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

DR. LAURENCE H. KANT — APPELLANT

APPEAL FROM COURT OF APPEALS CASE NO. 2011-CA-000004
AND FROM FAYETTE CIRCUIT COURT CASE NO. 09-CI-4070

v.

LEXINGTON THEOLOGICAL SEMINARY — APPELLEE

BRIEF OF *AMICUS CURIAE*, ANTI-DEFAMATION LEAGUE, IN SUPPORT OF APPELLANT

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief of Amicus Curiae was served, via first-class U.S. Mail, postage prepaid, this 29th day of April, 2013, on the following: Richard G. Griffith, Elizabeth S. Muyskens, Stoll Keenon Ogden, PLLC, 300 West Vine Street, Suite 2100, Lexington, Kentucky 40507; Christopher D. Miller, Arnold & Miller, PLC, 401 West Main Street, Suite 303, Lexington, Kentucky 40507; Hon. Samuel P. Givens, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 and the Hon. Kimberly N. Bunnell, Judge, Fayette Circuit Court, 120 N. Limestone, Lexington, Kentucky 40507.

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STATEMENT OF POINTS AND AUTHORITIES

PURPOSE OF THE BRIEF AND PARTICULAR ISSUES ADDRESSED

Amicus Curiae, Anti-Defamation League ("ADL"), submits this brief in support of Appellant Laurence Kant. Religious organizations, like their secular counterparts, are always free to bargain with their employees for certain contractual protections and thus to avail themselves of neutral principles of contract law. But, having done so, they are not free to demand from government a special exemption from the legal consequences of those bargains. Employees of religious institutions—whether or not they are ministerial in nature—have a right to pursue breach-of-contract claims against their employers where, as here, they can do so without entangling courts in doctrinal matters. Holding otherwise, as the courts below did, is contrary to the substantial weight of authority and raises serious Establishment Clause concerns about courts impermissibly favoring religious organizations over those who contract with them. These concerns also raise issues under the Kentucky Constitution, which specifically prohibits state support of religious organizations. *See* Ky. Const. §5. Because Kant's breach-of-contract claim against Lexington Theological Seminary ("LTS") can be resolved solely by reference to neutral principles of contract law, the ecclesiastical matters rule does not apply.

Granting LTS blanket immunity from actions to enforce the binding contractual obligations it voluntarily undertook would not only fail to advance any First Amendment interests, but would also upset the delicate balance between the First Amendment's Religion Clauses, and would unreasonably deny Appellant access to justice. ADL therefore requests that this Court reverse the decision of the Court of Appeals.

INTEREST OF AMICUS

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. It is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. ADL supports the separation of Church and State embodied in the Establishment Clause, but also zealously defends the Free Exercise Clause as essential to the health and preservation of our Republic. Another core ADL belief is that the Religion Clauses of the First Amendment must not be used improperly to deny access to justice in civil courts. To advance these goals, ADL has participated in many major Religion Clause cases over the last half century.[1] This case requires a careful balance of these First Amendment Clauses. Although ADL opposes infringement on the First Amendment protections afforded to religious institutions and organizations, it also recognizes that courts must not apply the First Amendment so broadly that it bestows on religious organizations blanket immunity from all actions to enforce the binding contractual obligations they voluntarily undertake. ADL thus has a strong interest in the issues to be decided and the outcome of this appeal.

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[1] *See, e.g.*, ADL briefs *amicus curiae* filed in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Engel v. Vitale*, 370 U.S. 421 (1962); and *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

ARGUMENT

I. The Ministerial Exception Does Not Apply to Breach-Of-Contract Actions.

The "ministerial exception" does not bar the enforcement of a religious organization's bargained-for contractual obligations. Over two centuries of jurisprudence compel this conclusion, and the United States Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706 (2012), does not undermine it. The Supreme Court in *Hosanna-Tabor* "express[ed] 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. Indeed, even the parochial school Petitioners acknowledged that, "[w]hen a church signs a contract written in secular language, the contract can be enforced unless the basic dispute is entangled in religious questions." Reply Brief for the Petitioner at 9, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694 (2012), 2011 WL 3919718. As explained *infra*, applying the ministerial exception to common law contract claims would unmoor the exception from the First Amendment principles underlying it and raise serious federal and state constitutional concerns.

A. Applying The Ministerial Exception To Bar Ministerial Employees From Enforcing Binding Contracts Does Not Advance First Amendment Interests And Instead Unreasonably Denies Access to Justice.

