breadth of its holding, explaining:

> The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. 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.

Id. at 710 (emphasis added). Thus, *Hosanna-Tabor* provides no support for the view expressed by the Court of Appeals' majority that the ministerial exception bars simple contract suits.

B. The Law Subjects Religious Institutions to "Neutral Principles" of Contract Law.

The Supreme Court declined to extend the ministerial exception to contract disputes for a simple reason: Decades of settled case law requires courts to adjudicate suits involving religious organizations when courts can do so by applying "neutral principles of law." *See Jones*, 443 U.S. at 597. Indeed, both state and federal courts alike—before and after *Hosanna-*

Tabor—routinely have decided claims against religious institutions, recognizing that normal contract law poses no threat to First Amendment freedoms. *See, e.g.*, *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 U.S. Dist. LEXIS 43240, at *14-17 (S.D. Ohio Mar. 29, 2012) (declining, post-*Hosanna-Tabor*, to apply ministerial exception to teacher's claims against religious school). Dr. Kant's claim against LTS involves the interpretation of language very similar to countless tenure contracts nationwide. Because a court need only apply neutral principles of law to resolve Dr. Kant's claim without meddling in church doctrine, Kentucky's courts have jurisdiction to hear this case. By refusing to reach the merits of the complaint below and by thus failing to hold LTS accountable for its contractual commitments, the Court of Appeals' majority not only has abandoned settled precedent but also has cast serious doubt on the validity of every employment contract in the Commonwealth between religious institutions and their employees.

The Supreme Court set forth the appropriate analysis of claims involving religious institutions in *Jones v. Wolf*, where the Court faced a property dispute between two factions of a Georgia Presbyterian congregation that had split over religious differences. 443 U.S. at 598. The complaint asked the courts to decide which faction owned the local church's property. *Id.* Rejecting the argument that the First Amendment requires courts to show "compulsory deference" to a religious institution's internal decision-making process, the Supreme Court upheld the Georgia courts' determination that they could hear the case. *Id.* at 605. As the Court explained, a court may hear *any* dispute as long as it can apply "neutral principles of law" that rely "exclusively on objective, well-established concepts of . . . law familiar to lawyers and judges." *Id.* at 603. Jurisdiction remains even where a court has to examine "certain religious documents, such as a church constitution," that "incorporate[] religious concepts," as long as a court can reach a decision without becoming entangled in church doctrine. *Id.* at 604.

As the Supreme Court made clear, states have "an obvious and legitimate interest in the peaceful resolution of . . . disputes, and in providing a civil forum . . . ." *Id.* at 602. If normal precepts of trust and property law controlled the issue of ownership in *Jones*, then Georgia's courts could assert their interest in providing "a civil forum" and decide the merits. *Id.* at 606.

With the above principles in mind, courts across the nation regularly provide a forum for the resolution of contract disputes involving religiously affiliated parties. *See, e.g.*, *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1360 (D.C. Cir. 1990) (remanding case to district court to adjudicate oral contract claim because "the issue of breach of contract can be adduced by a fairly direct inquiry"); *Jenkins v. Trinity Lutheran Church*, 825 N.E.2d 1206, 1213 (Ill. Ct. App. 2005) (reversing trial court's dismissal of minister's breach of contract claim because dispute may be decided based on "neutral principles" of law); *Pearson v. Church of God*, 478 S.E.2d 849, 853 (S.C. 1996) (holding that South Carolina's courts could adjudicate dismissed minister's claim to pension benefits because "courts cannot avoid adjudicating rights growing out of civil law"); *Fellowship Tabernacle v. Baker*, 869 P.2d 578, 583 (Idaho Ct. App. 1994) (affirming jury's verdict in favor of pastor against his former church on breach of contract claim, noting "Simply because a church is involved in the litigation does not make the matter ecclesiastical"); *Gipe v. Superior Court of Orange Cnty.*, 177 Cal. Rptr. 590, 595 (Cal. Ct. App. 1981) (allowing proceedings against church for breach of contract related to former minister's compensation because "the court can resolve the property dispute without attempting to resolve the underlying ecclesiastical controversy"); *Bodewes v. Zuroweste*, 303 N.E.2d 509, 511 (Ill. Ct. App. 1973) (reversing trial court and remanding for consideration of priest's compensation contract with the church's bishop); *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679, 714 (1872) (holding that, in disputes involving religious entities, "the courts when so called on must perform their functions as in other cases"). This unbroken chain of

authority rests on a common sense principle of fairness: "[T]he first amendment does not afford defenses against promises made and contracts formed." *Minker*, 894 F.2d at 1361; *accord Jenkins*, 825 N.E.2d at 1212 ("It was not the intent of (the first amendment) . . . that civil and property rights should be unenforceable in the civil courts simply because the parties involved might be church and members, officers, or the ministry of the church." (omission in original)).

The rule advocated by LTS, on the other hand, would unfairly immunize religious institutions from contractual burdens that they have negotiated and would also undermine the long-term interests of the institutions themselves. As a matter of necessity, universities throughout the Commonwealth must offer enforceable tenure contracts to faculty; otherwise, the threat posed by the common law employment-at-will doctrine would render these positions far less attractive and thus impair a school's ability to hire or retain faculty. *See Hill v. Ky. Lottery Corp.*, 327 S.W.3d 412, 420 (Ky. 2010) (noting that Kentucky follows "the common law doctrine that an employer may discharge his at-will employee for good cause, no cause, or for a cause that some might view as morally indefensible" (internal quotation marks and citation omitted)). Universities use the promise of job security to attract talented faculty who, in return, forgo other potential teaching and research opportunities. This is equally true in the context of a religious institution. The Court of Appeals' majority opinion, however, calls into question the viability of employment contracts at every religious institution in the Commonwealth. Were the decision below left standing, promises made and actions taken in reliance on contractual guarantees would evaporate. No enforceable tenure contracts could be written, as a contract is only as good as one's ability to enforce it. *Cf. Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR, 2012 Ky. App. LEXIS 124, at *33-34 (Ky. App. July 27, 2012) (holding that contract claims against religiously affiliated educational institutions are prohibited by the ministerial exception). The prospect that tenure at a religious institution

is merely symbolic because the institution could later invoke a "ministerial exception" harms the interests of both the professors and the institution.

The breadth of the rule advocated by LTS—and adopted by the courts below—would not only affect employment contracts but also potentially all other contracts that religious institutions enter into every day in the conduct of normal business. In light of the Court of Appeals' decision, businesses, independent contractors, and others who negotiate with religious institutions cannot be certain of the enforceability of their agreements, causing an understandable reluctance on the part of any well-advised business, potential employee, or faculty member to enter into a contractual relationship with churches, synagogues, and their affiliates. Heretofore, a religious institution has "always [been] free to burden its activities voluntarily through contracts [that] are fully enforceable in civil court." *Minker*, 894 F.2d at 1359. By expanding *Hosanna-Tabor*'s holding far beyond its original intent, the Court of Appeals has subverted fundamental principles of contract law to the detriment of the Commonwealth's religious institutions and their employees. Because the Court of Appeals' majority failed to apply neutral principles of contract law to the present dispute and failed to consider the broader implications of its failure to do so, this Court should reverse its decision.[1]

[1] Although the Court of Appeals' lead opinion purported to hold that the ecclesiastical matters rule also prohibited adjudication of Dr. Kant's lawsuit, *see Kant*, 2012 Ky. App. LEXIS 124, at *18-20, Chief Judge Acree's concurring opinion declined to join this holding. *See id.* at *37 (Acree, C.J., concurring) ("However, that narrow review does not require application of precedent relating to the ecclesiastical matters doctrine.") The Chief Judge concurred in the dismissal of Dr. Kant's suit solely on the ground of the ministerial exception. *Id.* Thus, two judges of the Court of Appeals, forming a majority, held that the ecclesiastical matters rule does not bar Dr. Kant's claim. *See id.* (stating that only "precedent relating to the ministerial exception" requires dismissal of lawsuit); *id.* at *44-49 (Keller, J., dissenting) (concluding that neither ecclesiastical matters rule nor ministerial exception applies). Should this Court decide to reach the issue despite LTS's failure to petition for review of that holding, the rule does not apply to this case for the reasons given in Sections II.B and C above. As explained by this Court in *Music v. United Methodist Church*, the ecclesiastical matters rule applies when a case "would inevitably require interpretation of provisions . . . that are highly subjective, spiritual, and ecclesiastical in nature." 864 S.W.2d 286, 290 (Ky. 1993). Dr. Kant's contractual claim does not require this Court to interpret any "subjective, spiritual, and ecclesiastical" language; neutral principles of law suffice. *See id.* at 288 (explaining that ecclesiastical matters rule will apply when neutral principles of law *cannot* be used).

C. The Court Can Resolve Dr. Kant's Claim by Application of Neutral Principles of Contract Law Without Reaching Any Theological Questions.