Cloaking religious organizations with blanket immunity from common law actions, like this one to enforce voluntary contractual commitments, advances no legitimate First Amendment interest. While the First Amendment's Religion Clauses surely protect religious organizations from government intrusion into the selection of ministers, "[a] church is always free to burden its activities voluntarily through contracts,

and such contracts are fully enforceable in civil court." *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1359 (D.C. Cir. 1990). Religious organizations might well conclude that they cannot attract talented ministerial employees without providing employment contracts. These organizations also might use employment contracts to protect themselves by imposing on ministerial employees contractual obligations that the organizations can later enforce in court. Whatever the reason, religious organizations that enter into employment contracts with ministerial employees willingly avail themselves of the law of contracts, and courts may in turn hold the organizations accountable for their employment-related contractual obligations. To hold otherwise would have broad and far-reaching implications.

Over two centuries of American jurisprudence confirm this conclusion. State and federal courts since the nation's founding have not hesitated to apply neutral principles of law to adjudicate employment-related contract disputes involving ministerial employees, notwithstanding similar First Amendment principles in their state constitutions.[2] *See* Brief for the National Employment Lawyers Ass'n as Amicus Curiae Supporting Respondents at 3-16, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012), 2011 WL 3561890 (collecting cases). As early as 1799, the

[2] *See* Md. Declaration of Rights of 1776, art. XXXIII ("all persons, professing the Christian religion, are equally entitled to protection in their religious liberty. . . ."); Vt. Const. ch. 1, art. III ("all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings") (1793); Mass. Const. of 1780, art. II ("no subject shall be hurt, molested, or restrained . . . for worshipping God in the manner and season most agreeable to the dictates of his own conscience. . . ."); Tenn. Const. of 1870 art. I, § 3 ("That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can . . . control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.").

Maryland General Court granted a writ of mandamus to a minister who argued he had been wrongfully dismissed in violation of his employment contract. *Runkel v. Winemiller*, 4 H. & McH. 429 (Md. Gen. Ct. 1799). Soon after, in *Avery v. Inhabitants of Tyringham*, the Supreme Judicial Court of Massachusetts held: "[R]eligious societies are left at liberty to make such contract, . . . as shall be agreed between them and their minister; but the contract once made, it is subject to all such rules of law as govern other engagements." 3 Mass. 160, 169 (1807). The Vermont Supreme Court similarly recognized in 1873 that contracts between ministers and churches "are considered as being of equal force and obligation as any other contracts[.]" *Williams v. Town of North Hero*, 46 Vt. 301, 317 (1873). *Cf. Travers v. Abbey*, 58 S.W. 247, 248 (Tenn. 1900) ("The pastor is actuated by a higher motive than the salary he receives. He may secure this as a matter of contract with members of his congregation or others, and when such contract exists, it may be enforced in the Courts . . . .").

Because "[a] church, like any other employer, is bound to perform its promissory obligations in accord with contract law," *Minker*, 894 F.2d at 1361, recent cases similarly affirm that the ministerial exception is not a *per se* bar prohibiting ministerial employees from suing to enforce these obligations. "[A]pplication of state contract law does not involve government-imposed limits on [a religious organization's] right to select its ministers. . . . 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." *Petruska v. Gannon Univ.*, 462 F.3d 294, 310 (3d Cir. 2006); *see also Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 817 (D.C. 2012) ("In this case, we are satisfied that the First Amendment does not bar Reverend Prioleau from

pursuing her contract claim against the church."). *Cf. Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) ("Like any other person or organization, [churches] may be held liable for their torts and upon their valid contracts").

Applying the ministerial exception to contract claims thus unmoors the exception from the First Amendment principles underlying it. LTS voluntarily entered into a contract, and cannot now assert that the ministerial exception shields it from claims to enforce it.

B. Providing Religious Institutions Blanket Contract Claim Immunity Through Application Of The Ministerial Exception Raises Serious Establishment Clause Concerns.

Rather than advance legitimate interests, refusing to adjudicate employment-related contract disputes simply because they involve a religious organization and a ministerial employee in fact raises serious First Amendment concerns about government impermissibly favoring religious organizations. Religious organizations, like their secular counterparts, are free to bargain with employees for certain contractual protections and thus to avail themselves purposefully of contract law. But they are not free to demand from the government a special exemption from the legal consequences of those bargains. Obliging religious organizations in this manner violates the Establishment Clause by impermissibly placing them in a preferred position. *See Redwing v. Catholic Bishop for the Diocese of Memphis*, 363 S.W.3d 436, 451 (Tenn. 2012) (explaining, in reinstating common law claims over First Amendment objections, that "[a]dopting a more expansive application of the ecclesiastical abstention doctrine runs the risk of placing religious institutions in a preferred position, and favoring religious institutions over secular institutions could give rise to Establishment Clause

concerns." (internal citations omitted)); *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-36 (5th Cir. 1998) ("[T]he constitutional guarantee of religious freedom cannot be construed to protect secular beliefs and behavior, even when they comprise part of an otherwise religious relationship."). *Cf. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (upholding Title VII exemption for religious organizations from prohibition on religious discrimination, but warning "[a]t some point, accommodation may devolve into an unlawful fostering of religion" in violation of the Establishment Clause (internal quotation marks omitted)).