A fair reading of Dr. Kant's contract claim demonstrates that a Kentucky court may decide the issues presented without becoming enmeshed in religious doctrine. Indeed, a court could refuse jurisdiction only by effectively adopting a standard of "compulsory deference" to virtually every action of a religious institution. *Cf. Jones*, 443 U.S. at 605 (rejecting argument that courts can only affirm "authoritative resolution of the dispute within the church itself"). Although certain portions of the Faculty Handbook contain religiously tinged language—as was the case in *Jones v. Wolf*—the operative provisions governing the dismissal of tenured faculty do not. The trial court need only read and interpret the three permissible reasons for dismissal of a tenured faculty member and then determine if LTS's admitted reason for terminating Dr. Kant—financial exigency—falls within the permissible grounds for dismissal. Because this neutral inquiry does not intrude on any First Amendment freedoms and is precisely the type of contractual interpretation that Kentucky's courts perform daily, the Court of Appeals erred by dismissing Dr. Kant's case.

The Supreme Court was clear in *Jones*: The mere presence of religious terms in a document governing the employment relationship between a party and a religious institution does not remove any subsequent dispute from the authority of secular courts. *Id.* at 604. Instead, a court must "scrutinize the document in purely secular terms" and determine whether the operative language *necessary* for resolution of the dispute requires interpretation of "religious precepts." *Id.* If it does not, regardless of whether the document as a whole "incorporates religious concepts," then the court is "constitutionally entitled" to decide the issue before it based on neutral principles of law. *Id.*

LTS attempts to avoid its contractual obligations by focusing the courts' attention on the first page of its Faculty Handbook, which states its mission in religious terms. *See* Mem. in

Supp. of Def.'s Renewed Mot. to Dismiss ("Def.'s Mem.") at 2 (citing to mission statement). The provisions governing the dismissal of a tenured member of the faculty, however, appear on page fourteen of the Faculty Handbook:

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

(Faculty Handbook at 14 (emphasis added).)

As the Complaint makes clear, and as LTS admitted, LTS terminated Dr. Kant because of a "financial exigency." Compl. ¶¶ 12-13; Answer ¶ 12; *see Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (holding that, on motion to dismiss, movant "admits as true the material facts of the complaint"). The question the trial court must answer to determine Dr. Kant's breach of contract claim is a secular one, specifically, whether a "financial exigency" constitutes (1) a moral failing,[2] (2) a failure by Dr. Kant to follow the duties of a tenured professor, or (3) conduct detrimental to LTS. If not, then LTS breached its contract with Dr. Kant. *See Nigrelli v. Catholic Bishop of Chicago*, No. 84 C 5564, 1991 U.S. Dist. LEXIS 3083, at *9 (N.D. Ill. Mar. 15, 1991) (finding no impermissible religious question when "defendant's reasons for termination are not religious-based").

Undoubtedly realizing early in this litigation that it could not remain true to its initial claim of "financial exigency" and plausibly contend that Dr. Kant's suit infringes on its religious freedom, LTS belatedly described its termination of Dr. Kant instead as a "spiritual decision to restructure its curriculum in order to reach more of 'today's Church.'" (Def.'s

[2] Claims involving the adjudication of a morals clause contained in a religious institution's employment contract do not require a court to decide questions of religious doctrine. *See Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 668 (6th Cir. 1999) (allowing discrimination claim against Catholic elementary school based on contractual morals clause to be heard by trial court); *Boyd v. Harding Academy*, 88 F.3d 410, 412-15 (6th Cir. 1996) (upholding and enforcing morals clause of Church-of-Christ-affiliated school).

Mem. at 1). Should the trial court find LTS's belated attempt to recharacterize its financial concerns as a spiritual enterprise, neutral principles of law still control this case. *Cf. Nigrelli*, 1991 U.S. Dist. LEXIS 3083, at *9 (holding that there is no issue under the First Amendment when "[t]he board made no mention of religious principles *when they [sic] refused to renew [the plaintiff's] contract*" (emphasis added)). The trial court need not question the veracity of LTS's self-serving explanation; it can take it at face value. The operative legal question nevertheless remains the same: Does the *institution's* desire to remake its curriculum amount to a determination that *Dr. Kant* suffered from a moral failing, failed to abide by the Faculty Handbook, or otherwise brought discredit on the institution? LTS failed to present any support for such a finding. Because the court does not need to resolve the validity of LTS's decision to reinvent its curriculum, the court will not run afoul of the First Amendment by becoming entangled in ecclesiastical affairs. *See Jones*, 443 U.S. at 604 (no impermissible entanglement unless a court must decide a question of religious doctrine); *Jenkins*, 825 N.E.2d at 1212 (adjudicating pastor's employment contract because "[a]n agreement for wages and benefits is governed by principles of civil contracts law and can be enforced by our courts"); *Pearson*, 478 S.E.2d at 853 (interpreting minister's pension contract because "[a] civil court is not being asked to adjudicate a matter of religious law . . . . Rather, it is being called to resolve a contractual dispute").

In the final analysis, LTS voluntarily negotiated a contract that gave it a limited option to terminate a tenured faculty member only on the basis of three enumerated grounds. It then terminated Dr. Kant for a different reason—financial exigency. The subsequent dispute between Dr. Kant and his former employer is therefore purely contractual, not theological, and thus does not require Kentucky's courts to adjudicate any issue of religious doctrine. Because neutral principles of law first alluded to more than a century ago govern this case, the

Commonwealth's courts can resolve Dr. Kant's claim on the merits. *See Watson*, 80 U.S. at 714 (holding that, when faced with a dispute involving a religiously affiliated party, "the courts when so called on must perform their functions as in other cases"). The Court of Appeals' erroneous opinion to the contrary should be reversed.

II. EVEN IF THE MINISTERIAL EXCEPTION COVERED CONTRACTS, IT WOULD NOT APPLY TO DR. KANT.

Even had the Supreme Court stretched the ministerial exception to cover contract disputes, it would not apply to Dr. Kant. The inquiry into whether the affirmative defense should apply to any specific individual is highly fact-intensive, taking into account all relevant evidence. Moreover, federal courts decline to designate someone a "minister" within the exception solely because that person teaches at a religious institution. Consequently, the Court of Appeals' majority erred by relying on LTS's status as a seminary and by refusing to determine whether or not Dr. Kant actually served LTS as a minister. At a minimum, the record demonstrates a genuine factual dispute concerning the role he played on the LTS faculty. *See Norton Hosps., Inc. v. Peyton*, 381 S.W.3d 286, 290 (Ky. 2012) (holding summary judgment appropriate only when there are "no genuine issues of material fact" and cautioning that the "record must be viewed in a light most favorable to the nonmoving party and all reasonable doubts must be resolved in that party's favor").

In *Hosanna-Tabor*, the Supreme Court instructed that a court must consider "all the circumstances of [the plaintiff's] employment" when deciding whether the ministerial exception applies and emphasized that no one factor determines the outcome. 132 S. Ct. at 707; *accord Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 331 (3d Cir. 1993) ("[C]ourts will continue to consider these situations on a case-by-case basis."); *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp.2d 211, 221 (E.D.N.Y. 2006) ("The inquiry into whether an employee should be considered clergy is fact-specific."). As mentioned previously, the

Justices in *Hosanna-Tabor* considered many factors before fitting the plaintiff within this narrow exception, emphasizing her formal training and commissioning as a Lutheran minister at a Lutheran institution, her decision to describe herself publicly as a minister and take a related tax deduction, and her daily leadership of religious rituals in the classroom. 132 S. Ct. at 707-08.

In sharp contrast to the Supreme Court's approach in *Hosanna-Tabor*, the Court of Appeals' majority labeled Dr. Kant a "minister" solely because he served LTS as a professor. *See Kant*, 2012 Ky. App. LEXIS 124, at *29 (holding that Kant was a minister "[b]ecause Kant's primary duties involved teaching religious-themed courses at a seminary"). *But see Kant*, 2012 Ky. App. LEXIS 124, at *39 (Acree, C.J., concurring) (expressing unease with lead opinion's focus on Kant's status as seminary professor because "[t]eaching at a seminary as opposed to a grade school, then, is just one circumstance" considered). By relying on only one factor, the Court of Appeals ignored not only the Supreme Court but also numerous other federal court decisions that regularly conduct a wide-ranging analysis of an employee's responsibilities. *See, e.g.*, *Geary*, 7 F.3d at 331 (examining all of plaintiff's duties and concluding that despite "apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles, a court could adjudicate [plaintiff]'s claims without . . . entanglement"); *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980) (declining to find that professors at religious university were ministers and observing "That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment . . . purely of ecclesiastical concern"); *Dias*, 2012 U.S Dist. LEXIS 43240, at *14-15 (agreeing with plaintiff's contention that "no court has held a teacher at a parochial school is a ministerial employee solely by virtue of his or her position as a teacher" and finding that plaintiff is not a minister after examining all available

evidence); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp.2d 849, 853 (S.D. Ind. 1998) (finding that practicing Catholic teacher at Catholic school not a minister after considering full scope of her duties, which included teaching secular and religious subjects, and holding "the application of the ministerial exception to non-ministers has been reserved generally for those positions that are . . . close to being exclusively religious based").