Awarding religious organizations blanket immunity from efforts by their ministerial employees to enforce voluntary contractual commitments goes well beyond any conceivable notion of permissible accommodation under the Establishment Clause. The outright bar the Court of Appeals adopted cannot survive First Amendment scrutiny.

C. Applying The Ministerial Exception To Breach-Of-Contract Claims Violates The Kentucky Constitution's More Stringent Anti-Establishment Prohibitions.

Section Five of Kentucky's Constitution provides in relevant part: "*No preference shall ever be given by law to any religious sect, society or denomination*; nor to any particular creed, mode of worship or system of ecclesiastical polity[.]" Ky. Const. §5 (emphasis added). This Court has twice held that this clause imposes a greater prohibition than its federal counterpart—the Establishment Clause—on the state preferring religion. *See Fiscal Court of Jefferson Cnty. v. Brady,* 885 S.W.2d 681, 686-87 (Ky. 1994) (invalidating direct transportation subsidies to religious schools because Section Five and other provisions of Kentucky's Constitution "restrict direct aid . . . to sectarian schools much more specifically and significantly than the only [federal] counterpart provision . . . the 'establishment of religion' clause in the First Amendment");

Neal v. Fiscal Court, Jefferson Cnty., 976 S.W.2d 907, 909-13 (Ky. 1999) (upholding a revised transportation subsidy program, but again emphasizing Section Five in affirming that Kentucky's Constitution "mandate[s] a much stricter interpretation than the Federal counterpart found in the First Amendment's 'establishment of religion clause'").

Although *Brady* and *Neal* address direct subsidies to religious organizations, there is no meaningful distinction between providing these organizations monetary benefits and cloaking them with blanket immunity from actions like this one to enforce contractual commitments. Obliging religious organizations in either manner impermissibly places them in a preferred position and violates Section Five of Kentucky's Constitution.

D. Even If The Ministerial Exception Were Relevant Here, The Courts Below Did Not Engage In The Fact-Specific Inquiry That *Hosanna-Tabor* Mandates.

Even were this Court to conclude that the ministerial exception could apply to contract-based claims—and it should not—the courts below failed to engage in the fact-specific inquiry mandated by *Hosanna-Tabor* to determine whether Kant is indeed a ministerial employee. Focused almost singularly on LTS's sectarian mission and the composition of its student body, the Court of Appeals found that the seminary's faculty are *per se* ministerial employees. *See Kant v. Lexington Theological Seminary*, No. 2011-CA-000004-MR, at 20-23. *Hosanna-Tabor* admonishes courts to avoid precisely that kind of "rigid formula," requiring instead that courts engage in a fact-specific inquiry to determine an employee's status. *See* 132 S. Ct. at 707. This fact-specific inquiry is critical because the ministerial exception is an affirmative defense—not a jurisdictional bar. *Id.* at 709 n.4. As an affirmative defense, defendant bears the burden of proof. Courts may not simply presume any particular class of employee are ministers. Nor may they defer to a religious organization's view on the matter. Courts must carefully

examine the factual record, and grant dismissal only where the record contains no genuine issue about an employee's status.

Of course, this is true generally of all affirmative defenses. *See Bank One, Kentucky, N.A. v. Murphy*, 52 S.W.3d 540, 544-46 (Ky. 2001); *Shah v. Am. Synthetic Rubber Corp.*, 655 S.W.2d 489, 492-93 (Ky. 1983). But it is particularly important in cases involving the ministerial exception. Treating the ministerial exception as an affirmative defense, and granting dismissal only after conducting a full fact-intensive inquiry into the precise nature of a plaintiff's employment, safeguards against courts applying the exception so broadly as to undermine civil liberties and improperly deny access to justice. *See* Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 Me. L. Rev. 23, 46 (2010).