The Court of Appeals majority's narrow focus on one fact obscures numerous other facts in the record supporting the conclusion that Dr. Kant did *not* serve as a minister. As the Court of Appeals' dissent aptly noted, LTS publicly described itself as an institution that offered courses for students "who 'simply want an opportunity to study Christianity in a disciplined way.'" *Kant*, 2012 Ky. App. LEXIS 124, at *45 (Keller, J., dissenting) (quoting Letter from LTS President Johnson). LTS also offered a joint degree in social work with the University of Kentucky. *Id.* Indeed, in its own advertising to potential students, LTS touted itself as "intentionally ecumenical with *almost 50 percent of its enrollment coming from other denominations* . . . . [and staff who] are likewise ecumenical, *having members from various traditions*." *Id.* (quoting LTS brochure) (emphasis added).

LTS's hiring of Dr. Kant reflects this ecumenical focus, and an examination of his teaching responsibilities confirms that he never functioned as a minister of the Disciples of Christ. Dr. Kant is Jewish, never led a Christian worship service or otherwise officiated at a Christian event, and never espoused Christian or Disciples of Christ doctrine. *Compare* Kant Second Aff. ¶ 3, *with Hosanna-Tabor*, 132 S. Ct. at 707-08 (finding that plaintiff was a minister, in part, because she was practicing Lutheran, commissioned as Lutheran minister, and led students in prayer three times daily). Dr. Kant also never publicly described himself as a minister or as a member of the Disciples of Christ. Nor did he ever take any tax deductions reserved for members of the ministry. *Compare* Kant Second Aff. ¶ 11 (affirming that Dr. Kant

did not consider himself a minister or take ministerial tax deductions), *with Hosanna-Tabor*, 132 S. Ct. at 707-08 (finding plaintiff was minister, in part, because she "held herself out as a minister of the Church" and "claimed a special housing allowance on her taxes" available only to those in ministry).

Apart from the absence of anything to indicate ministerial responsibilities, the record instead contains substantial evidence that Dr. Kant performed a purely educational function. Before its dispute with Dr. Kant ended up in court, LTS described him as a Professor of the History of Religion; and his course list contained numerous classes that would be at home in any secular liberal arts college, including "Hatred, Violence, Genocide, and the Human Condition"; "Jesus in Film and Literature"; "Religion and Values in American Society"; "Religious and Mythic Symbols"; and "World Scriptures." (Kant's Jan. 2006 Self-Evaluation for Tenure at 4, RA 0156); *cf. EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 457 (D.C. Cir. 1996) (supporting finding that faculty member was minister because she was within Department of Canon Law and Theology rather than broader Department of Religious Studies); *Guinan*, 42 F. Supp.2d at 850, 853 (declining to find teacher was minister after considering her overall course list). In short, Dr. Kant lectured on world religions rather than espousing and propagating the tenets of the Disciples of Christ. *See Kant*, 2012 Ky. App. LEXIS 124, at *47 (Keller, J., dissenting) (distinguishing between "teaching religion and teaching about religion" in explaining why ministerial exception does not apply). *Compare* Dare Self Eval. Response 2003A (noting that Dr. Kant provided example of "personhood and integrity" rather than "one of doctrine"), *with Mississippi College*, 626 F.2d at 485 ("That faculty members are expected to serve as exemplars of practicing Christians does not serve to make the terms and conditions of their employment . . . purely of ecclesiastical concern.").

By ignoring the Supreme Court's instruction to consider "all the circumstances" of Dr. Kant's employment and instead relying only on LTS's self-described status as a religiously affiliated institution, the Court of Appeals ignored compelling evidence that Dr. Kant was not a minister. *See Hosanna-Tabor*, 132 S. Ct. at 707. Accordingly, even if the ministerial exception were applied to Dr. Kant's contract claim, this Court would still have to vacate the Court of Appeals' opinion and remand this case to the trial court for further factual development under the proper, "all the circumstances" standard. *Id.*

III. CONCLUSION

For the reasons mentioned above, *amicus curiae* AAUP respectfully submits that the Court of Appeals' majority erred in applying the ministerial exception to Dr. Kant instead of adjudicating his contract claim using neutral principles of law. At a minimum, this Court should vacate the Court of Appeals' opinion and remand this matter for a proper development of the factual record to permit a consideration of all circumstances relevant to the applicability of this narrow constitutional exception.

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Respectfully Submitted,

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