Exemplifying this point, the Supreme Court determined that Petitioner in *Hosanna-Tabor* was a ministerial employee based on a careful fact-specific review of the record, including whether and to what extent: (i) Petitioner "held herself out as a minister"; (ii) Hosanna-Tabor "held [Petitioner] out as a minister, with a role distinct from that of most of its members"; (iii) Petitioner's "job duties reflected a role in conveying the Church's message and carrying out its mission," including leading worship services and important religious ceremonies; (iv) Petitioner played "an important role in transmitting the Lutheran faith"; and (v) "significant religious training and a recognized religious mission underlie the description of the employee's position." 132 S. Ct. at 707-

08. This in-depth analysis confirms that categorizing an employee as a ministerial employee requires a careful, case-by-case determination.[3]

By contrast, adopting a *per se* rule that a seminary's faculty are all ministerial employees grants a religious organization free rein to insulate itself from responsibility for unlawful conduct. There is no way to square that rule with the fact-specific inquiry *Hosanna-Tabor* mandates.

II. Kant's Contract Claim Will Not Entangle Courts In Ecclesiastical Matters.

The ecclesiastical matters rule does not apply to Kant's breach-of-contract claim. Adjudicating a breach-of-contract action does not offend the First Amendment so long as a civil court can resolve the dispute without becoming entangled in ecclesiastical matters. *See, e.g.*, *Prioleau*, 49 A.3d at 817 ("The record as developed does not suggest that resolving Reverend Prioleau's contract claim will require the court to entangle itself in church doctrine . . . [T]he trial court should be able to resolve the claim by employing neutral principles of law."); *Petruska*, 462 F.3d at 312 (same); *Minker*, 894 F.2d at 1360 (same); *cf. Jones v. Wolf*, 443 U.S. 595, 606 (1979) ("The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods."). Cases such as this aptly illustrate the danger in courts not sufficiently evaluating the actual risk of entanglement. Here, none exists; adjudicating

[3] Similarly, the Fifth Circuit concluded in *EEOC v. Southwestern Baptist Theological Seminary* that seminary faculty were ministers only after performing a fact-intensive inquiry that found the faculty all: (a) served as "intermediaries" between the church and its future ministers, (b) "instruct[ed] the seminarians in the whole of religious doctrine," (c) "model[ed] the ministerial role for the students," and (d) were evaluated on their "level of personal religious commitment." 651 F.2d 277, 283 (5th Cir. 1981).

Kant's contract claim would involve only an application of neutral principles of contract law, and in no way involve an examination into ecclesiastical matters.

A. This Case Only Involves Neutral Principles Of Contract Law.

Kant's breach-of-contract claim will not entangle a court in ecclesiastical matters. To the contrary, the courts below could have resolved Kant's breach-of-contract claim simply by reviewing the four corners of Kant's employment contract with LTS and applying neutral principles of contract law.

LTS extended Kant's tenure in March 2006, and the Faculty Handbook governing his employment states: "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." *See* 2006-07 Faculty Handbook, RA 173. LTS does not claim it terminated Kant for engaging in any conduct warranting dismissal under this provision. Nor does it claim to have fired him pursuant to any church law, doctrine, religious text, or other belief. Rather, LTS stated that financial exigencies forced it to eliminate tenure and to restructure its faculty. *See* Feb. 24, 2009 Letter from James Johnson to Kant, RA 625-31. Because financial exigency is not one of the abovementioned grounds for termination, Kant argues that LTS breached its contractual obligations to him. A court can resolve this contract claim simply by reviewing the four corners of the contract, and without inquiring into any ecclesiastical matters.

LTS's defenses do not change that fact. LTS claimed authority to terminate Kant pursuant to terms in an Employee Handbook, which it argued the Faculty Handbook had expressly incorporated and which expressly permitted termination based on financial exigencies. Brief of Appellee at 6 n.10 (Ky. Ct. App. Sept. 2, 2011). Alternatively, it

cited precedent purportedly showing that courts may interpret tenure policies to contain implied rights to terminate based on financial exigencies. *Id.* These defenses present two simple, solely secular questions: (a) whether LTS entered into a contract with Kant limiting the grounds pursuant to which it could terminate him; and (b) whether the terms of that agreement permit LTS to terminate him on the ground of financial exigency. These questions raise no risk of entangling a court in religious doctrine.

This Court's decision in *Music v. United Methodist Church*, 864 S.W.2d 286 (Ky. 1993) does not, as the Court of Appeals erroneously suggested, undermine this conclusion and is clearly distinguishable. Unlike this case, which can be resolved based solely on neutral principles of contract law, *Music* explicitly involved questions of church law. *Music* stands for the proposition that courts must not become excessively entangled in strictly ecclesiastical matters, such as evaluating a minister's performance, policing internal church governance, or otherwise interpreting highly subjective religious texts. 864 S.W.2d at 288-90. The case involved a minister who brought breach-of-contract claims based on allegations that his church had violated church law when it placed him on forced leave. The question in *Music* was whether a court could resolve those claims without being forced to offer an "interpretation of church law." *Id.* at 289. Because "determining the Appellant's claim . . . would inevitably require interpretation of provisions in the *Book of Discipline* that are highly subjective, spiritual, and ecclesiastical in nature," this Court quite properly affirmed the dismissal of the contract claims. *Id.* at 290. *Music* is thus entirely consistent with the weight of authority holding that the First Amendment does not bar contract claims by ministerial employees unless and until those

claims inevitably entangle courts in purely ecclesiastical matters. *See Petruska*, 462 F.3d at 312; *Minker*, 894 F.2d at 1360-61; *Prioleau*, 49 A.3d at 818.

Kant's claim does not raise any of the First Amendment concerns raised in *Music*. Because LTS expressly did not terminate Kant for any conduct-based reasons whatsoever, there is no risk here of entangling a court in an inquiry into his performance while at LTS. Nor has either party identified any subjective, spiritual, or ecclesiastical provision in a religious text that a court might have to interpret to resolve this dispute.[4] Similarly, resolving the parties' disagreement over the terms of Kant's employment will not require a determination of whether religious motivations actually drove LTS to terminate Kant, or an evaluation of LTS's decision to terminate him as opposed to another tenured faculty member. The only question raised by Kant's claim is whether the terms of his employment permitted LTS to terminate him on its asserted ground of financial exigency. This is a wholly secular question and does not involve ecclesiastical issues. Applying the ecclesiastical matters rule in this case would vest LTS with an unqualified and unprecedented right to voluntarily enter into binding contractual

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[4] LTS should bear the burden of persuading a court that the arguments on the merits excessively entangle a court in religious doctrine. *Music* held that inevitable entanglement in ecclesiastical matters preempted a court's subject matter jurisdiction. 864 S.W.2d at 290. But the United States Supreme Court more recently explained in *Hosanna-Tabor* that the First Amendment does not serve as a jurisdictional bar, but as a defense on the merits. 132 S. Ct. at 709 n.4. Although *Hosanna-Tabor* addressed this important jurisdictional question in a case about the ministerial exception, there is no reason to believe its jurisdictional analysis would not apply equally in the context of other First Amendment defenses. Following the jurisdictional analysis in *Hosanna-Tabor*, LTS should therefore bear the burden of proving that arguments on the merits will inevitably and excessively entangle a court in religious doctrine. Of course, whether characterized as a jurisdictional issue or as an affirmative defense, dismissal on First Amendment grounds is still not warranted unless and until a court can articulate why an employee cannot prove his claim without excessively entangling a civil court in church doctrine. *See, e.g.*, *Prioleau*, 49 A.3d at 818; *Minker*, 894 F.2d at 1360-61.

obligations, and then abandon those obligations at will whenever they became unpleasant, shielded from any legal ramifications. Such a result would raise the same constitutional concerns discussed *supra*.

B. LTS's Previous Request For Adjudication Of Its Claims Concerning Financial Exigency Belies Its Attempt To Assert The Ecclesiastical Matters Bar Here.

LTS erroneously attempts to use the First Amendment as both a shield and a sword. It insists that the First Amendment precludes judicial review of its response to the financial exigencies that led to Kant's termination. Yet LTS previously and proactively *sought* judicial review of similar issues regarding those very same financial exigencies. In 2009, LTS moved in Fayette Circuit Court for permission to release restrictions on the use of its endowment fund. *See* Motion to Release Restrictions, *In re Lexington Theological Seminary,* Civ. A. No. 09-CI-896 (Ky. Cir. Ct. July 20, 2009). LTS justified its request in light of the same financial exigencies that led to Kant's termination. *See id.* LTS even informed the court that financial exigencies had forced it to eliminate the tenure of its faculty. *Id.* LTS cannot have it both ways. If a court does not risk entanglement by assessing qualitatively whether financial exigency suffices to release LTS from certain binding endowment fund restrictions, surely it does not preclude a court from deciding whether LTS's contractual obligations to Kant permitted termination on the same grounds.

CONCLUSION

For the foregoing reasons, ADL respectfully asks this Court to reverse the opinion of the Court of Appeals and remand this case to the Fayette Circuit Court.

Respectfully submitted,

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